Gordon D. Schaber Competition

2019–20

Moot Court

Biff Tannen, et al.

v.

Sackamenna Unifed School District

FACT

Situation

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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BIFF TANNEN, et al., Plaintiffs & Appellants, vs. SACKAMENNA UNIFIED SCHOOL DISTRICT, Defendant & Appellee.	Case Nos.: 2018-50 2018-55 2018-62 FACTS

The parties agree the following facts are undisputed:

Sackamenna Unified School District is a large school district located in the City of Sackamenna, California. The school district, which receives federal financial assistance, has 14 high schools, one of which is Sackamenna High. About 1500 students attend Sackamenna High, which is one of the most ethnically and religiously diverse high schools in California. Sackamenna High includes grades 9th through 12th, with students between the ages of 13 and 18.

Sackamenna High School has always prided itself on its emphasis on, and curriculum regarding, inclusiveness and tolerance for different viewpoints. The school has had robust chapters of both the Young Democrats and the Young Republicans, clubs that were allowed to meet on campus during noninstructional time. The school has popular band

and choir classes, with after-school marching band and Glee Club programs. Students attending Sackamenna High can choose to take classes in five different languages: Spanish, French, German, Chinese and Russian. Students also may participate in Student Government, which is open to all students at the school, where students, among other things, are permitted to vote regarding proposals for new courses.

Prior to the 2018-19 school year, the school encouraged students to form clubs, which were allowed to meet before or after school during noninstructional times, with the only prerequisite being that each club obtain a faculty member as sponsor. By the start of the 2018-19 school year, about fifty different clubs had active memberships, including, among others, the Lawn Chair Club (dedicated to outdoor suntanning), the Chess Club, the Jugglers and Magicians (JAM) Club, the Game of Thrones Club, the Christian Club, the Jewish Club, the Buddhist Club, the Muslim Club, the Scuba Club, the Future Accountants of America (FAA) Club (a club for socializing by students interested in discussing future careers in accounting), the National Honor Society, the Math Club and the French Club.

Over the years, the school has had several service clubs, including the Key Club, one of the most popular clubs on campus. In order to graduate, seniors at Sackamenna High are required to participate in eight hours of community service. Because the mission of the Key Club is to help students develop civic responsibilities through fundraising activities, membership in the Key Club has been a sure way for seniors to meet their community service requirement.

At the start of the 2018-19 school year, several students, led by senior Biff Tannen, petitioned the school to form a new club to be called the Anti-Immigration Club. The students met the sole requirement for forming a new club in that they had a school teacher who agreed to sponsor the club. Upon reading the students' application, the principal of Sackamenna High, Mr. Headley, met with the students to express his concern that the club might be inconsistent with the school's emphasis on inclusivity. Biff Tannen countered that the club was consistent with the school's emphasis on tolerance for differing viewpoints. Biff assured Mr. Headley that the students had no interest in denigrating other high school students regarding their ancestry or immigration status, but rather the students wished to meet to discuss the political ramifications of the country's immigration policies. Believing that he had no choice in the matter, Mr. Headley granted the students' application. Soon thereafter, the Anti-Immigration Club began to meet on Wednesday afternoons immediately after school in the classroom of the club's teacher sponsor.

Two weeks later, members of the Anti-Immigration Club invited a well-known political commentator and former writer for right-wing news organizations named George Rockwell to come to the high school to speak to the club. Rockwell is known for his extreme views regarding immigration in which he has argued that the United States should immediately round up all persons in the country without legal authority and deport them to their home countries, and has suggested that this should include Muslims living legally in the U.S. but born elsewhere.

When Mr. Headley learned of the invitation, he told Biff that Rockwell was not allowed to speak on the high school campus. Headley was aware of news reports that violence had broken out at other venues where Rockwell spoke between supporters of Rockwell and groups who appeared at his speeches to protest against his views.

The next day, Biff came to school wearing a T-shirt with an image of Rockwell emblazoned on the front of the shirt. Mr. Headley encountered Biff as he was walking to his first class. Mr. Headley informed Biff the T-shirt was indecent and offensive because it promoted George Rockwell and his views regarding immigration that were inconsistent with the school's values of inclusiveness and tolerance. Biff countered that other student groups were allowed to wear T-shirts advocating their clubs' views such as T-shirts depicting Jesus, Moses and Muhammad. Mr. Headley responded that Biff could either turn the T-shirt inside out, cover up the T-shirt with another article of clothing, or go home and if so his absence would count as truancy. Biff chose to go home.

Following Mr. Headley's admonition that Rockwell could not speak on the high school campus, the Anti-Immigration Club extended an invitation to Rockwell to speak at a public park adjacent to the high school located on land owned by the school district. Members of the Anti-Immigration Club obtained a permit from the school district authorizing Rockwell's speech and use of a bullhorn. Club members advertised the speech around campus.

Rockwell came to the park on a Thursday a few minutes after high school classes ended for the day. Six members of the Anti-Immigration Club, including Biff Tannen, met with Rockwell and then crowded up against a raised concrete stage at the center of the park to hear Rockwell speak. A number of other curious students from the high school also came to hear the speech. A contingent of four security officers employed by the school district stood off to the side of the stage.

As Rockwell spoke, a large crowd of protestors formed and began chanting, "Hey hey! Hey ho! Racists have got to go!" As the protestors' chants grew louder, Rockwell yelled into a bullhorn to try to be heard above the chants. When Rockwell screamed into the bullhorn something about sending all Muslims back to where they came from, the protestors pressed in closer to the stage. The six Anti-Immigration Club members moved away from the stage, taking seats on a concrete planter box to one side of the stage. The other high school students managed to move away from the stage as well.

When the protestors made their way to the edge of the stage, Rockwell took a step back from the edge of the stage and then began exhorting the members of the Anti-Immigration Club to stand up. The security officers heard Rockwell shout, "Stand up and show you're men!" When Biff and one of the other club members rose to their feet, the protestors turned toward them, continuing their chants. As the group of protestors pressed toward the Anti-Immigration Club members, one of the security officers grabbed the bullhorn from Rockwell and ordered the crowd to disperse. When Rockwell tried to take the bullhorn back

from the officer, the other security officers hustled Rockwell off the stage and prevented him from returning to the stage. Within moments the club members and the protestors turned away from the stage and went their separate ways.

When news of the disturbance at the park came to the attention of the school superintendent, she called the school board into special session. Within days, the school board voted to cancel all "noncurriculum related student groups" at high schools within the school district, including Sackamenna High School. After further review by the school board's legal counsel, Mr. Headley announced that all school clubs were cancelled and banned from meeting on the Sackamenna High School campus other than Student Government, the Jugglers and Magicians (JAM) Club, the FAA Club, the National Honor Society, the Math Club, the French Club and the Key Club. Also allowed to continue to meet after school for rehearsals were the marching band and the Glee Club.

Immediately, student members of the Christian Club, the Jewish Club, the Buddhist Club and the Muslim Club, all of whom are 18 years old, filed suit against the school district in the United States District Court for the Eastern District of California, arguing that because the school district allowed some noncurriculum related student groups to continue to meet at the high school, the school district violated the federal Equal Access Act, 20 U.S.C. § 4071, by banning their clubs.

After conducting discovery, including depositions, undisputed facts were established relevant to the nature of various student groups

at Sackamenna High School, including the following: Students may receive student credit for participation in the marching band and the Glee Club, at the discretion of the orchestra and choir directors. One of three Social Studies teachers at Sackamenna High School includes a unit on homelessness and poverty in her classes, and requires her students to participate in Key Club activities. The high school's sophomore Intro. to Business class addresses careers in business including accounting, and covers some basic principles of accounting such as that a business owner must keep personal transactions separate from business transactions, and that the effects of inflation on recorded amounts are ignored. And the high school's freshman P.E. classes include a unit on juggling.

Shortly thereafter, Biff Tannen, who is 18 years old, filed his own lawsuit against the school district in the Eastern District, pursuant to 42 U.S.C. § 1983, arguing the school district's refusal to allow him to wear a George Rockwell T-shirt at school violated his rights under the First Amendment of the United States Constitution.

Days later, George Rockwell filed his own lawsuit against the school district in the Eastern District, also pursuant to 42 U.S.C. § 1983, arguing the school district violated his rights under the First Amendment by preventing him from continuing his speech.

The district court consolidated the three lawsuits. After a hearing at which no evidence was offered other than the facts described above, the district court judge entered summary judgment in favor of the school district as to all three of the consolidated actions.

The plaintiffs in the three actions have appealed to the United States Court of Appeals for the Ninth Circuit, where the cases have again been consolidated for purposes of oral argument. Three issues are now pending before the Ninth Circuit:

1. In banning the four religious clubs, did the school district violate the Equal Access Act, and, specifically, does any student group that is allowed to continue to meet at the high school constitute a "noncurriculum related student group" within the meaning of the Act?
2. Did the school district violate Biff Tannen's rights under the First Amendment of the United States Constitution by banning him from wearing a George Rockwell T-shirt on grounds that the T-shirt is indecent or offensive?
3. Did the school district violate George Rockwell's rights under the First Amendment by preventing him from continuing his speech?

LIBRARY [1]

[1]Some of the cases have been edited/altered for purposes of this competition.

20 U.S.C.A. § 4071

§ 4071. Denial of equal access prohibited

Currentness

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

* * *

110 S.Ct. 2356
Supreme Court of the United States

BOARD OF EDUCATION OF the WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al., Petitioners
v.
Bridget C. MERGENS, By and Through Her Next Friend, Daniel N. MERGENS, et al.

No. 88–1597.
|
Argued Jan. 9, 1990.
|
Decided June 4, 1990.

Opinion

****2362 *231** Justice O'CONNOR delivered the opinion of the Court, except as to Part III.

This case requires us to decide whether the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071–4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time. * * *

I

Respondents are current and former students at Westside High School, a public secondary school in Omaha, Nebraska. At the time this suit was filed, the school enrolled about 1,450 students and included grades 10 to 12; in the 1987–1988 school year, ninth graders were added. Westside High School is part of the Westside Community Schools system, an independent public school district. Petitioners are the Board of Education of Westside Community Schools (District 66); Wayne W. Meier, the president of the school board; James E. Findley, the principal of Westside High School; Kenneth K. Hanson, the superintendent of schools for the school district; and James A. Tangdell, the associate superintendent of schools for the school district.

Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis.

* * *

In January 1985, respondent Bridget Mergens met with Westside's Principal, Dr. Findley, and requested permission to form a Christian club at the school. The proposed club would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that the proposed club would not have a faculty sponsor. According to the students' testimony at trial, the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation.

Findley denied the request, as did Associate Superintendent Tangdell. In February 1985, Findley and Tangdell informed Mergens that

they had discussed the matter with Superintendent Hanson and that he had agreed that her request should be denied. The school officials explained that school policy **2363 required all student clubs to have a faculty sponsor, *233 which the proposed religious club would not or could not have, and that a religious club at the school would violate the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the board of education, but the board voted to uphold the denial.

Respondents, by and through their parents as next friends, then brought this suit in the United States District Court for the District of Nebraska seeking declaratory and injunctive relief. They alleged that petitioners' refusal to permit the proposed club to meet at Westside violated the Equal Access Act, 20 U.S.C. §§ 4071–4074, which prohibits public secondary schools that receive federal financial assistance and that maintain a "limited open forum" from denying "equal access" to students who wish to meet within the forum on the basis of the content of the speech at such meetings, § 4071(a). * * *

The District Court entered judgment for petitioners. The court held that the Act did not apply in this case because Westside did not have a "limited open forum" as defined by the Act—all of Westside's student clubs, the court concluded, were curriculum-related and tied to the educational function of the school. * * *

*234 The United States Court of Appeals for the Eighth Circuit reversed. 867 F.2d 1076 (1989). * * *

We granted certiorari, 492 U.S. 917, 109 S.Ct. 3240, 106 L.Ed.2d 587 (1989), and now affirm.

II

A

In *Widmar v. Vincent, supra,* we invalidated, on free speech grounds, a state university regulation that prohibited *235 student use of school facilities " 'for purposes of religious worship or religious teaching.' " *Id.,* at 265, 102 S.Ct., at 272. In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in *Lemon v. Kurtzman,* 403 U.S. 602, 612–613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion. *Widmar,* 454 U.S., at 271–274, 102 S.Ct., at 275–76. We noted, however, that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." *Id.,* at 274, n. 14, 102 S.Ct., at 276–77, n. 14.

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that

forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. §§ 4071(a) and (b). Specifically, the Act provides:

> "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings." § 4071(a).

A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." § 4071(b). "Meeting" is defined to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." § 4072(3). ***236** "Noninstructional time" is defined to mean "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." § 4072(4). Thus, even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.

* * *

B

The parties agree that Westside High School receives federal financial assistance and is a public secondary school within the meaning of the Act. App. 57–58. The Act's obligation to grant equal access to student groups is therefore triggered if Westside maintains a "limited open forum"—*i.e.,* if it permits one or more "noncurriculum related student groups" to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group." Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute. See, *e.g.,* *Mallard v. District Court, Southern District of Iowa,* 490 U.S. 296, 300, 109 S.Ct. 1814, 1818, 104 L.Ed.2d 318 (1989); *United States v. James,* 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986). The common meaning of the term "curriculum" is "the whole body of courses offered by an educational institution or one of its branches." Webster's Third New International Dictionary 557 (1976); see also Black's Law Dictionary 345 (5th ed. 1979) ("The set of studies or courses for a particular period, designated by a school or branch of a school"). Cf. *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S., at 271, 108 S.Ct., at 570 (high school newspaper produced as part of the school's journalism class was part of the curriculum). Any sensible interpretation of "noncurriculum related student group" must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the curric-

ulum" required for a group to be considered "noncurriculum related."

The Act's definition of the sort of "meeting[s]" that must be accommodated under the statute, § 4071(a), sheds some light on this question. "The term 'meeting' includes those activities of student groups which are ... not *directly related* to the school curriculum." § 4072(3) (emphasis added). Congress' ***238** use of the phrase "directly related" implies that student groups directly related to the subject matter of courses offered by the school do not fall within the "noncurriculum related" category and would therefore be considered "curriculum related."

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

* * *

We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The Committee Reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools, see H.R.Rep. No. 98–710, p. 4 (1984)H.R.Rep. No. 98–710, p. 4 (1984); S.Rep. No. 98–357, pp. 10–11 (1984), and, as the language of the Act indicates, its sponsors contemplated that the Act would do more than merely validate the status quo. The Committee Reports also show that the Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. See H.R.Rep. No. 98–710H.R.Rep. No. 98–710, *supra,* at 3–6 (discussing *Lubbock Civil Liberties Union v. Lubbock Independent School Dist.,* 669 F.2d 1038, 1042–1048 (CA5 1982), cert. denied, 459 U.S. 1155–1156, 103 S.Ct. 800, 74 L.Ed.2d 1003 (1983), and *Brandon v. Guilderland Bd. of Ed.,* 635 F.2d 971 (CA2 1980), cert. denied, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981)); S.Rep. No. 98–357, *supra,* at 6–9, 11–14 (same). A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.

In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular

course; or if participation in the group results in academic ***240** credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would ****2367** prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech. Whether a specific student group is a "noncurriculum related student group" will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Petitioners contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. See, *e.g.,* *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988); ***241** *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act. On matters of statutory interpretation, "[o]ur task is to apply the text, not to improve on it." *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. 120, 126, 110 S.Ct. 456, 460, 107 L.Ed.2d 438 (1989). Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." § 4071(c)(4); cf. *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 509, 89 S.Ct. 733, 738, 21 L.Ed.2d 731 (1969). The Act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." § 4071(f). Finally, because the Act applies only to public secondary schools that

receive federal financial assistance, § 4071(a), a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

* * *

To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory. See 130 Cong.Rec. 19222 (1984) (statement of Sen. Leahy) ("[A] limited open forum should be triggered by what a school does, not by what it says"). As the court below explained:

> "Allowing such a broad interpretation of 'curriculum-related' would make the [Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to ***245** some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the [Act]. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." 867 F.2d, at 1078.

See also *Garnett v. Renton School Dist. No. 403,* 874 F.2d 608, 614 (CA9 1989) ("Complete deference [to the school district] would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related").

Rather, we think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." Although Westside's physical education classes apparently include swimming, see Record, Tr. of Preliminary Injunction Hearing 25, counsel stated at oral argument that scuba diving is not taught in any regularly offered course at the school, Tr. of Oral Arg. 6. Based on Westside's own description of the group, Subsurfers does not directly relate to the curriculum as a whole in the same way that a student government or similar group might. App. 485–486. Moreover, participation in Subsurfers is not required by any course at the school and does not result in extra academic credit. *Id.,* at 170–171, 236. Thus, Subsurfers is a "noncurriculum related student group" for purposes of the Act. Similarly, although math teachers at Westside have encouraged their students to play chess, *id.,* at 442–444, chess is not taught in any regularly offered course at the school, Tr. of Oral Arg. 6, and participation in the Chess Club is not required for any class and does not result in extra credit for any class, App. 302–304. The Chess Club is therefore another "noncurriculum related

student group" at ***246** Westside. Moreover, Westside's principal acknowledged at trial that the Peer Advocates program—a service group that works with special education classes—does not directly relate to any courses offered by the school and is not required by any courses offered by the school. *Id.,* at 231–233; see also *id.,* at 198–199 (participation in Peer Advocates is not required for any course and does not result in extra credit in any course). Peer Advocates would therefore also fit within our description of a "noncurriculum related student group." The record therefore supports a finding that Westside has maintained a limited open forum under the Act.

Although our definition of "noncurriculum related student activities" looks to a school's actual practice rather than its stated policy, we note that our conclusion is also supported by the school's own description of its student activities. As reprinted in the ****2370** Appendix to this opinion, the school states that Band "is included in our regular curriculum"; Choir "is a course offered as part of the curriculum"; Distributive Education "is an extension of the Distributive Education class"; International Club is "developed through our foreign language classes"; Latin Club is "designed for those students who are taking Latin as a foreign language"; Student Publications "includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance)"; Dramatics "is an extension of a regular academic class"; and Orchestra "is an extension of our regular curriculum." These descriptions constitute persuasive evidence that these student clubs directly relate to the curriculum. By inference, however, the fact that the descriptions of student activities such as Subsurfers and chess do not include such references strongly suggests that those clubs do not, by the school's own admission, directly relate to the curriculum. We therefore conclude that Westside permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time," § 4071(b). Because Westside maintains a "limited open forum" under the Act, it is prohibited from ***247** discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time.

[12] The remaining statutory question is whether petitioners' denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, App. 315–316, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. *Id.,* at 434–435. Given that the Act explicitly prohibits denial of "equal access ... to ... any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings, § 4071(a), we hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act.

* * *

12 F.3d 1244
United States Court of Appeals,
Third Circuit.

Donna POPE, by her guardian ad litem William POPE, Appellee,
v.
EAST BRUNSWICK BOARD OF EDUCATION; David Seiden, in his official capacity; Patrick Sirr, in his official capacity; Donald Dicenzo, in his official capacity; Kitty Martin, in her official capacity; Thomas Maughan, in his official capacity; Henry Przystup, in his official capacity; Neal Rosen, in his official capacity; Norma Teicher, in her official capacity; Robert Van Wagner, in his official capacity; Jon Kopko, in his official capacity, Appellants.

Decided Dec. 23, 1993.

Before: BECKER, NYGAARD and ALITO, Circuit Judges.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

The East Brunswick Board of Education and its individual members appeal from an order of the district court granting permanent injunctive relief and nominal damages to plaintiff Donna Pope. The district court held that East Brunswick violated the Equal Access Act, 20 U.S.C. § 4071 *et seq.,* by refusing to certify plaintiff's Bible Club as a student organization and accord it equal treatment with other student groups at East Brunswick High School. Because we find that East Brunswick failed in its attempt to close its limited open forum, we will affirm.

I.

A.

* * *

These facts have been stipulated by the parties. The East Brunswick Board of Education is the elected school board governing East Brunswick High School, where plaintiff attended from 1988 until she graduated in 1991. Plaintiff and other students met informally in the cafeteria before the start of Wednesday classes. This group of students was known within the school as the Bible Club. East Brunswick tolerated these meetings, but gave the Bible Club no official recognition. The club was thus precluded from using the public address system, bulletin boards and other school facilities commonly used by other student groups. In 1988, when the Bible Club sought official recognition from school authorities, East Brunswick permitted extracurricular groups to be initiated by students and the school administration apparently had the power to approve or deny such requests. It chose to deny certification to the Bible Club.

* * *

[S]everal student organizations that had been certified apparently became casualties of the new [school district] policy. These included the Audio Visual Club, the Bicycle Club, the Booster Club, Youth Ending Hunger and a club devoted to rock and new wave music. Many clubs not obviously associated with the East Brunswick curriculum, however, returned in the new school year, including Drama, Folio (Art), Folio (Literary), Institute for Political/Legal Education Club, Students Against Drunk Drivers, Students Against Violating the Environment, and the Key Club, a service organ-

ization associated with Kiwanis. Although the Bible Club again petitioned for recognition, East Brunswick denied its request on the ground that it was not curriculum-related.

C.

Donna Pope, through her father, filed this suit in the district court under 42 U.S.C. § 1983. Count two [of her complaint] alleged a violation of the Equal Access Act. Pope sought declaratory and injunctive relief, nominal damages and attorney's fees.

Following discovery, both parties moved for summary judgment. After a hearing, the district court denied East Brunswick's motion for summary judgment and granted summary judgment for Pope. It ruled that East Brunswick, by not recognizing the Bible Club, violated the Equal Access Act.

* * *

This appeal followed. The district court had subject matter jurisdiction under 28 U.S.C. § 1343. We have appellate jurisdiction under 28 U.S.C. § 1291. We exercise *de novo* review over the district court's summary judgment.

II.

* * *

B.

The district court concluded that East Brunswick had created a limited open forum by allowing at least one noncurriculum related student group, the Key Club, to meet on school premises. Rejecting East Brunswick's contention that the Key Club was related to the high school curriculum, the court held that any nexus between the club and the curriculum was insufficient to satisfy the standards set forth in *Mergens.* We agree.

In *Mergens,* the Supreme Court defined the meaning of the statutory term "noncurriculum related student group" found in section 4071(b) of the Equal Access Act. After engaging in a textual analysis of the statutory language, the Court stated that

> a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

Id. at 238, 110 S.Ct. at 2365. It then held that "the term 'noncurriculum related student group' is best interpreted broadly to mean any student group that does not *di-*

rectly relate to the body of courses offered by the school." *Id.* at 239, 110 S.Ct. at 2366 (emphasis in original). The Court then set forth a four-part test for determining when a student group directly relates to the school curriculum, consistent with its view that Congress intended to set a low threshold for triggering the Act:

> 1. The group's subject matter is (or soon will be) taught in a regularly offered course;
>
> 2. The group's subject matter concerns the body of courses as a whole;
>
> 3. Participation in the group is required in a particular course; or
>
> 4. Academic credit is given for participation in the group.

Id. at 239–40, 110 S.Ct. at 2366.

East Brunswick argues that the Key Club was related to the high school curriculum under the test set forth in *Mergens*. To evaluate the legal merits of this contention, we first consider the nature of the club itself. The Key Club is a student service organization affiliated with Kiwanis. It is one of ***1252** several such clubs common in American high schools. The purpose of the Key Club is best described by the defendants' affidavit:

> This community service organization ... assists and enhances the students in developing their civic responsibilities to the community and in support of the state's Thorough and Efficient Education requirements. The students in the Key service organization draw upon all curricula areas.
>
> To that end, the bulk of the Key Club's activities involve a variety of student-initiated fund-raising activities, such as volleyball marathons, bowl-a-thons, game nights, and book, food and toy drives. The proceeds from these activities are donated to local charities. It is not an advocacy group for the poor and homeless, nor does it engage in direct, street-level outreach to such persons.

Nevertheless, East Brunswick asserts that the subject matter of the Key Club is directly related to the high school's History and Humanities classes, which teach a unit on homelessness, hunger and poverty. Richard Koenigsberg, the teacher of those classes, testified in his deposition that he believes it is important to relate the study of history to current social conditions. As part of that study, the class participates in and coordinates the Key Club's food and toy drives. Based on this participation in two of the Key Club's many activities, East Brunswick asserts that the club's existence does not create a limited open forum and trigger the Act. We disagree.

The parties have stipulated that students receive no academic credit for membership in the Key Club. And although defendants submitted the deposition of Assistant Principal Leslie Szukics to the district court for the proposition that the club's activities were related to a variety of curricular subjects, East Brunswick has prudently not emphasized this contention on appeal. In discussing groups whose subject matter "concerns the body of courses as a whole," the *Mergens* Court offered as its sole example a student government group, on the rationale that it might involve itself in proposals relating to current and future course offerings. *Id.* at 240, 110 S.Ct. at 2366. The Court

did not suggest that student government would be curriculum-related because its activities related in some way to subjects taught across a high school curriculum; indeed, such a statement would be at odds with its earlier statement that the group-curriculum relationship must be more than "tangential or attenuated." We doubt, in fact, whether this principle in *Mergens* extends much further than the student government organization mentioned by the Court.

On appeal, East Brunswick argues primarily that the participation in Key Club activities by Mr. Koenigsberg's students is sufficient to meet the third prong of the *Mergens* test: that "participation in the group is required in a particular course." We disagree. It is stipulated that, while students participated in one or two of the Key Club's activities, there was no requirement that the students maintain *membership* in the club. Significantly, the *Mergens* Court did not indicate that participation in one or more of the group's *activities* would be sufficient to make the group curriculum related, but instead focused on participation in the *group.* We believe this choice of language was intentional. Had the Supreme Court adopted the former language, schools could then evade the Act by the simple expedient of requiring some or all students to participate in a single activity or meeting of each group with which the school's administrators wished to create a curriculum relationship. Such a result would not be consistent with the low threshold for triggering the Act and would indeed render it "merely hortatory."

Although East Brunswick focuses mostly on the third prong of the *Mergens* test, it also contends that the subject matter of the Key Club is taught in the Humanities classes at the high school. The burden of showing that a group is directly related to the curriculum rests on the school district. *Mergens,* 496 U.S. at 240, 110 S.Ct. at 2366. In *Mergens,* ***1253** the defendant school district attempted to justify two service clubs, Interact and Zonta, because they promoted effective citizenship, an educational goal of the Social Studies Department. *Id.* at 244, 110 S.Ct. at 2369. The Supreme Court disagreed:

> To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory.

Id.

Here, the nexus between the service club and the curriculum is stronger than it was in *Mergens.* The activity of the Key Club that East Brunswick relies upon is not merely connected in some abstract sense to an overall goal of "good citizenship," but is tied directly to a specific instructional unit of a specific course. Nevertheless, East Brunswick's argument remains flawed and cannot prevail.

Mergens did not hold that the activities of a student organization need only relate in

some marginal way to something taught in class. Rather, the Court said that the *subject matter* of the student group must be taught in a class. Thus, a chess club does not become curriculum-related merely because its subject matter relates to mathematics and science by building the ability to engage in critical thought processes; unless chess is actually taught, the club is a noncurriculum related student group. *See id.* at 244, 110 S.Ct. at 2368–69. A French club, on the other hand, is curriculum-related as long as the school teaches French in a regularly offered course. *Id.* at 240, 110 S.Ct. at 2366. Here, the relevant subject matter of one unit of Mr. Koenigsberg's History course is poverty and homelessness. The subject matter of the Key Club is *not* poverty and homelessness, but community-related service and fund-raising activities. The history course and the Key Club accordingly have different subject matter.

Our view is supported by the policy concerns expressed in the *Mergens* opinions. The *Mergens* majority was justly troubled by the possibility that school systems would evade the Act's requirements "by strategically describing existing student groups." *See id.* at 244, 110 S.Ct. at 2369. * * * [W]e can envision a scenario in which an otherwise noncurriculum related chess club holds a bake sale to send its top player to a regional tournament. Under East Brunswick's rationale, the chess club would immediately relate to the Home Economics, Business, Accounting, Mathematics and Sociology curricula. Nevertheless, a few isolated club activities cannot be permitted to turn an otherwise noncurriculum related student group into a curriculum-related one. Rather, the curriculum-relatedness of a student activity must be determined by reference to the primary focus of the activity measured against the significant topics taught in the course that assertedly relates to the group.

Finally, the *Mergens* court specifically stated that for an activity to be curriculum-related, it "must at least have a more direct relationship to the curriculum than a religious or political club would have." *Id.* at 238, 110 S.Ct. at 2365. It is evident that the Bible relates generally to subjects taught in high school.[10] Indeed, according to respected authorities, no single book has had a greater influence on Western civilization, history and thought than has the Bible. *See, e.g., Engel v. Vitale,* 370 U.S. 421, 434, 82 S.Ct. 1261, 1268, 8 L.Ed.2d 601 (1962) ("The history of man is inseparable from the history of religion."); Jacob Needleman, *The Heart of Philosophy* 27 (1982) (teachings of ***1254** Plato and the Bible account for ninety percent of Western philosophical thought). So too, the Bible's teachings on concern for the poor are at least as related to the History and Humanities curriculum as is participation in the Key Club's food and toy drives. In addition, in its King James translation, the Bible remains a veritable monument of our English prose, and its phrases, allegories, similes and metaphors are firmly embedded in common English usage. It remains the most quoted work in *The Oxford Dictionary of Quotations* (3d ed. 1980). We conclude that upon the comparative-relatedness balance of *Mergens,* the Key Club is found wanting.

III.

The district court correctly found that the Equal Access Act applies to the East Brunswick school system and that defend-

ants violated the Act by failing to recognize the Bible Club. Accordingly, we will affirm its judgment.

81 F.Supp.2d 1166
United States District Court, D. Utah, Central Division.

EAST HIGH GAY/STRAIGHT ALLIANCE, an unincorporated association; Ivy Fox, a minor, by and through her mother and next friend, Kay Kosow Fox; Keysha Barnes, a minor by and through her father and next friend, James Barnes; and Leah Farrel, by and through her mother and next friend, Kelly Fogarty, Plaintiffs,
v.
BOARD OF EDUCATION OF SALT LAKE CITY SCHOOL DISTRICT, a body corporate of the State of Utah; Darline Robles, Superintendent of Salt Lake City School District, in her official capacity; and Cynthia Seidel, Assistant Superintendent, in her official capacity, Defendants.

Oct. 6, 1999.

MEMORANDUM OPINION AND ORDER

JENKINS, Senior District Judge.

On February 20, 1996, the Board of Education of the Salt Lake City School District adopted a formal written policy concerning student organizations:

> The Board of Education of Salt Lake City School District desires to promote and advance curriculum related student clubs. However, the Board does not allow or permit student groups or organizations not directly related to the curriculum to organize or meet on school property. It is the express decision of the Board of Education of Salt Lake City School District not to allow a "limited open forum" as that is defined by the Federal Equal Access Act, 20 U.S.C. § 4071.

(Pl.Ex. 112, annexed to Second Declaration of David S. Buckel, filed April 6, 1999 (dkt. no. 118).)

This written policy has been implemented by school administrators through a process that requires prior review and approval of every student club or group that seeks to meet on school premises during non-instructional time and to use school facilities to promote its activities.

Plaintiffs complain that as a "non-curricular" group, they have been denied the opportunity to meet on school premises at East High School during non-instructional time (*e.g.,* during the lunch hour), and have been denied access to facilities such as bulletin boards, the school PA system, and ***1169** closed circuit television to promote their organization and its activities, while other purportedly "curriculum related" groups have continued to meet, conduct activities and use school facilities. Plaintiffs' group has been excluded from "Club Rush" and "Spring Fest" and the school yearbook at East High School. (Second Amended Complaint, filed February 11, 1999 (dkt. no. 102), at 12–13 ¶ 34.) Plaintiffs seek access to school facilities to better reach students who need support, to promote

awareness and acceptance, and to feel like "citizens of equal status."

On March 4, 1999, both plaintiffs and defendants, asserting an absence of disputed material facts, filed motions for summary judgment.

* * *

IV

"Curriculum–Related" vs. "Non–Curricular" Student Groups

According to *Board of Education of Westside Comm. Schools v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), a group is deemed "curricular" if it "directly relates" to a school's curriculum, and

> a student group directly relates to a school's curriculum if *the subject matter of the group is actually taught or will soon be taught, in a regularly offered course;* if *the subject matter of the group concerns the body of courses as a whole;* if *participation in the group is required for a particular course;* or if *participation in the group results in academic credit.*

Id. at 239–40, 110 S.Ct. 2356 (emphasis added). Plaintiffs urge the correctness of this court's prior observation that "the required analysis under *Mergens* appears to be qualitative rather than quantitative: if at least part of a club's activities enhance, extend, or reinforce the specific subject matter of a class *in some meaningful way,* then the relationship between club and class is more than tangential or attenuated, and the club may be 'directly related' to the class in terms of its subject matter." *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District,* 30 F.Supp.2d 1356, 1360 (D.Utah 1998) (emphasis added & footnote omitted). Plaintiffs also "fully embrace" the Third Circuit's "refinement in the statutory interpretation" in *Pope:*

> the curriculum-relatedness of a student activity must be determined by reference to the *primary* focus of the activity measured against the *significant* topics taught in the course that assertedly relates to the group.

Pope v. East Brunswick Board of Education, 12 F.3d 1244, 1253 (3d Cir.1993) (emphasis supplied by plaintiffs)—an articulation that plaintiffs find neither "rigid" nor "overly elastic." (Pltfs' Mem. at 19–22.)

* * *

ICE

As it functioned during the 1997–98 school year, the Improvement Council at East (ICE) sought to create a "caring, positive school environment at East." (Pltfs' Mem. at 4 ¶ 12.) It met on school premises during non-instructional time and engaged in activities consistent with that purpose. During the 1997–98 year, ICE was not yet integrated into student government and academic credit was not given to students participating in ICE activities; nor was participation in ICE required by any existing school course.

The defendants respond that "[t]he activities of ICE are varied and numerous, although all activities involve the improvement of the physical and emotional environment of the school." (Defs' Opp. Mem. at 14.) ICE's activities "were always directly related to faculty committee and student government subject matters. Accordingly," defendants argue, "the fact that ICE was permitted to meet on school premises during noninstructional time during [the] 1997–98 school year did not violate the district's closed forum policy or the Equal Access Act." (*Id.* at 18.)

In reply, plaintiffs point out that following the commencement of this lawsuit, the defendants denied ICE's application for approval as a curriculum-related group for the following year, at least until the group became formally integrated into student government at East High School through a December 1998 amendment to the East High Constitution. (Pltfs' Reply Mem. at 1 ¶¶ 12, 18; *id.* at 5 & n. 7.) ICE's 1997–98 activities cannot be tied to subject matter actually taught in a course; nor do they relate to the body of courses as a whole in a way that would satisfy *Mergens.* (*Id.*) Plaintiffs analogize ICE to the Peer Advocates, a service group that the Court in *Mergens* found to be non-curricular. (Pltfs' Mem. at 28 (citing *Mergens,* 496 U.S. at 246, 110 S.Ct. 2356).) Defendants would not allow ICE to meet during the 1998–99 school year until after the integration into student government had been accomplished—a telling admission, plaintiffs suggest, of the non-curricular nature of the group. (*Id.* at 29 ("The denial confirms the conclusion that ICE's subject matter did not directly relate to the curriculum.").)

Having reviewed the factual materials submitted by the parties, this court concludes that to the extent that it met on school premises during non-instructional time during the 1997–98 school year, the Improvement Council at East was a non-curricular student group within the meaning of the Equal Access Act. During that time frame, then, the defendants had created a "limited open forum" at East High School that triggered the Act's guarantees of access by non-curricular student ***1181** groups.

FHA

Concerning the Future Homemakers of America (FHA), plaintiffs contend that "helping the community, specifically the vulnerable and needy," does not directly relate to the curriculum. (Pltfs' Mem. at 29.) Using their "weighing and balancing" assay approach, plaintiffs argue that when collated into plaintiffs' statistical categories, FHA's activities clearly preponderate as "community service" rather than curriculum-related in nature: FHA's "important service to the needy is the strongest thread that pulls them together, their primary focus, and thus their subject matter." However, as thus defined, "the group's subject matter is not actually taught in a course," and FHA does not have other *Mergens* factors tying its activities to the East High curriculum. (*Id.* at 32.)

Defendants respond that FHA's stated purpose "is to promote personal growth and leadership development in the family and consumer sciences curriculum," and that FHA activities "provide opportunities for students to practice and apply the curriculum that is taught in ... Family and Consumer Sciences courses." (Defs' Opp. Mem. at 10, 11.) They assert that the "community service projects" highlighted by plaintiffs "directly relate to skills taught in the three major subjects in the Family and Consumer Science

curriculum[:] food, sewing and child development.... [T]he common thread among these FHA/HERO community service projects is that the students utilize the skills learned in the classroom to provide food, clothing and child care to those in need." (*Id.* at 12–13.) Indeed, "The unique character of vocational education is that students acquire the skills necessary to provide products and services that are valuable in the workplace and in the community. It is not surprising that a vocational student group such as FHA performs community service projects utilizing their vocational skills." (*Id.* at 13.)

Plaintiffs reply that the defendants do not "identify significant topics of a course that match up to the primary focus of helping the needy and vulnerable in the community," in essence reiterating their initial argument that "community service" is not taught in East High classrooms. (Pltfs' Reply Mem. at 6.) Relying upon FHA's application for District approval, plaintiffs attempt to minimize the relationship between FHA's activities involving children and East High's child development classes, arguing that "helping children ... is only a small *part* of their primary focus, which is insufficient for a direct curricular connection ... [and] does not match up to the significant topics of the Child Development course ...." (*Id.* (emphasis in original).)

If in fact "[t]he burden of showing that a group is directly related to the curriculum rests on the school district," *Pope,* 12 F.3d at 1252, then this court concludes that defendants have met their burden as to FHA and that FHA is a curriculum-related group. FHA's activities, community service-oriented though they may be, nevertheless serve to enhance, extend, or reinforce the specific subject matter of one or more Applied Technology Education classes in a meaningful way, generally by affording students an opportunity to apply the skills that they have learned in the classroom. (*See* Defs' Opp. Mem. at x-xii ¶¶ 18–30.)

Put another way, plaintiffs have failed to show their entitlement to judgment as a matter of law under Rule 56 that FHA at East High School is a non-curricular student group whose meeting at East High during non-instructional time triggers the Equal Access Act's guarantees.

FBLA

As was the case on their earlier motion for preliminary relief, plaintiffs challenge the curriculum-relatedness of the Future Business Leaders of America (FBLA) at East High, renewing their assertion that FBLA's primary focus involves students "getting together to socialize and explore careers." (Pltfs' Mem. at 33.) Plaintiffs' categorical assay of FBLA's activities identifies "two substantial categories: socials and career exploration." (*Id.*) Plaintiffs acknowledge that FBLA's "career activities are also an integral part of its primary focus," but argue that the "subject matter of business students socializing and exploring careers is not 'actually taught,' because it does not match significant topics in a course." (*Id.* at 35, 36.) Yet defendants' statement that "[t]he course goals for 'Business Management' include *exploring 'career opportunities,'* " (Defs' Opp. Mem. at ix ¶ 13 (emphasis added)), stands uncontroverted by plaintiffs and appears substantially to match the dual "primary focus" identified for FBLA by plaintiffs—"to socialize and *explore careers*." (Pltfs' Reply Mem. at 8 (emphasis added).)

This court has again reviewed the activities of FBLA as set forth in the parties' respective statements of fact (*see* Pltfs' Mem. at 9–12 ¶¶ 39–55; Defs' Opp. Mem. at vi-x ¶¶ 4–17), and remains satisfied that FBLA maintains the direct relationship to East High's Applied Technology Education curriculum that is required for FBLA to be deemed "curriculum-related" under *Mergens*. *See also East High Gay/Straight Alliance,* 30 F.Supp.2d at 1360–62.

That FBLA also holds "social" events does not negate this direct relationship. A "social" event may well be held to "get to know one another, and to have some fun" as plaintiffs suggest, (Pltfs' Mem. at 10 ¶ 45), but the event may also serve to build interest in and enthusiasm for the group and its more substantive business- and career-oriented activities. The two certainly are not mutually exclusive, and this court does not read the Equal Access Act to require the defendants to take the "fun" out of FBLA in order to preserve its direct relationship to the curriculum. Plaintiffs' assertions to the contrary merely serve to illustrate the subtractive nature of their "assay" approach to the group's activities.

NHS

Like the FHA at East High, plaintiffs contend that the National Honor Society (NHS) at West High School has "community service to the needy" as its primary focus and subject matter, and that "the promotion of academic excellence does not capture the subject matter of West High NHS." (Pltfs' Mem. at 37, 38.) Plaintiffs point once more to *Garnett v. Renton School District,* 772 F.Supp. 531 (W.D.Wash.1991), *rev'd on other grounds,* 987 F.2d 641 (9th Cir.1993), and its determination that a student group which combined general academic achievement with community service was non-curricular. (*Id.* at 40–41.)

* * *

Assuming that at least some NHS activities or meetings are held on school premises during non-instructional time, does the NHS's community service orientation negate the honor society's direct relationship to the curriculum as a whole? This court concludes that it does not.

As this court earlier observed:

> Activities promoting academic excellence have a far more direct relationship to the school's "body of courses as a whole" than does a student government group that in some undefined way "addresses concerns, solicits opinions, and formulates proposals" pertaining to the curriculum. Academic excellence has no meaning apart from the courses of study offered by a school and cannot be achieved outside of the school's curriculum. By definition, then, academic achievement can have no "noncurriculum related" subject matter.

East High Gay/Straight Alliance, 30 F.Supp.2d at 1363. Remembering that "[a]ny sensible interpretation of 'noncurriculum related student group' must ... be anchored in the notion that such student groups are *those that are not related to the body of courses offered by the school,*" *Mergens,* 496 U.S. at 237, 110 S.Ct. 2356 (emphasis added), to find that NHS at West High School is a "noncurriculum related student group" requires the court to conclude that NHS "does not relate *directly* to the body of courses offered by the school." *Id.* at 239,

110 S.Ct. 2356 (emphasis in original). Such a conclusion in this instance defies logic and requires the court to ignore pertinent facts. So long as NHS relates directly to the body of courses as a whole by honoring, recognizing and encouraging academic achievement in the specific context of West High School's curriculum—and this court concludes that it does—participation by NHS members in community service projects does not negate that relationship or render non-curricular that which is otherwise undeniably curriculum-related.

* * *

The court thus concludes that with the exception of the Improvement Council at East during the 1997–98 school year, the subject matter of the five student groups addressed by plaintiffs' summary judgment motion bears a direct relationship to the curriculum at either East High School or West High School and are not "noncurriculum related student groups" within the meaning of 20 U.S.C.A. § 4071(b) (1990). The presence of ICE at East High School during the 1997–98 school year operated to create a "limited open forum" under the Equal Access Act during the time period that ICE was allowed to meet on school premises. To the extent that plaintiffs were denied the opportunity to meet during that same time period, plaintiffs' rights under the Equal Access Act were violated. However, the East High limited open forum was terminated after the end of the 1997–98 school year, and at that point the violation of plaintiffs' rights under the Act ceased.

Therefore, plaintiffs' Motion for Partial Summary Judgment should be granted in part (concerning ICE during the 1997–98 school year at East High) and denied in all other respects. To the extent that defendants' ***1185** Motion for Summary Judgment seeks a determination that the Salt Lake City School District did not establish a "limited open forum" following the adoption of the February 20, 1996 Policy, that motion must be denied as to East High School for the 1997–98 school year and granted in part, at least to the extent that plaintiffs have contested the curriculum-related nature of particular student groups approved pursuant to that Policy.

106 S.Ct. 3159
Supreme Court of the United States

BETHEL SCHOOL DISTRICT NO. 403, et al., Petitioners
v.
Matthew N. FRASER, a Minor and E.L. Fraser, Guardian Ad Litem.

Decided July 7, 1986.

Opinion

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred ***678** to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," App. 30, and that his delivery of the speech might have "severe consequences." *Id.,* at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students ****3162** hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class. *Id.,* at 41–44.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of ***679** many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution. * * *

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, 755 F.2d 1356 (1985), holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

We granted certiorari, 474 U.S. 814, 106 S.Ct. 56, 88 L.Ed.2d 45 (1985). We reverse.

II

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist., supra,* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.,* 393 U.S., at 506, 89 S.Ct., at 736. The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a non-disruptive, passive expression of a political viewpoint in *Tinker,* this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.,* at 508, 89 S.Ct., at 737.

***681** It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and

manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, New Basic History of the United States 228 (1968). In *Ambach v. Norwick,* 441 U.S. 68, 76–77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979), we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary ***682** Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." Jefferson's Manual of Parliamentary Practice §§ 359, 360, reprinted in Manual ****3164** and Rules of House of Representatives, H.R.Doc. No. 97–271, pp. 158–159 (1982); see *id.,* at 111, n. *a* (Jefferson's Manual governs the House in all cases to which it applies). The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any state. See Senate Procedure, S.Doc. No. 97–2, Rule XIX, pp. 568–569, 588–591 (1981). Senators have been censured for abusive language directed at other Senators. See Senate Election, Expulsion and Censure Cases from 1793 to 1972, S.Doc. No. 92–7, pp. 95–98 (1972) (Sens. McLaurin and Tillman); *id.,* at 152–153 (Sen. McCarthy). Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. See *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.,* 469 U.S. 325, 340–342, 105 S.Ct. 733, 742–743, 83 L.Ed.2d 720 (1985), we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school stu-

dent the classroom right to wear Tinker's armband, but not Cohen's jacket." ***683** *Thomas v. Board of Education, Granville Central School Dist.,* 607 F.2d 1043, 1057 (CA2 1979) (opinion concurring in result).

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." *Tinker,* 393 U.S., at 508, 89 S.Ct., at 737; see *Ambach v. Norwick, supra.* The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. See App. 77–81. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as ***684** bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and ****3165** the audience may include children. In *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico,* 457 U.S. 853, 871–872, 102 S.Ct. 2799, 2814–2815, 73 L.Ed.2d 435 (1982) (plurality opinion); *id.,* at 879–881, 102 S.Ct., at 2814–2815 (BLACKMUN, J., concurring in part and in judgment); *id.,* at 918–920, 102 S.Ct., at 2834–2835 (REHNQUIST, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis,* to protect children—especially in a captive audience—from exposure to sexually explicit,

indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. In *FCC v. Pacifica Foundation,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), we dealt with the power of the Federal Communications Commission to regulate a radio broadcast described as "indecent but not obscene." There the Court reviewed an administrative condemnation of the radio broadcast of a self-styled "humorist" who described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.,* at 729, 98 S.Ct., at 3030; see also *id.,* at 751–755, 98 S.Ct., at 3041–3043 (Appendix to opinion of the Court). The Commission concluded that "certain words depicted sexual and excretory activitites in a patently offensive manner, [and] noted ***685** that they 'were broadcast at a time when children were undoubtedly in the audience.' " The Commission issued an order declaring that the radio station was guilty of broadcasting indecent language in violation of 18 U.S.C. § 1464. 438 U.S., at 732, 98 S.Ct., at 3031. The Court of Appeals set aside the Commission's determination, and we reversed, reinstating the Commission's citation of the station. We concluded that the broadcast was properly considered "obscene, indecent, or profane" within the meaning of the statute. The plurality opinion went on to reject the radio station's assertion of a First Amendment right to broadcast vulgarity:

> "These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *Chaplinsky v. New Hampshire,* 315 U.S. [568], at 572 [62 S.Ct. 766, at 769, 86 L.Ed. 1031 (1942)]." *Id.,* at 746, 98 S.Ct., at 3039.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public ***686** school education. Justice ****3166** Black, dissenting in *Tinker,* made a point that is especially relevant in this case:

> "I wish therefore, ... to disclaim any purpose ... to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students." 393 U.S., at 526, 89 S.Ct., at 746.

* * *

***687** The judgment of the Court of Appeals
220 F.3d 465
United States Court of Appeals,
Sixth Circuit.

Nicholas J. BOROFF, Plaintiff–Appellant,
v.
VAN WERT CITY BOARD OF EDUCATION; John Basinger; William Clifton; and David Froelich, Defendants–Appellees.

Decided and Filed July 26, 2000

WELLFORD, J., delivered the opinion of the court, in which SILER, J., joined. GILMAN, J. delivered a separate dissenting opinion.

OPINION

WELLFORD, Circuit Judge.

After Van Wert (Ohio) High School administrators told Nicholas Boroff that he was not allowed to wear "Marilyn Manson" T-shirts to school, Boroff's mother initiated this action on his behalf pursuant to 42 U.S.C. § 1983, alleging that the administrators' refusal to let him wear the T-shirts violated his rights under the First and Fourteenth Amendments. The district court entered summary judgment in favor of the Van Wert City Board of Education and each of the school administrators who were named as defendants. We **AFFIRM** the decision of the district court.

I. BACKGROUND

This dispute arises out of a high school student's desire to wear "Marilyn Manson" T-shirts to school, and the school's opposing desire to prohibit those T-shirts. Marilyn Manson is the stage name of "goth" rock performer Brian Warner, and also the name of the band in which he is the lead singer. *See* Encarta World English Dictionary (2000) *<http:// dictionary.msn.com/find/entry.asp?search=goth* (defining "goth" as "a style of popular music that combines elements of heavy metal with punk" and also "a style of fashion ... characterized by black clothes, heavy silver jewelry, black eye make-up and lipstick, and often pale face make-up"). Band members take the first part of their stage names from a famous model or celebrity, such as Marilyn Monroe, Madonna, or Twiggy, and the second part from a notorious serial killer, such as Charles Manson, John Wayne Gacy, or Richard Ramirez. Marilyn Manson (the individual) is popularly regarded as a worshiper of Satan, which he has denied. *See* Neil Strauss, *Stage Fright,* Rolling Stone, June 26 1997, at 20. He is also widely regarded as a user of illegal drugs, which he has not denied. In fact, one of his songs is titled "I Don't Like the Drugs (But the Drugs Like Me)." *See* David Brown, *1998: The Best and Worst/Music,* Entertainment Weekly, Dec. 25, 1998, at 140; *see also* Gina Vivinetto, *Marilyn Manson, Not Kinder, Not Gentler,* St. Petersburg Times, Mar. 26 1999, at 23 (reporting that Manson no longer stores his drugs and drug paraphernalia in lunch boxes because ***467** "everyone ... is carrying their paraphernalia that way. Too trendy").

On August 29, 1997, Boroff, then a senior at Van Wert High School, went to school wearing a "Marilyn Manson" T-shirt. The front of the T-shirt depicted a three-faced Jesus, accompanied by the words "See No

Truth. Hear No Truth. Speak No Truth." On the back of the shirt, the word "BELIEVE" was spelled out in capital letters, with the letters "LIE" highlighted. Marilyn Manson's name (although not his picture) was displayed prominently on the front of the shirt. At the time, Van Wert High School had in effect a "Dress and Grooming" policy that provided that "clothing with offensive illustrations, drug, alcohol, or tobacco slogans ... are not acceptable." Chief Principal's Aide David Froelich told Boroff that his shirt was offensive and gave him the choice of turning the shirt inside-out, going home and changing, or leaving and being considered truant. Boroff left school.

On September 4, 1997, which was the next school day, Boroff wore another Marilyn Manson T-shirt to school. Boroff and his mother met that day with Froelich, Principal William Clifton, and Superintendent John Basinger. Basinger told the Boroffs that students would not be permitted to wear Marilyn Manson T-shirts on school grounds. Undaunted, Boroff wore different Marilyn Manson T-shirts on each of the next three school days, September 5, 8, and 9, 1997. The shirts featured pictures of Marilyn Manson, whose appearance can fairly be described as ghoulish and creepy. Each day, Boroff was told that he would not be permitted to attend school while wearing the T-shirts.

Boroff did not attend school for the next four days following September 9, 1997. On the fifth day, September 16, 1997, his mother initiated the present suit in the United States District Court for the Northern District of Ohio, alleging that the administrators' refusal to allow her son to wear Marilyn Manson T-shirts in school violated his First Amendment right to free expression and his Fourteenth Amendment right to due process. (After his eighteenth birthday, Boroff was substituted for his mother as the plaintiff.) The complaint named as defendants the Van Wert City Board of Education, Chief Principal's Aide Froelich, Principal Clifton, and Superintendent Basinger (collectively, the School). Boroff requested a temporary restraining order and moved for a preliminary injunction. The district court, following a hearing on September 16, 1997, denied both. Following discovery, both Boroff and the School moved for summary judgment. In a memorandum and order dated July 6, 1998, the district court entered summary judgment in favor of the School. This appeal followed.

II. ANALYSIS

A. Standard of Review

We review *de novo* a district court's decision to grant or deny summary judgment. *See* *Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir.1997). Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to a judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find for

the non-moving party." *Id.* at 252, 106 S.Ct. 2505.

B. First Amendment Claim

"It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the First Amendment rights of students in the public schools must be "applied in light of the special characteristics of the school environment." *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Tinker,* 393 U.S. at 506, 89 S.Ct. 733).

* * *

The district court below determined that the rule in *Fraser* applied to this case, concluding that "[a] school may prohibit a student from wearing a T-shirt that is offensive, but not obscene, on school grounds, even if the T-shirt has not been shown to cause a substantial disruption of the academic program." The court then held that the School did not act in a manifestly unreasonable manner in finding the T-shirts offensive and in enforcing its dress code.

In this appeal, Boroff argues that the district court erred in granting summary judgment to the School. In his appellate brief he maintains:

> The way to analyze this is to first determine whether the speech is "vulgar or offensive". If it is, then *Fraser* allows banning it, and the analysis is complete. Otherwise, apply *Tinker* and examine if there is a threat of substantial disruption such that would allow the school to ban the speech.

Appellant's Brief at 8. Boroff claims that the administrators' decision that the T-shirts are offensive was manifestly unreasonable and unsupported by the evidence. Boroff relies to a great extent on evidence that similar T-shirts promoting other bands, such as Slayer and Megadeth, were not prohibited, and also on evidence that one other student was not prohibited from carrying a backpack that donned three "Marilyn Manson" patches. Because the T-shirts were not "offensive," Boroff reasons, and because there is no evidence that a substantial disruption would arise from his wearing the T-shirts, then the School violated his First Amendment rights. We disagree.

The standard for reviewing the suppression of vulgar or plainly offensive speech is governed by *Fraser, supra. See Chandler v. McMinnville School District,* 978 F.2d 524, 529 (9th Cir.1992) (finding that school buttons containing inoffensive terms may not be prohibited absent a showing of a reasonable forecast of substantial disruption in school activities). The School in this case, according to the affidavit of Principal Clifton, found the Marilyn Manson T-shirts to be offensive because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission

of the school. Specifically, Clifton found the "three-headed Jesus" T-shirt to be offensive because of the "See No Truth. Hear No Truth. Speak No Truth." mantra on the front, and because of the obvious implication of the word "BELIEVE" with "LIE" highlighted on the back. The principal specifically stated that the distorted Jesus figure was offensive, because "[m]ocking any religious figure is contrary to our educational mission which is to be respectful of others and others' beliefs." The other T-shirts were treated with equal disapproval. Clifton went on to explain the reasoning behind the School's prohibition of the T-shirts generally:

"17. Although I do not know if [Boroff] intends to communicate anything when wearing the Marilyn Manson t-shirts, I believe that the Marilyn Manson t-shirts can reasonably be considered a communication agreeing with or approving of the views espoused by Marilyn Manson in its lyrics and those views which have been associated to Marilyn Manson through articles in the press. I find some of the Marilyn Manson lyrics and some of the views associated with Marilyn Manson as reported in articles in the news and entertainment press offensive to our basic educational ***470** mission at Van Wert High School. Therefore, I believe that all of the Marilyn Manson t-shirts ... are offensive to and inconsistent with our educational mission at Van Wert High School."

Furthermore, Clifton quotes some of the lyrics from Marilyn Manson songs that the School finds offensive, which include (but certainly are not limited to) lines such as, "you can kill yourself now because you're dead in my mind," "let's jump upon the sharp swords/and cut away our smiles/without the threat of death/there's no reason to live at all," and "Let's just kill everyone and let your god sort them out/Fuck it/Everybody's someone else's nigger/I know you are so am I/I wasn't born with enough middle fingers." The principal attested that those types of lyrics were contrary to the school mission and goal of establishing "a common core of values that include ... human dignity and worth ... self respect, and responsibility," and also the goal of instilling "into the students, an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as citizens."

Clifton also submitted to the district court magazine articles that portray Marilyn Manson as having a "pro-drug persona" and articles wherein Marilyn Manson himself admits that he is a drug user and promotes drug use. Clifton concludes from his fourteen years of experience that children are genuinely influenced by the rock group and such propaganda.

* * *

Under these circumstances, we find that the district court was correct in finding that the School did not act in a manifestly unreasonable manner in prohibiting the Marilyn Manson T-shirts pursuant to its dress code. The Supreme Court has held that the school board has the authority to determine "what manner of speech in the classroom or in school is inappropriate." *Fraser,* 478 U.S. at 683, 106 S.Ct. 3159. The Court has determined that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission ... even though the government could not censor similar speech outside the school.' " *Kuhlmeier,* 484 U.S. at 266, 108 S.Ct. 562 (quoting

Fraser, 478 U.S. at 685, 106 S.Ct. 3159). In this case, where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts.

The dissent would find that the evidence was sufficient for a reasonable jury to infer that the School has engaged in "viewpoint discrimination" by prohibiting the T-shirts, similar to the armband prohibition in *Tinker.* The dissent primarily relies on one sentence in Principal Clifton's affidavit, in which Clifton stated that he found the "three-headed Jesus" T-shirt to be offensive because "it mocks a major religious figure." Under that reasoning, if a jury finds that the School has prohibited the T-shirts because of any viewpoint expressed on the shirts, then the School must show that it reasonably predicted that allowing the T-shirts would have caused a substantial ***471** disruption of, or material interference with, school activities. *See* *Tinker,* 393 U.S. at 509, 89 S.Ct. 733.

In our view, however, the evidence does not support an inference that the School intended to suppress the expression of Boroff's viewpoint, because of its religious implications. Rather, the record demonstrates that the School prohibited Boroff's Marilyn Manson T-shirts generally because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education. The dissenting judge agrees that "[i]f the only T-shirts at issue in this case were the ones that simply displayed illustrations of Marilyn Manson largely unadorned by text, the judgment of the district court might be sustainable." He reasons, however, that the one T-shirt featuring the distorted Jesus figure may have been prohibited because of the School's disagreement with its religious message. In our view, the School's treatment of the "three-headed Jesus" T-shirt and the others is not distinguishable. The record establishes that all of the T-shirts were banned in the same manner for the same reasons—they were determined to be vulgar, offensive, and contrary to the educational mission of the school. *See* *Pyle v. South Hadley School Committee,* 861 F.Supp. 157, 159 (D.Mass.1994) (upholding a prohibition on T-shirt proclaiming "See Dick drink. See Dick drive. See Dick die. Don't be a Dick." and "Coed Naked Band: Do It To The Rhythm.").

In sum, we are of the view that the School has the authority to prohibit Marilyn Manson T-shirts under these circumstances.

461 F.3d 320
United States Court of Appeals,
Second Circuit.

Zachary GUILES, by his father and next friend, Timothy GUILES; and by his mother and next friend Cynthia Lucas, Plaintiff–Appellant–Cross–Appellee,
v.
Seth MARINEAU, Kathleen Morris–Kortz, Douglas Shoik and Rodney Graham, Defendants–Appellees–Cross–Appellants.

Decided Aug. 30, 2006.

Before CARDAMONE, POOLER, and SOTOMAYOR, Circuit Judges.

Opinion

CARDAMONE, Circuit Judge.

* * *

A. *The Parties*

In May 2004 plaintiff Guiles was a seventh-grade student at Williamstown Middle High School. * * *

B. *The T-shirt*

In March 2004 plaintiff began wearing the offending T-shirt to school. He had purchased it at an anti-war rally he attended. The front of the shirt, at the top, has large print that reads "George W. Bush," below it is the text, "Chicken–Hawk–In–Chief." Directly below these words is a large picture of the President's face, wearing a helmet, superimposed on the body of a chicken. Surrounding the President are images of oil rigs and dollar symbols. To one side of the President, three lines of cocaine and a razor blade appear. In the "chicken wing" of the President nearest the cocaine, there is a straw. In the other "wing" the President is holding a martini glass with an olive in it. Directly below all these depictions is printed, "1st Chicken Hawk Wing," and below that is text reading "World Domination Tour."

The back of the T-shirt has similar pictures and language, including the lines of cocaine and the martini glass. The representations on the back of the shirt are surrounded by smaller print accusing the President of being a "Crook," "Cocaine Addict," "AWOL, Draft Dodger," and "Lying Drunk Driver." The sleeves of the shirt each depict a military patch, one with a man drinking from a bottle, and the other with a chicken flanked by a bottle and three lines of cocaine with a razor. Without question Guiles's T-shirt uses harsh rhetoric and imagery to express disagreement with the President's policies and to impugn his character.

C. *School Action Relating to the T-shirt*

Guiles wore the T-shirt on average once a week for two months. Although the shirt evoked discussion from students, it did not cause any disruptions or fights inside or outside the school. But, the T-shirt raised the ire of one fellow student whose politics evidently were opposed to Guiles's. This student complained to teachers who told her that the shirt was political speech and therefore protected.

On May 12, 2004 Guiles was to go on a school field trip. He wore the T-shirt that day. A parent who was to chaperone the trip—indeed the parent of the student who

had previously complained to teachers regarding the shirt—noticed the shirt and voiced her objection to defendant Marineau.

Marineau, after consulting with Shoik, determined that the T-shirt, specifically the images of drugs and alcohol, violated the following provision of the WMHS dress code:

"Any aspect of a person's appearance, which constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity, and racism is outside our responsibility and integrity guideline as a school community and is prohibited]."

WMHS Student/Parent Handbook 2003–2004 at 13 (brackets in original).

***323** Marineau gave Guiles three choices: (1) turn the shirt inside-out; (2) tape over the images of the drugs and alcohol and the word "cocaine"; or (3) change shirts. Marineau was unsure whether the word cocaine violated the policy. He did not, however, relay this doubt to the student, leaving the student to think that it too must be taped over. Guiles's father came in to speak with Marineau, who reiterated that the shirt contravened dress code policy. Guiles and his father then went to speak with Shoik who reaffirmed what Marineau had said. Guiles returned home with his father for the remainder of that day.

On May 13, 2004 plaintiff returned to school wearing the T-shirt. Marineau again instructed him to tape over the offending images with duct tape, turn the shirt inside out, or change shirts. Guiles declined, and Marineau filled out a discipline referral form and sent plaintiff home. The discipline referral form remains in Guiles's record. On May 14, 2004 Guiles again wore the T-shirt to school, this time, however, with the images of drugs and alcohol and the word "cocaine" covered with duct tape. On the duct tape plaintiff had scrawled the word "Censored."

* * *

Finding the images plainly offensive or inappropriate under *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), the district court held the school's censorship of the images was proper and declined to issue an injunction. The trial court also held the school violated Guiles's free speech rights by censoring the word cocaine, and therefore it ordered the discipline referral form expunged from Guiles's academic record. Guiles and defendants both appeal.

DISCUSSION

Standard of Review

Normally we review the district court's findings of fact for clear error and ***324** its conclusions of law *de novo. See* Fed.R.Civ.P. 52(a); *Ramos v. Town of Vernon,* 353 F.3d 171, 174 (2d Cir.2003). But because this appeal concerns allegations of abridgement of free speech rights, we do not defer to the district court's findings of fact. Instead, in First Amendment cases we make an independent and searching inquiry of the entire record, since we are obliged to conduct a "fresh examination of crucial facts ... so as to assure ourselves that [the lower court's] judgment does not constitute a forbidden intrusion on the field of free expression." *Hurley v. Irish–Am. Gay, Lesbian*

& Bisexual Group, 515 U.S. 557, 567–68, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *see also* *Bery v. City of New York,* 97 F.3d 689, 693 (2d Cir.1996) ("[W]e are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court.").

I. Free Speech Law in Schools

We wrestle on this appeal with the question of how far a student's constitutional right freely to express himself on school grounds extends. As the Supreme Court aptly put it, "[o]ur problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). We begin with several premises. First, we are mindful that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy v. James,* 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). Thus neither party disputes that "students have First Amendment rights to political speech in public schools." *Brandon v. Bd. of Educ.,* 635 F.2d 971, 980 (2d Cir.1980). But while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker,* 393 U.S. at 506, 89 S.Ct. 733, neither are their rights to free speech "automatically coextensive with the rights of adults," *Fraser,* 478 U.S. at 682, 106 S.Ct. 3159. Indeed even for adults it is familiar law that "the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571–72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (noting that certain limited categories of speech may be prevented without raising a constitutional problem: "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

* * *

We distill the following from *Tinker, Fraser,* and *Hazelwood:*

> (1) schools have wide discretion to prohibit speech that is less than obscene—to wit, vulgar, lewd, indecent or plainly offensive speech, *Fraser,* 478 U.S. at 683–85, 106 S.Ct. 3159; *Hazelwood,* 484 U.S. at 272 n. 4, 108 S.Ct. 562;
>
> (2) if the speech at issue is "school-sponsored," educators may censor student speech so long as the censorship is "reasonably related to legitimate pedagogical concerns," *Hazelwood,* 484 U.S. at 273, 108 S.Ct. 562; and
>
> (3) for all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser,* nor school-sponsored under *Hazelwood,* the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school. *See* *Tinker,* 393 U.S. at 513, 89 S.Ct. 733.

Our articulation of the *Tinker—Fraser—Hazelwood* trilogy is in accord with how other circuits commonly understand these cases. *See, e.g.,* *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 214 (3d Cir.2001) ***326** (Alito, J.) ("To summarize:

Under *Fraser,* a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood,* a school may regulate school-sponsored speech.... Speech falling outside of these categories is subject to *Tinker's* general rule...."); *Chandler v. McMinnville Sch. Dist.,* 978 F.2d 524, 529 (9th Cir.1992) ("We conclude ... that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser,* school-sponsored speech by *Hazelwood,* and all other speech by *Tinker.*").

* * *

II. Applying the Supreme Court Standards

We turn next to which standard applies to this appeal. That the parties vigorously contest this point is not surprising. ***327** Where this case falls on the *Tinker—Fraser—Hazelwood* spectrum primarily determines whether the defendants' censorship of Guiles's T-shirt survives First Amendment scrutiny. For the reasons set out below, we hold that neither *Hazelwood* nor *Fraser* govern, and therefore, the general rule of *Tinker* applies.

A. Hazelwood *Does Not Apply*

We agree with the district court that *Hazelwood* is inapplicable. The deferential standard of *Hazelwood,* which permits schools to regulate student speech so long as the regulation reasonably relates to "legitimate pedagogical concerns," *Hazelwood,* 484 U.S. at 273, 108 S.Ct. 562, comes into play only when the student speech is "school-sponsored" or when a reasonable observer would believe it to be so sponsored, *see id.* at 273–74, 108 S.Ct. 562; *Peck,* 426 F.3d at 628–29; *Saxe,* 240 F.3d at 213–14 (noting that "*Hazelwood's* permissive 'legitimate pedagogical concern' test governs only when a student's *school-sponsored* speech could reasonably be viewed as speech of the school itself" (emphasis added)). No one disputes that the school did not sponsor Guiles's T-shirt or that the T-shirt could not reasonably be viewed as bearing the school's imprimatur. While we do not doubt that an anti-drug and alcohol policy may be of "legitimate pedagogical concern" to schools, absent school sponsorship, defendants may not look to *Hazelwood* for support.

B. Fraser *Does Not Apply*

We disagree with the district judge that *Fraser* governs this case. The district court applied *Fraser,* reasoning that it must ask whether "the images of drugs and alcohol are *offensive* or *inappropriate,"* and concluding that, if so, "then, under *Fraser,* they may be censored." *Guiles,* 349 F.Supp.2d at 881 (emphasis added). The trial court then accepted the "judgment of the defendants that such images are an inappropriate form of expression for their middle school" and accordingly, upheld the school's censorship of Guiles's T-shirt. *Id.* We believe the district court misjudged the scope of *Fraser* and, consequently, applied it in error.

Fraser's reach is not as great as the trial court presumed. *Fraser* permits schools to censor student speech that is "lewd," "vulgar," "indecent," or "plainly offensive." *Fraser,* 478 U.S. at 683–85, 106 S.Ct. 3159; *Hazelwood,* 484 U.S. at 271 n. 4, 108 S.Ct. 562 (discussing *Fraser*). We thus ask whether the images of a martini glass, a bottle and glass, a man drinking from a bottle, and lines of cocaine constitute lewd, vulgar, indecent, or plainly offensive speech. We

think it clear that these depictions on their own are not lewd, vulgar, or indecent. Lewdness, vulgarity, and indecency normally connote sexual innuendo or profanity. *See Merriam–Webster's Third New Int'l Dictionary* 1147, 1301, 2566 (1st ed.1981) (defining (a) "lewd" as "inciting to sensual desire or imagination," (b) "vulgar" as "lewd, obscene, or profane in expression," and (c) "indecent" as "being or tending to be obscene").

We are left then with the question of whether the pictures are plainly offensive. Indeed, the district court held *Fraser* applicable on the basis of its "plainly offensive" language, which it interpreted broadly. *Guiles,* 349 F.Supp.2d at 881. What then constitutes plainly offensive speech under *Fraser?* And, can we say that depictions of drugs and alcohol such as those on Guiles's T-shirt are plainly offensive? These are questions of first impression in this Circuit. While what is plainly offensive is not susceptible to precise definition, we hold that the images depicted on Guiles's T-shirt are not plainly offensive as a matter of law.

Dictionaries commonly define the word offensive as that which causes displeasure ***328** or resentment or is repugnant to accepted decency. *See Merriam–Webster's Third Int'l Dictionary* 1156; *Black's Law Dictionary* 1110 (7th ed.1999). We doubt the *Fraser* Court's use of the term sweeps as broadly as this dictionary definition, and nothing in *Fraser* suggests that it does. But if it does, then the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency. Yet the Supreme Court held the school could not censor the students' speech in that case.

What is plainly offensive for purposes of *Fraser* must therefore be somewhat narrower than the dictionary definition. Courts that address *Fraser* appear to treat "plainly offensive" synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent—meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity. *See* * * * *Saxe,* 240 F.3d at 213 (noting that "*Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends' "). In fact, the Supreme Court deemed Fraser's speech could be freely censored because it was imbued with sexual references, bordering on the obscene. *See Fraser,* 478 U.S. at 683, 106 S.Ct. 3159 ("The pervasive *sexual innuendo* in Fraser's speech was *plainly offensive* to both teachers and students." (emphasis added)).

What is more, the cases cited by *Fraser* all concern vulgarity, obscenity, and profanity. See *Fraser,* 478 U.S. at 684–85, 106 S.Ct. 3159, where the Supreme Court cites *Ginsberg v. New York,* 390 U.S. 629, 639–41, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (upholding ban on sale of sexually oriented material to minors); *Pico,* 457 U.S. at 871–72, 102 S.Ct. 2799 (acknowledging that school may remove "pervasively vulgar" books from library); and *FCC v. Pacifica Found.,* 438 U.S. 726, 745–48, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (upholding FCC's ability to censor "obscene, indecent, or profane" speech). * * *

Judge Newman's oft-quoted concurrence in a case that pre-dates *Fraser* also suggests that the district court's reading of *Fraser* is incorrect. Judge Newman noted that "[t]he

First Amendment does not prevent a school's reasonable efforts toward the maintenance of campus standards of civility and decency" and memorably stated that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.,* 607 F.2d 1043, 1057 (2d Cir.1979) (Newman, J., concurring) (referring to *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), in which the Supreme Court upheld an adult's right to wear a jacket bearing the statement "[F ... expletive deleted] the Draft"). The import of his analysis was that "a school can act to keep indecent language from circulating on high school grounds." *Id. Fraser* itself quoted Judge Newman and indicated that its rule applies to the "manner of speech," i.e., the offensiveness of its form, but not the speech's content. ***329** 478 U.S. at 682–83, 685, 106 S.Ct. 3159; *see also Hazelwood,* 484 U.S. at 286 n. 2, 108 S.Ct. 562 (Brennan, J., dissenting) (stating that *Fraser* is limited to "the appropriateness of the *manner* in which the message is conveyed, not of the message's *content"*) (emphasis in original); *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.,* 354 F.3d 249, 256 (4th Cir.2003) ("When speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message."); *Boroff v. Van Wert City Bd. of Educ.,* 220 F.3d 465, 473 (6th Cir.2000) (Gilman, J., dissenting) (noting that the terms "vulgar" and "offensive" in *Fraser* "refer to words and phrases that are themselves coarse and crude, regardless of whether one disagrees with the overall message that the speaker is trying to convey").

Moreover, the *Fraser* Court, in noting the "interest in protecting minors from exposure to vulgar and offensive spoken language," discussed at some length its earlier opinion in *Pacifica,* 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073. *Fraser,* 478 U.S. at 684–85, 106 S.Ct. 3159. *Pacifica* involved comedian George Carlin's "Filthy Words" monologue, which the *Fraser* Court characterized as "vulgarity." *Id.* at 685, 106 S.Ct. 3159. It noted that the words comprising the monologue, which dealt with sexuality and excretion, "offend for the same reasons that obscenity offends." *Id.; Saxe,* 240 F.3d at 213 (noting that "*Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends' "). For these reasons and others we discuss below, although we need not conclusively determine what is "plainly offensive" under *Fraser* to resolve the instant case, we decline to adopt the position of the Sixth Circuit in *Boroff* that a school has broad authority under *Fraser* to prohibit speech that is "inconsistent with its basic educational mission." 220 F.3d at 470;
* * *.

Here, the images of a martini glass, alcohol, and lines of cocaine, like the banner in *Frederick,* may cause school administrators displeasure and could be construed as insulting or in poor taste. We cannot say, however, that these images, by themselves, are as plainly offensive as the sexually charged speech considered in *Fraser* nor are they as offensive as profanity used to make a political point. *See Thomas,* 607 F.2d at 1057 (Newman, J., concurring in result). We do not think in light of this discussion that the images on plaintiff's T-shirt are plainly offensive, especially when considering that they are part of an anti-drug political message.

* * *

CONCLUSION

Accordingly, for the foregoing reasons, we vacate the district court's order insofar as it denied Guiles's declaratory judgment action seeking to enjoin defendants from enforcing the dress code with regard to his T-shirt. We affirm the district court's holding that the disciplinary action should be expunged from Guiles's record and remand this matter to the district court for further proceedings consistent with this opinion.

All Citations

71 S.Ct. 303
Supreme Court of the United States

FEINER
v.
PEOPLE OF STATE OF NEW YORK.

Decided Jan. 15, 1951.

Opinion

Mr. Chief Justice VINSON delivered the opinion of the Court.

Petitioner was convicted of the offense of disorderly conduct, a misdemeanor under the New York penal laws, in the Court of Special Sessions of the City of Syracuse and was sentenced to thirty days in the county penitentiary. The conviction was affirmed by the Onondaga County Court and the New York Court of Appeals, 1950, 300 N.Y. 391, 91 N.E.2d 316. The case is here on certiorari, 1950, 339 U.S. 962, 70 S.Ct. 987, petitioner having claimed that the conviction is in violation of his right of free speech under the Fourteenth Amendment.

In the review of state decisions where First Amendment rights are drawn in question, we of course make an examination of the evidence to ascertain independently whether the right has been violated. Here, the trial judge, who heard the case without a jury, rendered an oral decision at the end of the trial, setting forth his determination of the facts upon which he found the petitioner guilty. His decision indicated generally that he believed the state's witnesses, and his summation of the testimony was used by the two New York courts on review in stating the facts. Our appraisal of the facts is, therefore, based upon the uncontroverted facts and, where controversy exists, upon that testimony which the trial judge did reasonably conclude to be true.

On the evening of March 8, 1949, petitioner Irving Feiner was addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse. At approximately 6:30 p.m., the police received a telephone complaint concerning the meeting, and two officers were detailed to investigate. One of these officers went to the scene immediately, the other arriving some twelve minutes later. They found a crowd of about seventy-five or eighty people, both Negro and white, filling the sidewalk and spreading out into the street. Petitioner, standing on a large wooden box on the sidewalk, was addressing the crowd through a loud-speaker system attached to an automobile. Although the purpose of his speech was to urge his listeners to attend a meeting to be held that night in the Syracuse Hotel, in its course he was making derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse, and other local political officials.

The police officers made no effort to interfere with petitioner's speech, but were first concerned with the effect of the crowd on both pedestrian and vehicular traffic. They observed the situation

from the opposite side of the street, noting that some pedestrians were forced to walk in the street to avoid the crowd. Since traffic was passing at the time, the officers attempted to get the people listening to petitioner back on the sidewalk. The crowd was restless and there was some pushing, shoving and milling around. One of the officers telephoned the police station from a nearby store, and then both policemen crossed the street and mingled with the crowd without any intention of arresting the speaker.

At this time, petitioner was speaking in a 'loud, high-pitched voice.' He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights. The statements before such a mixed audience 'stirred up a little excitement.' Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the officers finally 'stepped in to prevent it from resulting in a fight.' One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but the latter refused to accede to his request and continued talking. The officer waited for a minute and then demanded that he cease talking. Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that 'the law has arrived, and I suppose they will take over now.' In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.

On these facts, petitioner was specifically charged with violation of s 722 of the Penal Law of New York, Mc.K.Consol. Laws, c. 40, the pertinent part of which is set out in the margin. The bill of particulars, demanded by petitioner and furnished by the State, gave in detail the facts upon which the prosecution relied to support the charge of disorderly conduct. Paragraph C is particularly pertinent here: 'By ignoring and refusing to heed and obey reasonable police orders issued at the time and place mentioned in the Information to regulate and control said crowd and to prevent a breach or breaches of the peace and to prevent injury to pedestrians attempting to use said walk, and being forced into the highway adjacent to the place in question, and prevent injury to the public generally.'

We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his

speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.

The language of Cantwell v. State of Connecticut, 1940, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. On one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U.S. at page 308, 60 S.Ct. at page 905. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. Schneider v. State of New Jersey, Town of Irvington, 1939, 308 U.S. 147, 160, 60 S.Ct. 146, 150, 84 L.Ed. 155; Kovacs v. Cooper, 1949, 336 U.S. 77, 82, 69 S.Ct. 448, 451, 93 L.Ed. 513. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. 'A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.' Cantwell v. State of Connecticut, supra, 310 U.S. at page 308, 60 S.Ct. at page 905, 84 L.Ed. 1213. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.
Affirmed.

805 F.3d 228
United States Court of Appeals,
Sixth Circuit.

BIBLE BELIEVERS; Ruben Chavez, aka Ruben Israel; Arthur Fisher; Joshua DeLos-Santos, Plaintiffs–Appellants,
v.
WAYNE COUNTY, MICHIGAN; Benny N. Napoleon, in his official capacity as Sheriff, Wayne County Sheriff's Office; Dennis Richardson, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office; Mike Jaafar, individually and in his official capacity as Deputy Chief, Wayne County Sheriff's Office, Defendants–Appellees.

Decided and Filed: Oct. 28, 2015.

OPINION

CLAY, Circuit Judge.

Plaintiffs Ruben Chavez ("Israel"), Arthur Fisher, Joshua DeLosSantos, and the Bible Believers (collectively "the Bible Believers" or "Plaintiffs") appeal the district court order entering summary judgment in favor of Defendants Sheriff Benny N. Napoleon, Deputy Chief Dennis Richardson, Deputy Chief Mike Jaafar, and Wayne County (collectively "Wayne County" or "Defendants"). Plaintiffs initiated this constitutional tort action pursuant to 42 U.S.C. § 1983, alleging that Defendants violated their First Amendment rights to freedom of speech and free exercise of religion * * *. The district court held that Defendants' actions in cutting off the Bible Believers' religious speech did not violate the Constitution. We **REVERSE** the judgment of the district court in full and **REMAND** this case for entry of summary judgment in favor of Plaintiffs, for the calculation of damages, and for the award of appropriate injunctive relief, consistent with this opinion.

BACKGROUND

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps,* 562 U.S. 443, 458, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011) (citation and internal quotation marks omitted). "Nowhere is this [First Amendment] shield more necessary than in our own country for a people composed [from such diverse backgrounds]." *Cantwell v. Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Born from immigrants, our national identity is woven together from a mix of cultures and shaped by countless permutations of geography, race, national origin, religion, wealth, experience, and education. Rather than conform to a single notion of what it means to be an American, we are fiercely individualistic as a people, despite the common threads that bind us. This diversity contributes to our capacity to hold a broad array of opinions on an incalculable number of topics. It is our freedom as Americans, particularly the freedom of speech, which generally al-

lows us to express our views without fear of government sanction.

Diversity, in viewpoints and among cultures, is not always easy. An inability or a general unwillingness to understand new or differing points of view may breed fear, distrust, and even loathing. But it "is the function of speech to free men from the bondage of irrational fears." *Whitney v. California,* 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Robust discourse, including the exchanging of ideas, may lead to a better understanding (or even an appreciation) of the people whose views we once feared simply because they appeared foreign to our own exposure. But even when communication fails to bridge the gap in understanding, or when understanding fails to heal the divide between us, the First Amendment demands that we tolerate the viewpoints of others with whom we may disagree. If the Constitution were to allow ***234** for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom. Because "[t]he right to speak freely and to promote diversity of ideas ... is ... one of the chief distinctions that sets us apart from totalitarian regimes," *Terminiello v. City of Chi.,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), dissent is an essential ingredient of our political process.

The First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* If we are not persuaded by the contents of another's speech, "the remedy to be applied is more speech, not enforced silence." *Whitney,* 274 U.S. at 377, 47 S.Ct. 641 (Brandeis, J., concurring). And although not all manner of speech is protected, generally, we interpret the First Amendment broadly so as to favor allowing more speech. *See* *Cox v. Louisiana,* 379 U.S. 536, 578, 85 S.Ct. 466, 13 L.Ed.2d 487 (1965) ("[W]hen passing on the validity of a regulation of conduct, which may indirectly infringe on free speech, this Court ... weigh[s] the circumstances in order to protect, not to destroy, freedom of speech." (internal quotation marks omitted)) (Black, J., concurring).

This case calls on us to confirm the boundaries of free speech protections in relation to angry, hostile, or violent crowds that seek to silence a speaker with whom the crowd disagrees. Set against the constitutional right to freedom of speech, we must balance the state's interest in insuring public safety and preventing breaches of the peace. The scenario presented by this case, known as the "heckler's veto," occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation. The particular facts of this case involve a group of self-described Christian evangelists preaching hate and denigration to a crowd of Muslims, some of whom responded with threats of violence. The police thereafter removed the evangelists to restore the peace. Bearing in mind the interspersed surges of ethnic, racial, and religious conflict that from time to time mar our national history, the constitutional lessons to be learned from the circumstances of this case are both timeless and markedly seasonable.

In this opinion we reaffirm the comprehensive boundaries of the First Amendment's free speech protection, which envelopes all manner of speech, even when that speech is loathsome in its intolerance, designed to cause offense, and, as a result of such offense, arouses violent retaliation.

We also delineate the obligations and duties of law enforcement personnel or public officials who, in the exercise of the state's police power, seek to extinguish any breaches of the peace that may arise when constitutionally protected speech has stirred people to anger, and even to violence.

Facts

A. Dearborn and the Arab International Festival

Dearborn—home of the world headquarters of the Ford Motor Company—is a city located in Wayne County, Michigan, that borders Detroit and has a stable population ***235** of approximately 100,000 people. Dearborn is also home to one of the largest populations of Arab Americans in the country—second only to New York City. Dearborn's Arab American population is comprised of both Christian and Muslim families whose national origins include Lebanon, Armenia, Yemen, Iraq, and Palestine, among other nations.

Beginning in 1996 and continuing for 17 years thereafter, each June, Dearborn celebrated its Arab heritage and culture by hosting the Arab International Festival. The Festival, which was free to the public, featured Middle Eastern food, music, artisan booths, cultural acts, and other amusements, including carnival rides. A principal purpose of the Festival was to promote cultural exchange. Each year, the Festival took place on a stretch of Warren Avenue, covering several blocks temporarily closed to vehicular traffic. The street became a pedestrian thoroughfare lined with vendors and information booths. The brick and mortar stores lining the Warren sidewalks also remained open. The Festival attracted people from around the world, and by 2012, it was the largest festival of its kind in the United States, annually drawing more than 300,000 people over the course of three days.

Given the size of attendance and the Festival's focus on cultural exchange, a diverse array of religious groups requested permission to set up information booths on the Festival grounds. The Festival also had a history of attracting certain Christian evangelists who preferred to roam free among the crowd and proselytize to the large number of Muslims who were typically in attendance each year. These evangelists would come from across the country to distribute leaflets up and down the sidewalks of Warren Avenue in the heart of the Festival. This practice was disrupted in 2009 when the Dearborn police enforced an anti-leafletting policy promoted by the American Arab Chamber of Commerce—the Festival's primary sponsor—and ratified by the City. A panel of this Court subsequently held that Dearborn's anti-leafletting policy unconstitutionally encroached on the free speech rights protected by the First Amendment because it failed to serve a substantial government interest and it was not narrowly tailored, as is required with respect to any time, place, or manner restriction on protected speech. *See* *Saieg v. City of* ***236** *Dearborn,* 641 F.3d 727 (6th Cir.2011). The City of Dearborn thereafter ceded to the Wayne County Sheriff's Office ("WCSO") primary responsibility over Festival security in future years.

B. The Bible Believers

The Bible Believers were among the self-described evangelical groups that attended the Festival for the purpose of spreading their Christian beliefs. The founder and leader of the Bible Believers, known as "Israel," testified that due to his sincerely held religious beliefs he was required "to try and convert non-believers, and call sinners to repent." Therefore, Israel and his Bible Believers regularly engaged in street preaching, which consisted of advocating for their Christian beliefs and parading around with banners, signs, and tee-shirts that displayed messages associated with those beliefs. Many of the signs and messages displayed by the Bible Believers communicated overtly anti-Muslim sentiments.

* * *

D. The 2012 Arab International Festival

The Bible Believers returned to Dearborn in 2012, at approximately 5:00 p.m. on Friday, June 15, for the 17th Annual Arab International Festival. As they had done the previous year, the Bible Believers traveled to the Festival so that they could exercise their sincerely held religious beliefs. Unfortunately for the Festival-goers, those beliefs compelled Israel and his followers to hurl words and display messages offensive to a predominantly Muslim crowd, many of whom were adolescents. These messages were written on their tee-shirts and on the banners and signs that they carried. The following is a sampling of the Bible Believers' messages:

"Islam Is A Religion of Blood and Murder"

"Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers"

"Prepare to Meet Thy God—Amos 4:12"

"Jesus Is the Judge, Therefore Repent, Be Converted That Your Sins May Be Blotted Out"

"Trust Jesus, Repent and Believe in Jesus"

"Only Jesus Christ Can Save You From Sin and Hell"

"Turn or Burn"

"Fear God"

(R. 20–2, Israel Decl., PGID 176–77). In addition to the signs, one of the Bible Believers carried a severed pig's head on a spike, because, in Israel's own words, it would "ke[ep] [the Muslims] at bay" since "unfortunately, they are kind of petrified of that animal." (R. 28–A, Raw Festival Footage, Time: 00:49:45).

Laden with this imagery, the Bible Believers entered the Festival and began their preaching. At first, few people paid attention other than to glance at what appeared to be an odd assembly. The first speaker told the crowd that they should not follow "a false prophet," who was nothing but

an "unclean drawing" and "a pedophile." (*Id.* at 00:01:40). He continued by telling what was by then a group made up of approximately thirty teenagers that "[y]our religion will send you to hell." (*Id.* at 00:03:30). Tensions started to rise as a ***239** few youths became incensed after the speaker taunted, "You believe in a prophet who is a pervert. Your prophet who wants to molest a child," and "God will reject you. God will put your religion into hellfire when you die." (*Id.* at 00:03:56, 00:04:38). This continued as a few of the teens became agitated, until one youth simply told his friends to "quit giving them attention," convincing some members of the crowd to disperse. (*Id.* at 00:06:07).

After approximately seven minutes of proselytizing, some elements of the crowd began to express their anger by throwing plastic bottles and other debris at the Bible Believers. An officer was captured on video observing the scene without intervening or reprimanding the juvenile offenders. The size of the crowd ebbed and flowed. At one point an officer approached the Bible Believers and commanded that the speakers stop using a megaphone or be cited for violating city ordinances. The Bible Believers relented, but also responded by noting that "these angry kids are a little bit more vicious than the megaphone." (*Id.* at 00:16:16). A few minutes later, an officer did ask the kids to back up and subsequently removed one of the teenagers who he saw throwing a bottle. However, all police presence and intervention dissipated after this minimal and isolated intervention.

The Bible Believers continued preaching for another ten minutes without the megaphone, all while a growing group of teenagers jeered and heckled, some throwing bottles and others shouting profanities. At one point, a parent stepped in to reprimand his child for participating in the assault. The onslaught reached its climax when a few kids began throwing larger items such as milk crates. By that time, the Bible Believers had stopped all speechmaking whatsoever.

* * *

In summary, the Bible Believers attended the 2012 Festival for the purpose of exercising their First Amendment rights by spreading their anti-Islam religious message. When a crowd of youthful hecklers gathered around the Bible Believers, the police did nothing. When the hecklers began throwing bottles and other garbage at the Bible Believers, a WCSO officer intervened only to demand that the Bible Believers stop utilizing their megaphone to amplify their speech. Virtually absent from the video in the record is any indication that the police attempted to quell the violence being directed toward the Bible Believers by the lawless crowd of adolescents. Despite this apparent lack of effort to maintain any semblance of order at the Festival, each time the police appeared on the video—to reprimand the use of the Bible Believers' megaphone, to suggest that the Bible Believers had the "option to leave" the Festival, to trot by on horseback while doing next to nothing, and to expel the Bible Believers from the Festival under threat of arrest—the agitated crowd became subdued and orderly simply due the authoritative presence cast by the police officers who were then in close proximity. Only once is an officer seen removing one of the bottle-throwing teens. Israel, when faced with the prospect of being arrested for disorderly conduct, observed, "and you would think we would be complaining, but we're not." (R. 28–A, Raw Festival Footage, Time: 00:55:16). The Bible Believers were thereafter es-

corted from the Festival and ticketed by a large group of WCSO officers for removing the license plate from their van.

Procedural History

On September 25, 2012, the Bible Believers initiated this suit, pursuant to 42 U.S.C. § 1983, in the United States District Court for the Eastern District of Michigan. The complaint alleged that Defendants violated the Bible Believers' rights of free speech and free exercise, protected by the First Amendment. * * * The district court issued an opinion granting Defendants' motion for summary judgment, denying the Bible Believers' cross-motion for summary judgment, and dismissing the Bible Believers' claims.

The Bible Believers thereafter filed a timely notice of appeal. The issues were briefed and the case was argued before a three-judge panel of this Court the following year. The panel, in a split decision, affirmed the judgment of the district court granting summary judgment to Wayne County and the individual Defendants. *Bible Believers v. Wayne Cty.,* 765 F.3d 578 (6th Cir.2014). The Bible Believers petitioned for *en banc* rehearing. We granted that petition, thereby vacating the panel opinion, *id.* (opinion vacated, reh'g en banc granted Oct. 23, 2014), and heard oral argument for a second time on March 4, 2015.

DISCUSSION

Standard of Review

We review *de novo* an appeal from a grant of summary judgment. *Gillie v. Law Office of Eric A. Jones, LLC,* 785 F.3d 1091, 1097 (6th Cir.2015). Summary judgment is appropriate when there exists no genuine dispute with respect to the material facts and, in light of the facts presented, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. "The court may look to the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits when ruling on the motion." *Gillie,* 785 F.3d at 1097 (citation and internal quotation marks omitted). The facts must be viewed in the light most favorable to the non-moving party and the benefit of all reasonable inferences in favor of the non-movant must be afforded to those facts. *Id.* The mere "scintilla of evidence" within the record that militates against the overwhelming weight of contradictory corroboration does not create a genuine issue of fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Analysis

I. The First Amendment and the "Heckler's Veto"

Free-speech claims require a three-step inquiry: first, we determine whether the speech at issue is afforded constitutional protection; second, we examine the nature of the forum where the speech was made; and third, we assess whether the government's action in shutting off the speech was legitimate, in light of the applicable standard of review. *Cornelius v. NAACP Le-*

gal Def. & Educ. Fund, Inc., 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); *Saieg,* 641 F.3d at 734–35.

We need only to address steps one and three because the parties agree that the Festival constituted a traditional public forum available to all forms of protected expression. The parties strenuously dispute whether the Bible Believers' conduct constituted incitement to riot, and they also dispute the level of scrutiny that should be applied to this case. Ultimately, we find that Defendants violated the Bible Believers' First Amendment rights because ***243** there can be no legitimate dispute based on this record that the WCSO effectuated a heckler's veto by cutting off the Bible Believers' protected speech in response to a hostile crowd's reaction.

* * *

A. Protected Speech

The First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas. This protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted. The protection would be unnecessary if it only served to safeguard the majority views. In fact, it is the minority view, including expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment. *See, e.g., Nat'l Socialist Party of Am. v. Vill. of Skokie,* 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (recognizing First Amendment rights of Neo Nazis seeking to march with swastikas and to distribute racist and anti-Semitic propaganda in a predominantly Jewish community); *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (recognizing the First Amendment rights of Ku Klux Klan members to advocate for white supremacy-based political reform achieved through violent means); *Texas v. Johnson,* 491 U.S. 397, 405–06, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (recognizing flag burning as a form of political expression protected by the First Amendment); *Snyder,* 562 U.S. 443, 454–56, 131 S.Ct. 1207 (2011) (recognizing a religious sect's right to picket military funerals). "[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (citation omitted). Religious views are no different. "After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick,* 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). Accordingly, "[t]he right to free speech ... includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado,* 530 U.S. 703, 716, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Any other rule "would effectively empower a majority to silence dissidents simply as a matter of personal predilections," *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), and the government might be inclined to "regulate" offensive speech as "a convenient guise for banning the expression of unpopular views." *Id.* at 26, 91 S.Ct. 1780. We tolerate the speech with which we disagree. When confronted by offensive, thoughtless, or baseless speech that we believe to be untrue, the "answer is [always] more

speech." *Williams–Yulee v. Fla. Bar,* ––U.S. ––––, 135 S.Ct. 1656, 1684, 191 L.Ed.2d 570 (2015) (Kennedy, J., dissenting).

Despite the First Amendment's broad sweep, not all speech is entitled to its sanctuary. There are a limited number of categorical exclusions from the comprehensive ***244** protection offered by the Free Speech Clause. These exclusions are rooted in history and tradition, and include only those forms of expression that are "long familiar to the bar" as falling outside the confines of First Amendment protection. *United States v. Alvarez,* –– U.S. ––––, 132 S.Ct. 2537, 2544, 183 L.Ed.2d 574 (2012) (plurality opinion) (citation and internal quotation marks omitted). Two areas of unprotected speech that have particular relevance to the interaction between offensive speakers and hostile crowds are "incitement to violence" (also known as "incitement to riot") and "fighting words." Both classes of speech are discussed below.

1. Incitement

The right to freedom of speech provides that a state cannot "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447, 89 S.Ct. 1827 (footnote omitted). Advocacy for the use of force or lawless behavior, intent, and imminence, are all absent from the record in this case. The doctrine of incitement has absolutely no application to these facts.

The Bible Believers' speech advocated for their Christian beliefs and for harboring contempt for Islam. This advocacy was purportedly intended to convince Muslims at the Festival that they should convert to Christianity. Regardless of the wisdom or efficacy of this strategy, or of the gross intolerance the speakers' conduct epitomized, disparaging the views of another to support one's own cause is protected by the First Amendment. *See, e.g., Snyder,* 562 U.S. at 454, 131 S.Ct. 1207 (placards reading "You're Going to Hell," "Priests Rape Boys," and "God Hates Fags," "certainly convey[ed] ... [a] position on those issues" and constituted protected speech).

The only references to violence or lawlessness on the part of the Bible Believers were messages such as, "Islam is a Religion of Blood and Murder," "Turn or Burn," and "Your prophet is a pedophile." These messages, however offensive, do not advocate for, encourage, condone, or even embrace imminent violence or lawlessness. Although it might be inferred that the Bible Believers' speech was intended to anger their target audience, the record is devoid of any indication that they intended imminent lawlessness to ensue. Quite to the contrary, the Bible Believers contacted Wayne County prior to their visit, requesting that the WCSO keep the public at bay so that the Bible Believers could "engage in their peaceful expression."

It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot. And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime." Eugene Volokh, *Crime–Facilitating Speech,* 57 Stan. L.Rev. 1095, 1190 (2005).

In *Hess v. Indiana,* the Supreme Court held that a protestor who yelled, "We'll take the fucking street again," amidst an agitated crowd that was already resisting police authority could not be punished for ***245** his speech. 414 U.S. 105, 107, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973). Because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), speech that fails to specifically advocate for listeners to take "any action" cannot constitute incitement. *Hess,* 414 U.S. at 109, 94 S.Ct. 326.

Wayne County relies on *Feiner v. New York,* 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951), to support the proposition that the Bible Believers' speech was subject to sanction, and that such sanction does not offend the Constitution. In *Feiner,* the Supreme Court upheld a conviction for breach of the peace where, in the context of a civil rights rally, a speaker "gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights." *Id.* at 317, 71 S.Ct. 303. The majority, over a vigorous dissent, supported its holding by relying on police testimony that the crowd had become restless, "and there was some pushing, shoving and milling around." *Id.* The majority described the scenario as a "crisis." *Id.* at 321, 71 S.Ct. 303. Thus, it has been said that *Feiner* "endorses a Heckler's Veto." Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America 89 (Jamie Kalven ed.1988).

The better view of *Feiner* is summed up, simply, by the following truism: when a speaker incites a crowd to violence, his incitement does not receive constitutional protection. *See Glasson v. City of Louisville,* 518 F.2d 899, 905 n. 3 (6th Cir.1975) ("For over twenty years the Supreme Court has confined the rule in *Feiner* to a situation where the speaker in urging his opinion upon an audience intends to incite it to take action that the state has a right to prevent."). *Feiner* lends little support for the notion that the Bible Believers' speech amounted to incitement. The Bible Believers did not ask their audience to rise up in arms and fight for their beliefs, let alone request that they hurl bottles and other garbage upon the Bible Believers' heads.

Subsequent Supreme Court precedent illustrates that the speaker's advocacy in *Feiner* itself could no longer be sanctioned as incitement. *See, e.g., United States v. Williams,* 553 U.S. 285, 298–99, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) ("To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 928, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) ("[T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." (citation omitted)); *Communist Party of Ind. v. Whitcomb,* 414 U.S. 441, 450, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974) (rejecting the notion that "any group that advocates violen[ce] ... as an abstract doctrine must be regarded as necessarily advocating unlawful action"); *see also* 5 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 20.39(a) (5th ed.2013) (noting that "[t]he authority of *Feiner* has been undercut significantly in subsequent [Supreme Court] cases"). In *Claiborne Hardware Co.,* a speaker explicitly proposed to a large crowd that anyone who failed to abide by the terms of an

agreed upon boycott would have to be "disciplined." 458 U.S. at 902, 102 S.Ct. 3409. The speaker also stated, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* Nonetheless, this speech was not deemed by the Court to be incitement. *Id.* at 928–29, 102 S.Ct. 3409.

***246** [7] The Supreme Court has repeatedly referred to *Brandenburg*—not *Feiner*—as establishing the test for incitement. *See, e.g., Whitcomb,* 414 U.S. at 447–48, 94 S.Ct. 656 ("We most recently summarized the constitutional principles that have evolved in this area[—incitement—]in *Brandenburg*."); *Claiborne Hardware Co.,* 458 U.S. at 928, 102 S.Ct. 3409 ("The emotionally charged rhetoric of [the plaintiff's] speeches did not transcend the bounds of protected speech set forth in *Brandenburg*."); *see also James v. Meow Media, Inc.,* 300 F.3d 683, 698 (6th Cir.2002) ("The Court firmly set out the test for whether speech constitutes unprotected incitement to violence in *Brandenburg*."). The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action,[11] (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech. 395 U.S. at 477, 89 S.Ct. 1860. The Bible Believers' speech was not incitement to riot simply because they did not utter a single word that can be perceived as encouraging violence or lawlessness. Moreover, there is absolutely no indication of the Bible Believers' subjective intent to spur their audience to violence. The hostile reaction of a crowd does not transform protected speech into incitement.

2. Fighting Words

A second type of speech that is categorically excluded from First Amendment protection is known as "fighting words." This category of unprotected speech encompasses words that when spoken aloud instantly "inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *see also Sandul v. Larion,* 119 F.3d 1250, 1255 (6th Cir.1997). We rely on an objective standard to draw the boundaries of this category—no advocacy can constitute fighting words unless it is "likely to provoke the *average person* to retaliation." *Street v. New York,* 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) (citation and internal quotation marks omitted) (emphasis added). Offensive statements made generally to a crowd are not excluded from First Amendment protection; the insult or offense must be directed specifically at an individual. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 432, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Stevens, J., concurring); *accord Cohen,* 403 U.S. at 20, 91 S.Ct. 1780 (defining fighting words as a "direct personal insult"). The Bible Believers' speech cannot be construed as fighting words because it was not directed at any individual. Furthermore, the average individual attending the Festival did not react with violence, and of the group made up of mostly adolescents, only a certain percentage engaged in bottle throwing when they heard the proselytizing.

* * *

4. Constitutional Rule: No Heckler's Veto

The Supreme Court, in *Cantwell, Terminiello, Edwards, Cox,* and *Gregory,* has repeatedly affirmed the principle that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis,* 373 U.S. 526, 535, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963) (citations omitted). If the speaker's message does not fall into one of the recognized categories of unprotected speech, the message does not lose its protection under the First Amendment due to the lawless reaction of those who hear it. Simply stated, the First Amendment does not permit a heckler's veto.

* * *

When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals. *See* ***253** *Watson,* 373 U.S. at 535–36, 83 S.Ct. 1314. Nor can an officer sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker's removal was necessary for his or her own protection. "[U]ncontrolled official suppression of the privilege [of free speech] cannot be made a substitute for the duty to maintain order in connection with the exercise of th[at] right." *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 516, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech, he or she may do so without fear of retribution from the state, for the speaker is not the one threatening to breach the peace or break the law. However, the Constitution does not require that the officer "go down with the speaker." If, in protecting the speaker or attempting to quash the lawless behavior, the officer must retreat due to risk of injury, then retreat would be warranted. The rule to be followed is that when the police seek to enforce law and order, they must do so in a way that does not unnecessarily infringe upon the constitutional rights of law-abiding citizens. *See* *Gregory,* 394 U.S. at 120, 89 S.Ct. 946 ("[A] police officer['s] ... duty is to enforce laws already enacted and to make arrests ... for conduct already made criminal.") (Black, J., concurring). The police may go against the hecklers, cordon off the speakers, or attempt to disperse the entire crowd if that becomes necessary. Moreover, they may take any appropriate action to maintain law and order that does not destroy the right to free speech by indefinitely silencing the speaker.

* * *

CONCLUSION

Because the Wayne County Defendants impermissibly cut off the Bible Believers' protected speech, placed an undue burden on their exercise of religion, and treated them disparately from other speakers at the 2012 Arab International Festival, solely on the basis of the views that they ***262** espoused, Wayne County Defendants violated the Bible Believers' constitutional rights under the First and Fourteenth Amendments. * * * Therefore, we **REVERSE** the grant of summary judgment by the district court in favor of Defendants, and **REMAND** this case for entry of

summary judgment in favor of Plaintiffs, for the calculation of damages, and any other appropriate relief, consistent with this opinion.