GAY-STRAIGHT ALLIANCES AND SANCTIONING PRETEXTUAL DISCRIMINATION UNDER THE EQUAL ACCESS ACT

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ABSTRACT

This article addresses manipulation of the federal Equal Access Act to allow prejudice and discrimination against lesbian, gay, bisexual, transgender, and questioning (LGBTQ) students who wish to form gay-straight alliances (GSA) in public schools. By focusing on patterns of argumentation in the recent surge of GSA litigation, this article argues that the incorporation of the constitutionally stringent standard developed by the Supreme Court in *Tinker v. Des Moines Independent Community School District* into the Equal Access Act's safe harbor exceptions is necessary to prevent courts from discriminating against LGBTQ students and from giving effect to the private homophobic and transphobic prejudices of community members, parents, and school administrators. Incorporating a more deferential reasonableness standard into the Equal Access Act's safe harbor exceptions allows school administrators to invoke LGBTQ student safety disingenuously as a pretext to ban GSAs; thus, the exact discrimination that the Equal Access Act was designed to prohibit becomes a way to evade its intended purpose.

TABLE OF CONTENTS

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INTRODUCTION

Consider three LGBTQ[1] high school students, Steven, Maria, and Hector, who approach Mr. Cohen, an algebra teacher, to form a gay-straight alliance (GSA).[2] The students tell Mr. Cohen that they want to organize the group in order to increase acceptance and awareness of LGBTQ issues and to provide a safe space for LGBTQ students and supporters. Mr. Cohen agrees to advise the student group and submits a formal proposal to the school board to organize the GSA.

At the next school board meeting, numerous outspoken parents and teachers oppose the GSA's formation. Parents declare that homosexuality is a sin and demand that the board prohibit the GSA in order to ensure

1. In this article, I use LGBTQ to refer to lesbian, gay, bisexual, transgender, and/or questioning identities.

2. GSAs are extracurricular student organizations that are intended to provide a safe and supportive environment for LGBTQ youth and straight allies. GLSEN, About Gay-Straight Alliances (GSAs), http://www.glsen.org/cgi-bin/iowa/all/library/record/2342.html (last visited May 12, 2010).

that their children are not exposed to "immoral" and "disgusting" discussions of "homosexual sex." Teachers protest that the GSA's discussions would violate the high school's abstinence policy. Steven, Maria, and Hector disagree and proclaim that the purpose of the GSA is to promote acceptance on the basis of sexual orientation and gender identity. The students assure the board, parents, and community members that discussions of sex are not part of the GSA's agenda.

The board begins to deliberate. All of the board's members sympathize with the parents' and teachers' views and denounce the GSA as a "sex-based club" that is inappropriate for students. In less than five minutes, the board decides to prohibit the GSA's formation.

One week later, the school board sends a memorandum to Mr. Cohen detailing the reasons for the GSA's rejection. The memorandum emphasizes concerns that the GSA is a "sex-based club" and that the organization's discussions will violate the school's abstinence policy. The memorandum also states that the GSA will cause an increase in student harassment and violence.

Mr. Cohen shares the memorandum with Steven, Maria, and Hector. Mr. Cohen and the three students are surprised by the memorandum's discussion of student safety, which was never discussed by the school board, parents, or community members at the board's meeting. Steven, Maria, and Hector decide to sue the school district, alleging a violation of their rights under the Federal Equal Access Act (EAA).[3] In response, the board invokes the EAA safe harbor exceptions, which it alleges authorize the school district to ban the GSA in order to maintain school order and ensure student safety.[4]

The formation of GSAs in public schools is a very recent phenomenon.[5] The first public GSA emerged in 1988.[6] Now, over 4000 GSAs exist in public schools throughout the United States.[7] In 1999, the first federal district court addressed the legitimacy of a GSA ban under the EAA and the First Amendment,[8] and GSA litigation has become more

3. Equal Access Act, 20 U.S.C. §§ 4071–4074 (2006).

4. For an overview of these exceptions, see *infra* Part II.B.

5. For a chronological historical account of the development and spread of GSAs, see MELINDA MICELI, STANDING OUT, STANDING TOGETHER: THE SOCIAL AND POLITICAL IMPACT OF GAY-STRAIGHT ALLIANCES 15–40 (2005).

6. GLSEN, Background and Information About Gay-Straight Alliances, http://www.glsen.org/cgi-bin/iowa/all/library/record/2336.html (last visited May 12, 2010).

7. *Id.*

8. *See* E. High Gay/Straight Alliance v. Bd. of Educ., 81 F. Supp. 2d 1166 (D. Utah 1999). LGBTQ students almost always assert that banning GSAs violates the EAA. LGBTQ students usually also claim that banning GSAs violates the First Amendment. This article does not focus on students' First Amendment claims during GSA litigation. For discussion of the First Amendment claims, see Jordan Blair Woods, Morse v.

common during recent years.[9] Inevitably, as more students attempt to form GSAs, an increasing number of schools try to prohibit them.

The EAA prevents public schools from denying controversial or unpopular student organizations equal access to school facilities and resources on the basis of religious, political, or philosophical viewpoint.[10] Schools districts, however, do not have to comply with this requirement if their denial falls within the scope of one of the EAA safe harbor

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Frederick *'s New Perspective on Schools' Basic Educational Missions and the Implications of Gay-Straight Alliance First Amendment Jurisprudence*, 18 COLUM. J. GENDER & L. 281 (2008) (arguing that the Supreme Court's decision in *Morse v. Frederick* should increase the strength of LGBTQ students' First Amendment claims in GSA litigation). *See also* Doni Gewirtzman, *"Make Your Own Kind of Music": Queer Student Groups and the First Amendment*, 86 CAL. L. REV. 1131 (1998) (examining the First Amendment issues raised by efforts to prevent LGBT student organizations from organizing and arguing that the current approach to protecting student speech has led to inconsistent results because of the lack of an underlying rationale in the Supreme Court's jurisprudence). It is important to recognize that although many courts have separated the EAA and First Amendment claims, some recent decisions have concluded that the two are coextensive because the substantive protections are the same under both the First Amendment and the EAA. *See e.g.*, Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd., 602 F. Supp. 2d 1233, 1235 (M.D. Fla. 2009). The debate over whether the EAA and First Amendment claims are coextensive or separate is beyond the scope of this article. Rather, I argue that even if courts separate these claims, at the very least, the First Amendment principles articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), should be incorporated into the EAA safe harbor exceptions.

Since 1999, out of the ten federal court cases to assess the legitimacy of GSA bans under the EAA or the First Amendment, only three have addressed the First Amendment claims. *See* Gonzalez *ex rel.* Gonzalez v. Sch. Bd., 571 F. Supp. 2d 1257, 1268–69 (S.D. Fla. 2008); Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 560–64 (N.D. Tex. 2004); *E. High Gay/Straight Alliance*, 81 F. Supp. 2d at 1169–72. Two courts were only faced with equal access claims during litigation. *See* Straights & Gays for Equality (SAGE) v. Osseo Area Schs.—Dist. No. 279, 471 F.3d 908 (8th Cir. 2006); Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 483 F. Supp. 2d 1224 (S.D. Fla. 2007). Four courts have avoided addressing the First Amendment claim because the cases could be disposed of solely on equal access grounds. *See* White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist., No. 2:06-CV-29, 2006 WL 1991990, at *12 (N.D. Ga. July 14, 2006); Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003); Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., No. IP01-1518, 2002 WL 32097530, at *21 (S.D. Ind. Aug. 30, 2002); Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000). More recently, in granting a preliminary injunction under the EAA, a Florida district court held that it was not necessary to "conduct a separate First Amendment analysis [because] in enacting the EAA, Congress effectively codified the First Amendment rights of non-curricular student groups." *Gay-Straight Alliance of Yulee High Sch.*, 602 F. Supp. 2d at 1235.

9. *See* Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 BYU EDUC. & L.J. 89, 89 (identifying "lawsuits brought by gay and lesbian student groups seeking to meet on school premises under the auspices of the Equal Access Act" as one category of litigation involving sexual orientation in schools that has become more common in recent years).

10. 20 U.S.C § 4071(a) (2006). *See infra* Part II.A (providing an overview of the statutory provision).

exceptions. The two exceptions that are commonly invoked in GSA litigation allow public schools to ban student organizations that disrupt the "maintain[ance of] order and discipline on school premises" or jeopardize the "well-being of students."[11]

An examination of the recent surge of GSA litigation under the EAA illustrates that the antidiscrimination function of the EAA is in serious jeopardy; this increase in litigation challenging the scope of the EAA safe harbor exceptions has contributed to an atmosphere of uncertainty regarding the statute's reach and effectiveness.[12] School districts put forth two analytically distinct arguments to ban GSAs under the "maintenance of school order" and the "well-being of students" EAA safe harbor exceptions: (1) they argue that GSAs are "sex-based clubs," and (2) they argue that GSAs increase student harassment and violence. In framing GSAs as "sex-based clubs,"[13] school districts allege that GSAs inhibit school districts from shielding students from harmful discussions of sexual activity, thereby impeding the maintenance of school order and harming the well-being of students.[14] School districts that maintain abstinence policies add an additional prong to this argument, contending that GSA discussions would violate school policy and contradict the school's curriculum, undermining the ability of schools to determine and enforce

11. § 4071(f). *See infra* Part II.B (providing an overview of the statutory exceptions).

12. It is appropriate to focus on GSA litigation in order to discuss this potential manipulation because almost all of the cases that discuss the scope of the EAA safe harbor exceptions involve GSAs. The only two federal circuit courts of appeal to address the scope of the EAA safe harbor exceptions did not involve a GSA. Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 467 (7th Cir. 2001) (challenging restrictions on Bible club); Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996) (challenging nondiscrimination requirement as applied to religious student group). But five of the seven district courts that have addressed the bounds of the EAA exceptions did involve GSAs. *See Gay-Straight Alliance of Yulee High Sch.*, 602 F. Supp. 2d at 1235–38; *Gonzalez*, 571 F. Supp. 2d at 1267–68; *Gay-Straight Alliance of Okeechobee High Sch.*, 483 F. Supp. 2d at 1227–30; *Caudillo*, 311 F. Supp. 2d at 564–71; *Boyd County High Sch. Gay Straight Alliance*, 258 F. Supp. 2d at 688–91. The only published opinion from a district court that does not involve GSAs but discusses the bounds of the EAA exceptions is the lower court opinion from *Hsu ex rel. Hsu v. Roslyn Union Free School District No. 3*, 876 F. Supp. 445 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir. 1996), which reached the Second Circuit Court of Appeals and is one of the cases involved in the circuit split discussed in Part III, *infra*.

13. *E.g.*, *Gonzalez*, 571 F. Supp. 2d at 1260.

14. *See, e.g.*, *Caudillo*, 311 F. Supp. 2d at 568 ("If a type of speech . . . interferes with the teaching of curriculum [by contradicting messages conveyed by that curriculum], then it would 'materially and substantially interfere' with the school functions and may thus be restricted."). Some school districts have also tried to use the "sex-based" argument to avoid triggering the EAA altogether. *See, e.g.*, Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1144 (C.D. Cal. 2000). The "sex-based club" argument will be discussed in more detail in Part IV.A, *infra*.

education policies.[15] As this article will demonstrate, discriminatory stereotypes and animus on the basis of sexual orientation and gender identity underlie this line of thinking and influence the erroneous conclusion that GSA activities will categorically involve improper discussions of sexual activity or expose high school students to harmful outside influences merely because GSAs focus on issues of sexual identity.

School districts also contend that GSAs increase student harassment and violence, and therefore impede the maintenance of school order and threaten the well-being of LGBTQ students.[16] Recent empirical data suggests that GSAs are beneficial to the mental and physical security of LGBTQ students.[17] However, given the frequency with which LGBTQ students are subject to harassment and violence in public secondary schools,[18] it is relatively easy for school districts to draw a correlation between LGBTQ student safety risks and GSA formations.[19]

Hence the problem: even if school districts are motivated to ban GSAs because of prejudice, a highly deferential reading of the EAA safe harbor exceptions allows school districts to invoke LGBTQ student safety as a reason to ban GSAs in every case. This article is concerned with this potential for pretextual discrimination. Scholars are paying more attention to the rights of students to form GSAs under the EAA.[20] However, the potential manipulation of the EAA safe harbor exceptions to allow prejudice and discrimination against students who wish to form GSAs has not yet been comprehensively addressed in legal scholarship, despite being

15. *See, e.g.*, *Gonzalez*, 571 F. Supp. 2d at 1263–66 (summarizing defendant school district's argument that allowing GSA to meet on school grounds would violate school's abstinence policy, jeopardizing school's receipt of federal funds conditioned upon maintaining abstinence-only policy, and would contravene state law mandating abstinence as core value).

16. For a discussion of this point in detail, see *infra* Part IV.B.

17. See *infra* Part V.A.1, for a discussion of this empirical data.

18. *See infra* notes 165–67 and accompanying text.

19. For more discussion on this point, see *infra* Part IV.C.

20. *See, e.g.*, Brian Berkley, *Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying to Avoid the Equal Access Act*, 61 WASH. & LEE L. REV. 1847 (2004) (arguing that schools can avoid the requirements of the EAA by characterizing GSAs as "curriculum-related"); DeMitchell & Fossey, *supra* note 9 (discussing themes and policy implications arising from GSA litigation under the EAA); Sarah Orman, *"Being Gay in Lubbock:" The Equal Access Act in* Caudillo, 17 HASTINGS WOMEN'S L.J. 227 (2006) (criticizing Texas district court's decision to permit exclusion of a GSA under the EAA); Carolyn Pratt, *Protecting the Marketplace of Ideas in the Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of Gay/Straight Alliances in America's Public Schools*, 5 FIRST AMENDMENT L. REV. 370 (2007) (arguing that both the EAA and the First Amendment protect GSAs at public schools); Alice Riener, *Pride and Prejudice: The First Amendment, the Equal Access Act, and the Legal Fight for Gay Student Groups in High Schools*, 14 AM. U. J. GENDER SOC. POL'Y & L. 613 (2006) (exploring the tension between the traditional authority of schools to promote certain moral values among students and the First Amendment rights of students).

a potentially powerful tool for school districts to target LGBTQ students and deny them the EAA's protection.

Some ambiguity exists over whether the EAA safe harbor exceptions should be read in a manner that is highly deferential to school districts' decisions. The level of deference will then determine what evidence, and how much of it, schools may rely on when claiming to protect students from "sex-based clubs" or from potential increases in harassment of and violence against LGBTQ students as justification for banning GSAs. At the heart of this ambiguity lies a disagreement over whether the EAA safe harbor exceptions incorporate the speech-protective standard for limiting student expression under the First Amendment as articulated by the Supreme Court in *Tinker v. Des Moines Independent Community School District*,[21] or whether access by student groups to school facilities is governed by a less protective standard than the *Tinker* rule. In *Tinker*, the Court held that student speech must "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" in order for schools to prohibit it.[22] Later Supreme Court cases have ruled that some forms of student speech fall outside the definition of individual political speech that was so highly protected in *Tinker*. For example, lewd or obscene speech does not require the same protection as individual student speech under *Tinker*,[23] nor does speech that may be reasonably viewed to bear the imprimatur of the school.[24]

Thus there are two questions that concern the rights of students to

21. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

22. *Id.* at 509 (internal quotation marks omitted).

23. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) ("[P]etitioner School District acted entirely within its permissible authority in imposing sanctions . . . in response to . . . offensively lewd and indecent speech. . . . A high school assembly or classroom is no place for . . . sexually explicit [speech] . . . .").

24. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) ("Educators are entitled to exercise greater control over [school-sponsored] student expression to assure . . . that the views of the individual speaker are not erroneously attributed to the school."). In *Hazelwood*, the plaintiffs challenged a restriction on student expression intended for the school newspaper. The Supreme Court drew a distinction between "requir[ing] a school to tolerate particular student speech," which would be protected by the standard in *Tinker*, and "requir[ing] a school affirmatively to promote particular student speech." *Id.* at 270–71. Because the latter type of speech requires less protection, the Court held:

> [A] school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would "substantially interfere with [its] work" . . . but also from speech that is . . . poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.

Id. at 271 (citing *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 509). GSAs seeking incorporation as recognized student groups and access to school resources could then be characterized as falling under this second category of speech, which is subject to a lesser standard of protection; thus, the question of whether the EAA incorporates the *Tinker* standard as a matter of statutory interpretation is of particular importance.

form GSAs in public high schools. The first is whether, as a matter of constitutional law, student groups like GSAs are the type of speech that require the same level of protection recognized in *Tinker*. The second question is whether, even if the Constitution does not require protecting the access of student groups to school facilities, the EAA incorporates the *Tinker* standard and consequently, as a matter of statutory law, schools are required to satisfy the *Tinker* standard before they may prohibit access. This article focuses on the latter. The Second Circuit has ruled that the *Tinker* standard applies to cases brought under the EAA, and as a result, schools must meet the high burden of showing that an organization's meeting will materially or substantially impede school order or harm students' well-being.[25] The Seventh Circuit has not followed this approach and instead appears to give greater weight to arguments by school districts defending their decisions to limit student speech.[26]

Judicial decisions on whether possible threats to school order or student well-being justify banning GSAs under the EAA safe harbor exceptions mirror this circuit split to some extent.[27] The district courts that have upheld the incorporation of the *Tinker* standard into the EAA safe harbor exceptions have barred school districts from using potential increases in the harassment and violence inflicted on LGBTQ students as a justification to ban GSAs.[28] Conversely, the Northern District of Texas, which is the only district court to explicitly find that the EAA does not require school districts to satisfy the *Tinker* standard, upheld a school district's prohibition of a GSA after the school alleged that the GSA's meetings would jeopardize LGBTQ student safety.[29]

These courts have framed the debate over how to define the scope of the EAA safe harbor exceptions as a matter of statutory interpretation; most of the courts that have addressed the issue have agreed that the stricter standard of *Tinker* applies to claims challenging the exclusion of student groups under the EAA's exceptions in § 4071(f). This article

25. Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 867 (2d Cir. 1996) ("Congressional supporters of the Equal Access Act made it clear during the floor debates that the Act adopted [the] limitations [of *Tinker*] . . . .").

26. Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464, 467 (7th Cir. 2001).

27. At least one federal district court has discounted a school's concerns for order, discipline, and student well-being without addressing directly whether the *Tinker* standard must be satisfied before a school may deny access to a student organization under § 4071(f). *See* Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 483 F. Supp. 2d 1224, 1229–30 (S.D. Fla. 2007).

28. *See* Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667, 688–90 (E.D. Ky. 2003); Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., No. IP01-1518, 2002 WL 32097530, at *20–21 (S.D. Ind. Aug. 30, 2002).

29. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 569 (N.D. Tex. 2004) ("[T]his Court does not believe that the EAA requires such a substantial showing of interference [as required by *Tinker*] under [the] exceptions [in § 4071(f)].").

examines the normative implications of this debate. It argues that the incorporation of the *Tinker* standard into the EAA safe harbor exceptions is necessary to prevent public schools from invoking LGBTQ student safety or misconstruing GSAs as "sex-based clubs" as discriminatory pretexts for banning GSAs. Incorporating a deferential reasonableness standard into the EAA safe harbor exceptions allows school districts to hijack the EAA in order to give effect to the homophobic and transphobic prejudices of school administrators, parents, and community members. Conversely, incorporating the *Tinker* standard into the EAA safe harbor exceptions safeguards the EAA from being used in a way that subverts its intended purpose of preventing discrimination.

This article proceeds in five Parts. Part I summarizes *Tinker*, the foundational First Amendment student free speech case. Part II introduces the EAA's operative rule and safe harbor exceptions. Part III details the current arguments over whether the *Tinker* standard should be incorporated into the EAA safe harbor exceptions. Part IV exposes the problem of pretextual discrimination with which this article is concerned. By focusing on patterns of argumentation in GSA litigation, I demonstrate that incorporating a highly deferential reasonableness standard into the EAA safe harbor exceptions allows schools to invoke LGBTQ student safety as a discriminatory pretext to ban GSAs in order to give effect to private discrimination on the basis of sexual orientation and gender identity. Part V illustrates how incorporating the *Tinker* standard into the EAA safe harbor exceptions would shield LGBTQ students from this pretextual discrimination and provides guiding principles that illustrate how the incorporation of the *Tinker* standard into the EAA safe harbor exceptions would affect legal analysis in GSA cases.

I.
TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

Tinker v. Des Moines Independent Community School District[30] is the foundational case in First Amendment student speech jurisprudence.[31] In *Tinker*, the student petitioners were suspended after wearing black armbands to school in protest of the Vietnam War and in violation of school policy.[32]

Before the *Tinker* decision, the Supreme Court's stance on the free

30. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

31. *See, e.g.*, Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 527 (2000) ("*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students.").

32. *Tinker*, 393 U.S. at 504.

speech rights of public secondary school students was relatively unclear because the Court had not developed precedent in this area of the law.[33] As a result, school districts exercised discretion to regulate student expression.[34] In light of this history, the school district in *Tinker* argued that the Court should adopt a rule that would continue to grant schools ample discretion to limit student expression that could be reasonably anticipated to cause a school disturbance.[35] Due to public sensitivity over the Vietnam War, the school district claimed that the armbands could be prohibited under the First Amendment because they would cause a disturbance at school.[36]

The Supreme Court rejected this deferential rule, declaring: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[37] To protect these rights, the *Tinker* Court adopted a stringent rule requiring schools to show that student expression will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" before schools may prohibit it.[38]

The *Tinker* Court affirmed that schools cannot meet this standard simply because they fear that expression would cause a disturbance at school. The Court reasoned:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on

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33. *See* Jonathan W.A. Liff, *First Amendment Rights in Public Schools*, 11 J. CONTEMP. LEGAL ISSUES 627, 627 n.3 (2000) ("Before *Tinker* the Supreme Court had not ventured into students' speech and press rights . . . .").

34. *See* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009) ("*Tinker* was quite a departure from what came before it; prior to *Tinker*, it was not a foregone conclusion that students had any affirmative free speech rights in public schools."); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1774 n.241 (1987) ("In the years before *Tinker* judicial deference to the judgment of school officials was in fact the rule . . . .").

35. *See* Brief for Respondents at *35, *Tinker*, 393 U.S. 503 (No. 1034), 1968 WL 94384.

36. *Tinker*, 393 U.S. at 508. The school district also highlighted that at least one student suspended from another school district for wearing an armband had been subjected to physical violence. Brief for Respondents, *supra* note 35, at *33. Moreover, a former student within the school district was killed in the Vietnam War. The school district believed that a disturbance could erupt because some of the former student's friends were still in school. *Id.* at *11.

37. *Tinker*, 393 U.S. at 506.

38. *Id.* at 509 (internal quotation marks omitted).

> the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .[39]

Since the Court found no evidence that the armbands had caused a disturbance in class or resulted in threats or acts of violence on school grounds, it upheld the students' right to wear the armbands.[40] After *Tinker*, as a matter of constitutional law, school prohibitions of student speech must be motivated by more than a mere desire to avoid the discomfort that always accompanies a controversial or unpopular viewpoint. The Court, however, has distinguished between protecting student speech and requiring schools to sponsor student speech,[41] opening the door to arguments that schools are not constitutionally required to provide access to school facilities for GSAs.

II.
THE EQUAL ACCESS ACT

In 1984, Congress enacted the EAA. Legislative history indicates that congressional proponents of the EAA believed that federal legislation was necessary to end the inconsistent application of the First Amendment principles announced by the Supreme Court in *Widmar v. Vincent*.[42] In *Widmar*, the Court held that a public university must grant religious student groups access to university facilities, so long as such groups did not "violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[43] The Court, however, did not clarify whether *Widmar*'s holding applied to public secondary schools,[44] and many public secondary schools across the United

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39. *Id.* at 508.

40. *Id.*

41. *See supra* note 24.

42. Widmar v. Vincent, 454 U.S. 263 (1981). *See* DeMitchell & Fossey, *supra* note 9, at 93 ("Congress modeled the EAA after *Widmar* to afford high school students the same right to meet in religious groups on high school campuses."); Todd Hagins, *Mother Goose and Father God: Extending the Equal Access Act to Pre-High-School Students*, 15 REGENT U. L. REV. 93, 108 (2002) ("Congress passed the EAA partly in response to lingering doubts left by previous Supreme Court rulings on the issue of allowing . . . student groups to meet on school grounds. Specifically, lower courts varied on whether precedent applied to primary and secondary schools, with most courts staking a position against the extension."); Frank R. Jimenez, *Beyond* Mergens*: Ensuring Equality of Student Religious Speech Under the Equal Access Act*, 100 YALE L.J. 2149, 2152–53 (1991) ("Before enactment of the EAA, the Courts of Appeals for the Second, Third, and Fifth Circuit refused to allow student-initiated religious speech in public high schools.").

43. *Widmar*, 454 U.S. at 277.

44. *See* DeMitchell & Fossey, *supra* note 9, at 92–93 ("Although the Court never explicitly stated whether or not the holding applied to secondary schools, the Court's decision took note of the fact that college students [are differently situated] than high

States banned religious extracurricular activities.[45] Concerned with these prohibitions and the uncertainty surrounding the issue, Congress enacted the EAA to extend *Widmar*'s principles and thereby ensure that students had equal access rights to organize and participate in extracurricular activities in public secondary schools.[46]

A. The EAA's Basic Statutory Provisions

Even though Congress's main focus in enacting the EAA was on ensuring that religious student organizations had equal access rights, the statute also applies to philosophical and political student groups.[47] The

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school students."). In light of this uncertainty, federal circuit and district courts disagreed over whether public elementary and secondary schools had to grant equal access to school facilities and resources to religious student organizations. In *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *superseded by statute*, Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984), the Fifth Circuit Court of Appeals found a violation of the First Amendment's Establishment Clause when voluntary religious groups were allowed to use school facilities. However, in *Bender v. Williamsport Area School District*, 563 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3rd Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986), *and superseded by statute*, Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984), a federal district court in Pennsylvania reached a contrary conclusion and held that the Constitution compelled a school district to grant equal access to voluntary religious student groups. Mississippi Representative Trent Lott, who introduced the EAA to the House of Representatives, summarized his concerns regarding these conflicting court decisions:

> Obviously, these two decisions provide no clear guidance for school administrators who merely wish to follow the law and to avoid being sued either by religious groups or by civil liberties groups. If the Supreme Court will not clarify the law, as it has so far failed to do, it is incumbent upon us to end the confusion and clearly . . . delineate the rights of students in public schools.

Hearings on the Equal Access Act, Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Educ. of the H. Comm. on Educ. and Labor, 98th Cong. 3–4 (1983) [hereinafter *EAA Hearings*] (statement of Rep. Trent Lott).

45. S. REP. NO. 98-357, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2357–58 ("[M]any school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech. These districts have banned student-initiated extracurricular religious clubs, certain student community service organizations and activities (including dances to benefit the American Cancer Society), student newspaper articles on religious topics, and student art with religious themes. They have even prohibited students from praying together in a car in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying their personal bibles on school property. Individual students have been forbidden [from saying] a blessing over their lunch or recit[ing] the rosary silently on a school bus."). *See also* 130 CONG. REC. 19,211 (1984) (statement of Sen. Hatch) ("[R]eligious student clubs across the country are being told they cannot meet on the same basis as other student clubs.").

46. "I think school districts are confused as to what the rules are. And I suppose, in a way, it's regrettable that we would have to pass a Federal law to end the confusion." *EAA Hearings*, *supra* note 44, at 12 (statement by Rep. Barlett).

47. *E.g.*, Orman, *supra* note 20, at 229 ("Although its writers originally envisioned the EAA as specifically protecting religious activity, its protection was extended to clubs espousing political and philosophical as well as religious views."). *See also* Bd. of Educ. v.

operative rule of the EAA 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.[48]

Schools create a "limited open forum" under the EAA when they allow "one or more noncurriculum-related student groups to meet on school premises during noninstructional time."[49] Since the EAA is only triggered when schools have created a limited open forum, schools can avoid the EAA's requirements by prohibiting all noncurriculum-related student groups or by declining federal funding.[50]

Congress provided few definitions to help clarify the EAA's operative rule. In order to comply with the EAA, a school must provide a "fair opportunity to students who wish to conduct a meeting within [a school's] limited open forum."[51] To satisfy this rule, schools must meet the five criteria laid out in § 4071(c),[52] one of which uses language that mirrors the

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Mergens *ex rel.* Mergens, 496 U.S. 226, 259 (1990) (Kennedy, J., concurring) ("[O]ne of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind.").

48. 20 U.S.C. § 4071(a) (2006). To enforce this rule, "[c]ourts can use a full range of legal and equitable remedies . . . . In addition to declaratory and injunctive relief, courts can award damages and attorney fees under the Act. Damages are also available under Section 1983 of the Civil Rights Act of 1964." Ralph D. Mawdsley, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?*, 2001 BYU EDUC. & L.J. 1, 5.

49. § 4071(b). Although the distinction is subtle, a "limited open forum" under the EAA is not the same as a "limited public forum" for First Amendment purposes. *See, e.g.*, *Mergens*, 496 U.S. at 242 ("Congress' [sic] deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases."). Public schools create a "limited public forum" under the First Amendment when they make their facilities generally available for student group activities. *See, e.g.*, Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 560 (N.D. Tex. 2004) ("[S]chools that open their doors for groups to meet have created 'limited public forums' . . . .").

50. *Mergens*, 496 U.S. at 241. Because, for most public schools, neither of these two options is practicable, schools that seek to ban GSAs must attempt to justify such decisions under the EAA, rather than avoiding the EAA's requirements altogether. *See* DeMitchell & Fossey, *supra* note 9, at 121–22 (observing that, due to parental expectations and the strong educational value of many noncurriculum-related student groups, "closing campuses to noncurriculum related groups as a strategy for avoiding recognition of gay student groups is not a realistic option for many school districts").

51. § 4071(c).

52. Section 4071(c) provides that schools shall be deemed to have afforded a fair opportunity to potential student groups if they satisfy the following criteria:

(1) the meeting is voluntary and student-initiated; (2) there is no sponsorship of

First Amendment standard adopted by the Supreme Court in *Tinker*.[53] Congress further defined "meeting" to include "activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum,"[54] and "noninstructional time" as covering "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends."[55] Beyond these sparsely worded definitions, Congress provided little further guidance on how the EAA's antidiscrimination function should be applied.

Courts have thus assumed the role of clarifying the EAA's language and the circumstances under which it is triggered. In *Board of Education v. Mergens ex rel. Mergens*,[56] the Supreme Court highlighted the fact that confusion over the EAA's application stems predominately from Congress's failure to define the term "noncurriculum related student group,"[57] either in the statute itself or in the legislative history surrounding the enactment of the EAA.[58] The Court concluded, however, that despite

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> the meeting by the school, the government, or its agents or employees; (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity; (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

Id.

53. *See supra* notes 37–38 and accompanying text. *Compare* § 4071(c)(4) ("[T]he meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school . . . ."), *with* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) ("[T]here is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . ."). For a more in depth discussion of *Tinker*, see *supra* Part I.

54. 20 U.S.C. § 4072(3) (2006).

55. § 4072(4).

56. Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226 (1990). In *Mergens*, respondent students requested permission from school administrators to form a Christian club to meet on school grounds. *Id.* at 232. Despite allowing about thirty extracurricular student organizations to meet on campus, the school district prohibited the students from organizing a Christian club. *Id.* at 231–33. The student respondents claimed that the school district's refusal to permit the club to meet on school grounds violated the EAA, as well as the respondents' constitutional rights. *Id.* at 233. Petitioners advocated for a very narrow interpretation of "noncurriculum" that would allow schools virtually unfettered discretion in determining which groups were curriculum related. *Id.* at 244. Under this interpretation, petitioners contended that the EAA was not triggered because all of its student organizations were directly related to the school's curriculum, and thus no limited open forum had been created. *Id.*

57. *Id.* at 237 ("Unfortunately, the Act does not define the crucial phrase 'noncurriculum related student group.' Our immediate task is therefore one of statutory interpretation.").

58. In characterizing the EAA's legislative history as ambiguous, and therefore not dispositive in determining the meaning of its terms, the Court observed:

> Although the phrase "noncurriculum related student group" nevertheless

the ambiguity, the legislative history revealed a consensus on the general purpose of the EAA, which was to "end discrimination by allowing students to meet and discuss religion before and after classes."[59] The Court held that the proper interpretation of "noncurriculum related student group" must be consistent with this nondiscriminatory purpose.[60]

In furtherance of the EAA's anti-discriminatory purpose, the Court defined "noncurriculum student group" as a group "not *directly* relat[ing] to the body of courses offered by the school."[61] The Court provided four criteria to determine whether a student organization would directly relate to a school's body of courses: (1) "the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course"; (2) "the subject matter of the group concerns the body of courses as a whole"; (3) "participation in the group is required for a particular course"; or (4) "participation in the group results in academic credit."[62] The Court further held that a court's assessment should be guided by the school's actual practice rather than stated policy, although it found that in the present case, its conclusion that a limited open forum existed at the school was "supported by the school's own description of its student activities."[63] Federal courts of appeals have further refined this principle, requiring a comparison of "the primary focus of the activity [to] the significant topics taught in the course that assertedly relates to the group" in order to determine whether an organization may be deemed "curriculum related" and therefore outside the scope of the EAA.[64]

> remains sufficiently ambiguous that we might normally resort to legislative history, we find the legislative history on this issue less than helpful. Because the bill that led to the Act was extensively rewritten in a series of multilateral negotiations after it was passed by the House and reported out of committee by the Senate, the Committee Reports shed no light on the language actually adopted. During congressional debate on the subject, legislators referred to a number of different definitions, and thus both petitioners and respondents can cite to legislative history favoring their interpretation of the phrase.

Id. at 238.

59. *Id.* at 239. The Court found consensus in the fact "that the Act . . . was passed by wide, bipartisan majorities in both the House and the Senate." *Id.*

60. *Id.*

61. *Id.* The Court rejected the petitioners' argument that "'curriculum related' means anything remotely related to abstract educational goals," a definition which would "permit[] schools to evade the [EAA] by strategically describing existing student groups [thereby] render[ing] the Act merely hortatory." *Id.* at 244. The school petitioners' broad interpretation would permit any school to declare that it maintains a closed forum and then selectively choose the student clubs it wanted to allow by claiming that these clubs relate to the school's broadly-defined educational goals. *Id.* at 244–45.

62. *Id.* at 239–40.

63. *Id.* at 246.

64. *See, e.g.*, Pope *ex rel.* Pope v. E. Brunswick Bd. of Educ., 12 F.3d 1244, 1253 (3d Cir. 1993).

B. The EAA Safe Harbor Exceptions

The EAA contains three exceptions, laid out in § 4071(f), under which public secondary schools do not have to comply with the EAA's requirements. These exceptions, known as the safe harbor provisions, preserve the authority of schools to deny access to student groups in order to (1) "maintain order and discipline on school premises," (2) "protect the well-being of students and faculty," and (3) "assure that the attendance of students at meetings is voluntary."[65] The tension between these exceptions and the general anti-discriminatory function of the EAA has not been fully resolved by Congress or the courts.

Legislative history indicates that the purpose of the EAA safe harbor provisions is to provide schools some authority to limit the activities of student organizations. Congressional floor debates reveal a concern that school districts would have no ability to limit student organizations from forming after the EAA had been triggered.[66] Even though the intended purpose of the EAA is to prevent discrimination against unpopular student organizations, Congress did not want to strip school districts of all their discretion to limit student speech. Consistent with this sentiment, Senator Hatfield, an author of the § 4071(f) provisions, explained that the purpose of the exceptions was to outline the types of organizations that school districts would be able to ban from public schools under the EAA.[67] Senator Danforth, another author of the EAA safe harbor provisions, seemed to be especially concerned with affording schools discretion to protect students from outside cults and other extremist groups.[68] The amount of discretion that the safe harbor provisions provide for school districts to limit speech, however, is unclear from the legislative history.

The Second Circuit and Seventh Circuit Courts of Appeals are the only federal appellate courts wherein the bounds of the safe harbor exceptions have been raised.[69] These courts appear to disagree over

65. 18 U.S.C. § 4071(f) (2006).

66. *See* 130 CONG. REC. 19,223 (1984) (statement of Sen. Gorton) ("[O]nce this limited open forum has been created, which will require the schools to permit religious-oriented student organizations equal access, are there any effective limits on the kind of organizations, which can be permitted in a public school?").

67. 130 CONG. REC. 19,224 (1984) (statement of Sen. Hatfield) ("We have restrictions that the meetings cannot be unlawful, they cannot interfere with the basic programs of the school—that is, the orderly conduct of educational activities within the school. We have tried to set reasonable parameters there.").

68. 130 CONG. REC. 19,229 (1984) (statement of Sen. Danforth) ("[I]t is the present intent of the author of this language that it would continue to be possible for the school boards . . . to prevent kids from being in effect brainwashed within the school premises; that is to say, in the event that, for example, a cult were to set up a cell . . . . That is the purpose of the Danforth Amendment.").

69. *See* Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001)

whether the three exceptions incorporate the *Tinker* standard or are governed by a more deferential reasonableness standard. Additionally, only a handful of district courts have interpreted the scope of the exceptions; most of these cases involve GSAs and interpret the exceptions as incorporating the *Tinker* standard.[70]

III.
THE CIRCUIT SPLIT: WHAT STANDARD GOVERNS THE EAA SAFE HARBOR EXCEPTIONS?

In defining what constitutes a "fair opportunity" for student groups to access school resources, Congress explicitly incorporated *Tinker*'s language, mandating, "Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting . . . if such school uniformly provides that . . . the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school."[71] But the fact that the EAA safe harbor exceptions use different language leaves open the possibility that they do not require adherence to *Tinker*'s standard, and are governed instead by a standard that is less protective of student speech. Only the Second and Seventh Circuit Courts of Appeals have decided cases wherein the scope of the safe harbor exceptions under § 4071(f) was raised. In *Hsu ex rel. Hsu v. Roslyn Union Free School District No. 3*, the Second Circuit held that the *Tinker* standard should be incorporated into these exceptions.[72] Several years later, in *Gernetzke v. Kenosha Unified School District No. 1*, the Seventh Circuit indicated in dicta that it would construe the § 4071(f) exceptions as governed by a deferential reasonableness standard.[73] Although both of these cases involved Bible clubs, they are relevant to EAA litigation involving GSAs because their analyses address the proper circumstances under which schools may prohibit an extracurricular student organization from meeting on school grounds.

(suggesting a deferential reasonableness standard for the EAA safe harbor exceptions); Hsu *ex rel.* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996) (incorporating the *Tinker* standard into the EAA safe harbor exceptions). For a discussion of the circuit split, see *infra* Part III.

70. *See* Berkley, *supra* note 20, at 1872–84. *See also* Pratt, *supra* note 20, at 380 ("These two exceptions [§ 4071(c)(4), (f)] to the EAA's requirements have become major components in the defense-of-school actions in GSA litigation, as schools seeking to evade the EAA have tried to fit banning a GSA into one of these two exceptions.").

71. 18 U.S.C. § 4071(c)(4) (2006). *See also Mergens*, 496 U.S. at 240–41 (citing § 4071(c)(4) to support the argument that "schools and school districts nevertheless retain a significant measure of authority" over the activities offered at individual schools).

72. *Hsu*, 85 F.3d at 867–68 & n.28, 870–72.

73. *Gernetzke*, 274 F.3d at 466–67.

A. *The Second Circuit Approach: Incorporating the* Tinker *Standard into the EAA Safe Harbor Exceptions*

Hsu involved three high school students who wanted to form an after-school Christian Bible club.[74] According to the plaintiffs, during a meeting held by the school district's board of education, a member of the board stated that although it was legally obligated to grant the Bible club access to the school's facilities, school officials did not want the club to meet.[75] Another board member suggested that the school district should stop receiving federal funds to prevent the club from meeting.[76] After the board deferred its decision to a later date, two school administrators asked the club's organizers to provide a formal written constitution so that the board "could make a fully informed decision about whether to recognize" the club.[77]

One of the provisions of the Bible club's constitution became the focus of the *Hsu* case. This provision limited eligibility for officer positions in the club to "professed Christians."[78] The school district argued that this limitation violated the school's "nondiscrimination policy."[79] Eventually, the board agreed that it would allow the Bible club to meet if it abandoned its exclusionary policy.[80] The Bible club's members viewed this condition as "incompatible" with the fundamental principles of the club, and argued that accepting this condition "'would influence the form and content' of the Club, and might alter the speech at the Club's meetings."[81] The students filed suit, alleging violations of the EAA.[82]

The school district did not invoke any of the EAA's statutory exceptions to ban the Bible club from forming. The court, however, analyzed these exceptions sua sponte and found, "The protection provided by the *Tinker* line of cases is incorporated in subsections 4071(c)(4) and 4071(f)."[83] Although the court acknowledged that *Tinker* involves students' First Amendment free speech rights, whereas the EAA involves statutory rights,[84] it concluded that attempts to restrict student rights are held to the same standard under both:

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74. *Hsu*, 85 F.3d at 848–49.
75. *Id.* at 848.
76. *Id.*
77. *Id.* at 849.
78. *Id.*
79. *Id.* at 850.
80. *Id.* at 850–51.
81. *Id.* at 851 (quoting the complaint).
82. *Id.* at 850. The plaintiffs also alleged violations of the Religious Freedom Restoration Act and various state and federal constitutional provisions.
83. *Id.* at 867 n.28.
84. *Id.* at 870.

> [T]he Equal Access Act strikes the same balance that the Supreme Court has struck between First Amendment free speech rights and a public school's right to maintain order: the Act grants broad free speech rights under § 4071(a), and restricts those rights, under § 4071(c)(4), when club meetings "materially and substantially interfere with the orderly conduct of educational activities within the school."[85]

This balance applied to both § 4071(c) and to § 4071(f), despite differences in language between the two provisions.[86] In terms of substantive meaning, the court concluded that the requirements imposed by the statutory provision and those of the constitutional standard were equivalent.[87]

The Second Circuit's incorporation of *Tinker*'s constitutionally-stringent standard into the EAA safe harbor exceptions resulted in a victory for the Bible club. The court began by recognizing the deference that schools must be given when deciding how to properly educate youth.[88] It then went on to observe that the EAA is an exception to this usual rule.[89] After reviewing the evidentiary record, the court found that the school offered nothing but a "conclusory statement that prayer meetings will substantially and materially impede the orderly conduct of the school."[90] Applying *Tinker*, the court held that such a statement, without evidentiary support, was "insufficient" to limit student expression.[91] In particular, the court cited *Tinker*'s famous conclusion that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[92] Consistent with this sentiment, the fact that the school's suppression of the Bible club was a well-intentioned act intended to prohibit religious discrimination did "not

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85. *Id.*

86. *Id.*

87. *See id.* at 870–71 ("[A] school may deny recognition to a student group . . . under the Equal Access Act, if there are grounds for concluding that recognition of the group would materially and substantially interfere with the school's overarching mission to educate its students, as this standard has been explained by *Tinker* [and other Supreme Court cases interpreting the First Amendment].").

88. *Id.* at 872 ("[P]ublic school administrators must be given a great deal of autonomy in deciding how best to run their schools: '[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.'" (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)) (alteration in original)).

89. *Id.* ("[T]he Equal Access Act is a definite, though measured, interference in these purely local decisions.").

90. *Id.*

91. *Id.*

92. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

make the suppression permissible."[93]

B. The Seventh Circuit Approach: Incorporating a Deferential Reasonableness Standard into the EAA Safe Harbor Exceptions

The Seventh Circuit, in *Gernetzke*,[94] is the only other federal appellate court wherein the applicable standard for the § 4071(f) exceptions has been raised. The Seventh Circuit decided *Gernetzke* on procedural grounds and therefore did not reach the merits of the claims.[95] Nonetheless, dicta in the case may prove useful in thinking about the scope of the EAA's safe harbor provisions, particularly in light of the paucity of precedent in this area.

In *Gernetzke*, a student Bible club submitted a sketch in response to its school's invitation to all student groups to paint murals in the main hallway of the school.[96] The Bible club's sketch depicted "a heart, two doves, an open Bible with a well-known passage from the New Testament . . . and a large cross."[97] The principal approved the entire mural, except the cross.[98] The principal feared that if the school approved the cross, it would be vulnerable to Establishment Clause litigation and would also be required to approve murals containing Satanic and neo-Nazi symbols (since the school's student body included students from both movements), which could "incite ugly conflicts among the students."[99] Even without the cross's inclusion in the mural, "the Bible club's mural was defaced with a witchcraft symbol, and a group of [students] unsuccessfully petitioned . . . to paint a mural containing a swastika,"[100] confirming the principal's fears that permitting a cross would require the school to recognize more controversial student beliefs. The Bible club's students filed suit, alleging that the elimination of the cross from the mural violated their rights under the EAA.[101]

While the Seventh Circuit decided the case on procedural grounds,[102] language in the court's dicta suggested greater deference to the judgment

93. *Id.* at 872 n.32 (citing *Tinker*, 393 U.S. at 508). The school district also raised Establishment Clause concerns as a defense, an argument the court did not find persuasive. *Id.* at 862–64.

94. Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001).

95. *Id.* at 467.

96. *Id.* at 466.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 467.

of school officials than demanded by *Tinker*.[103] In an opinion written by Judge Richard Posner, the court concluded that the principal's decision to exclude the cross from the mural was legitimate under § 4071(f), which preserves the traditional "authority of the school . . . to maintain order and discipline on school premises."[104] In coming to this conclusion, the court did not indicate what standard it was applying—that is, whether it believed the cross would have "materially and substantially interfere[d]" with the regular operations of the school,[105] or whether the court applied some lesser, undefined standard in order to find that the school's action was likely permissible.[106]

In writing for the court, Posner left open the possibility that some First Amendment protections might not apply to actions taken under the EAA. He acknowledged that First Amendment precedent forbids a "heckler's veto," or the suppression of expression merely because listeners may respond disruptively.[107] Posner observed, however, that the § 4071(f) "maintaining order and discipline" exception "suggest[ed] that the principle of those [heckler's veto] cases had not been carried over into the Equal Access Act."[108] Posner also noted that First Amendment jurisprudence has traditionally been more approving of limits on speech in the context of schools than in the context "of adults engaged in political expression in the normal venues," particularly in light of the fact that "[o]rder and discipline are part of any high school's basic educational mission."[109] While the Seventh Circuit did not explicitly reject the application of *Tinker*, at least one federal district court appears to have read *Gernetzke* as having done exactly that.

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103. *See id.* ("We . . . express our doubts about the appropriateness of litigation that is intended . . . to wrest the day-to-day control of our troubled public schools from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools.").

104. *Id.* (quoting 20 U.S.C. § 4071(f)).

105. Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 509 (1969).

106. In concluding that the principal's action in excising the cross from the mural was "insulated from liability under the [EAA]," *Gernetzke*, 274 F.3d at 466, the court also observed that the principal's action was based on a "reasonabl[e] belie[f that displaying the cross was] likely to lead to litigation or disorder," *id.* at 467. It seems unlikely that a reasonable belief in potential disorder could satisfy the "materially and substantially interfere" standard of *Tinker*, 393 U.S. at 509.

107. *Gernetzke*, 274 F.3d at 467. For a definition of "heckler's veto," see David A. Strauss, *Little Rock and the Legacy of* Brown, 52 ST. LOUIS U. L.J. 1065, 1079 (2008) ("In First Amendment law, the idea is known as the 'heckler's veto': people opposed to a speaker may not, by threatening or engaging in disruptive actions, create the harm that justifies the speaker's suppression."). *See also infra* Part V.B (discussing further the case law prohibiting a heckler's veto under the First Amendment).

108. *Gernetzke*, 274 F.3d at 467.

109. *Id.*

In *Caudillo ex rel. Caudillo v. Lubbock Independent School District*,[110] a Texas district court addressed the applicability of the EAA safe harbor provisions to a GSA. In upholding a school district's decision to restrict the speech of an unincorporated GSA, the court observed, "The Supreme Court, diverging from the *Tinker* analysis, [has] held that it [is] appropriate for educators to protect students from sexually explicit, indecent, or lewd speech."[111] The court concluded that the school district's "exclusion of sexual subject matter is not related to any viewpoint"[112] and is therefore subject to less stringent requirements than political student speech. In support of this contention, the court cited to *Gernetzke*, stating that "other circuits have determined that a school may prevent student expression that might invite a lawsuit or incite conflicts among students without violating the EAA."[113]

The *Caudillo* court concluded that it was permissible under the EAA for the school district to restrict the GSA's access based on "demonstrable factors that would give rise to any reasonable forecast by the school administration of substantial and material disruption of school activities."[114] In finding a "reasonable forecast," the court deferred to the judgment of school district officials, who "relied on their years of experience in the realm of public education to make a judgment call."[115] Furthermore, because the school district had an abstinence policy prohibiting any discussions related to sex, and because the GSA would discuss matters related to sex, the GSA's "speech create[d] a 'material and substantial' interference with [the school district's] educational mission and function."[116] If *Tinker* had been applied, a more "substantial showing of interference" would have been required to justify the exclusion of the GSA.[117]

110. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550 (N.D. Tex. 2004).

111. *Id.* at 562 (citations omitted).

112. *Id.* This conclusion by the court seems to ignore evidence cited in the opinion that the GSA sought to, among other goals, "[i]mprove the relationship between heterosexuals and homosexuals," "[h]elp the community," "[i]ncrease rights given to non-heterosexuals," and "[e]ducate willing youth about . . . hatred." *Id.* at 556.

113. *Id.* at 569.

114. *Id.* at 568.

115. *Id.* at 569.

116. *Id.* at 568.

117. *Id.* at 569.

IV.
THE PROBLEM: MANIPULATING THE EAA THROUGH PRETEXTUAL INVOCATIONS OF LGBTQ STUDENT SAFETY

An examination of the arguments put forth in GSA litigation demonstrates that incorporating a deferential reasonableness standard into the EAA safe harbor exceptions jeopardizes the antidiscrimination function of the EAA. Deferring to the judgment of school districts permits the exclusion of GSAs to be based on prejudicial views held by school officials, community members, or other students, rather than on any nondiscriminatory application of the safe harbor exceptions.

School districts are putting forth two analytically distinct arguments to ban GSAs under the § 4071(f) "maintenance of school order" and "well-being of students" safe harbor exceptions. First, school districts argue that GSAs are "sex-based clubs" and therefore interfere with the ability of school districts to shield students from harmful or age-inappropriate discussions of sexual activity.[118] In cases involving school districts that maintain abstinence policies, school districts further contend that GSAs would impede schools from maintaining order because the content of the groups' discussions would violate established school policy.[119] This argument, which is rooted in discriminatory stereotypes and the animus of school administrators, parents, and community members, has been generally unsuccessful in the courts.[120]

Second, school districts contend that GSAs would impede the maintenance of school order and harm the well-being of LGBTQ students because GSA meetings would increase the harassment and violence experienced by LGBTQ students.[121] Even though social science research supports the notion that GSAs are beneficial to LGBTQ students' mental and physical security, the frequency with which LGBTQ students experience harassment and violence in public secondary schools[122] makes it

118. *See, e.g., id.* at 565–66, 568. *See also* Gonzalez *ex rel.* Gonzalez v. Sch. Bd., 571 F. Supp. 2d 1257, 1263–67 (S.D. Fla. 2008). Some school districts have also used the "sex-based" argument to avoid triggering the EAA. *See, e.g.*, Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135, 1144 (C.D. Cal. 2000) ("Specifically, [a] Board Member . . . stated in her motion that 'the District has a curriculum on sex education, which deals with human sexuality, sexual behavior and consequences, and prevention of sexually transmitted diseases. To the extent that the proposed GSA club intends to discuss these issues related to sexual orientation, the club is a "curriculum related" club, not covered by the Equal Access Act.'").

119. *See, e.g., Caudillo*, 311 F. Supp. 2d at 566, 568 (contending that GSA's goal of discussing safe sex would violate school district's abstinence policy).

120. *See, e.g., Gonzalez*, 571 F. Supp. 2d at 1263–67 (rejecting school district's argument that GSA would violate school's abstinence-only policy).

121. *See, e.g., Caudillo*, 311 F. Supp. 2d at 568–71.

122. This research is presented in more detail in Part V.A.1, *infra*.

possible for school districts to draw an arguable correlation between LGBTQ student safety and GSA formations. Under a deferential reasonableness standard, even this hypothetical connection is enough to justify exclusion.

By juxtaposing these two arguments, it becomes clear that a deferential reading of the § 4071(f) safe harbor exceptions allows school districts to invoke LGBTQ student safety to ban GSAs, even if the school district seeks to do so primarily because of prejudicial sentiments, including a belief that GSAs are "sex-based clubs." Enabling school districts to manipulate the EAA to give effect to pretextual discrimination jeopardizes the antidiscrimination function of the EAA and perpetuates prejudice against LGBTQ people in schools and communities.

A. The "Sex-Based Club" Argument

School districts in GSA litigation have put forth two types of "sex-based club" arguments. The first conceptualizes GSAs as noncurriculum-related "sex-based clubs" that schools may prohibit under § 4071(f) because the clubs' discussions of sexuality inhibit the maintenance of school order and harm the well-being of students. The second argument conceptualizes GSAs as curriculum-related groups because issues of sexuality are part of the school's sex education curriculum. School districts that put forth this argument posit that GSAs do not fall under the purview of the EAA because the statute only applies to noncurriculum-related groups.

The first version of the "sex-based club" argument was put forth by the school district in *Gonzalez ex rel. Gonzalez v. School Board*.[123] In October 2007, the Okeechobee County School Board in Florida enacted a policy banning any club that is "sex-based or based upon any sexual grouping, orientation or activity of any kind."[124] School officials alleged that the new policy sought to prohibit student groups "that challenge[d] the district's abstinence-only education."[125] In its brief, the school district argued, "The 'limited open forum' created by the EAA does not require Okeechobee schools to permit student-initiated clubs . . . where the subject matter of the club would be sex and sexuality."[126] The school district further alleged:

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123. *Gonzalez*, 571 F. Supp. 2d 1257.

124. Rachel Simmonsen, *Okeechobee District Bans 'Sex-Based' Clubs*, PALM BEACH POST, Oct. 11, 2007, at 2B.

125. *Id.*

126. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Accompanying Memorandum of Law at 7, Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 571 F. Supp. 2d 1257 (S.D. Fla. 2008) (No. 06-14320), 2007 WL 617215.

> The school may restrict sex-based clubs, whether based upon homosexual, bisexual, or heterosexual sexual identities, from the school's limited open forum because a student club organized around what immature students perceive to be their sexual orientation or preference at an early stage of their lives would materially and substantially interfere with the orderly conduct of the school's abstinence-based curriculum and would not protect student well-being.[127]

Consequently, the school district argued that its authority to ban the GSA was "within the terms of the [§ 4071(f)] safe harbor exceptions."[128]

In rejecting the school district's reliance on its abstinence policy to ban the GSA, the district court emphasized that the school district "has failed to demonstrate that the GSA's mission to promote tolerance towards individuals of non-heterosexual identity is inherently inconsistent with the abstinence only message [the school district] has adopted."[129] The court observed that "the crux of [the school's] proposition appears to be that because the topic of tolerance relating to sexual identity is a subset of the topic of sexuality generally, the dialogue required to discuss tolerance towards non-heterosexuals is impossible to convey without doing violence to the principle of abstinence."[130] The court dismissed this point by arguing that if this were the case, then even topics included in the school's own curriculum (such as pregnancy and sexually transmitted diseases), would undercut the school's abstinence policy.[131] Because the argument, when taken to its logical conclusion, would lead to an absurd result, the court concluded that the mere fact that a student group's subject matter could touch on sex did not place that group outside the protections of the EAA.[132] Thus, even potential discussions of sex-related topics in GSA meetings did not create a substantial threat to student well-being or school order that would justify invoking the safe harbor provisions of the EAA.[133]

The second version of the "sex-based club" argument, wherein schools claim that GSAs are curriculum-related and thus outside the scope of the

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127. *Id.* at 9.

128. *Id.*

129. Gonzalez *ex rel.* Gonzalez v. Sch. Bd., 571 F. Supp. 2d. 1257, 1264 (S.D. Fla. 2008).

130. *Id.*

131. *Id.*

132. *Id.* ("[T]his Court dismisses the unsupported assertion that curriculum based discussions of sexually related topics related to heterosexual activity may occur without violating the abstinence only program but that such a violation would occur in the case of noncurricular based discussions of tolerance towards nonheterosexuals.").

133. *Id.* at 1267 ("[The school district] has failed to demonstrate that recognition of the GSA . . . would jeopardize the well-being of students . . . [or that it] is likely to detract from the maintenance of order and discipline.").

EAA, was put forth by the school district in *Colin ex rel. Colin v. Orange Unified School District*.[134] In *Colin*, the GSA's mission statement said: "'We respect privacy and require NO one to make disclosures regarding his or her own sexual orientation. This is not a sexual issue, it is about gaining support and promoting tolerance and respect for all students.'"[135] After months of consideration, the school district's board of education unanimously denied the students' application to form the GSA.[136] Unlike the school district in *Gonzalez*, which argued that it had the authority to prohibit the GSA as a noncurriculum club under the § 4071(f) safe harbor exceptions, the board in *Colin* argued that the EAA did not apply because the GSA's discussions involved sex, which was a topic related to the school curriculum. To support its position, the board put forth four points:

> (1) the proposed GSA has a subject matter related to sexual conduct and sexuality; (2) the District and El Modena High School offer courses that address sex, sexual conduct, sexual abstinence, and sexual transmission of diseases; (3) the State of California in the Education Code imposes strict requirements on how, when and by whom sex education and related courses are taught; and (4) the Board should consider that unrestricted, unsupervised student led discussion of sexual topics is age inappropriate and is likely to interfere with the legitimate educational concerns of the District in this sensitive area of sex education.[137]

The school district's position was rooted in its belief that the GSA's discussions would pertain to matters of sex simply because the group organized around issues pertaining to LGBTQ identities.

The *Colin* court disagreed with the school district, finding that the GSA was a noncurriculum-related group and that the EAA was triggered. The court reasoned, "The subject matter of the group, dealing with their personal experiences of homophobia and seeking to improve relations among and between gay and straight students, is not 'actually taught . . . in a regularly offered course' at [the high school]."[138] Rather than overlapping with curricular topics such as "prevention of pregnancy and sexually transmitted diseases," the GSA sought to discuss "issues related to sexual orientation and homophobia," placing its subject matter outside

134. Colin *ex rel.* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000).

135. *Id.* at 1138.

136. *Id.* at 1139.

137. *Id.* at 1139–40.

138. *Id.* at 1145 (quoting Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 229 (1990)).

the scope of the sex-related aspects of the curriculum and confirming that the GSA is a noncurriculum-related student group.[139] In finding that the GSA was not related to the sex-related topics addressed by the school's curriculum, the court was able to conceive of the GSA as something more than a "sex-based club."[140]

In addressing the merits of both "sex-based club" arguments, the *Gonzalez* and *Colin* courts implicitly recognized a distinction between LGBTQ status and conduct. When school districts prohibit GSAs on the basis of a belief that they are "sex-based clubs," school districts erroneously presume that improper discussions of sexual activity will occur simply because GSAs are organized around issues of LGBTQ identity—that somehow, LGBTQ identity and sex-related discussions are intrinsically and irrevocably linked.[141] Litigants in other contexts have invoked the status/conduct distinction as a means to prevent LGBTQ people from being discriminated against solely on the basis of their sexual orientations.[142] Although the line between LGBTQ status and conduct is

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139. *Id.* at 1144 (internal quotation marks omitted).

140. The court went on to observe that even if the GSA dealt with topics included in the curriculum, once the EAA had been triggered by the school's recognition of *any* noncurriculum-related student groups, recognition of the GSA, regardless of its relation to the curriculum, could not be denied unless the safe harbor provisions were satisfied. *Id.* at 1145–46.

141. Of course, in *Caudillo ex rel. Caudillo v. Lubbock Independent School District*, the plaintiff GSA proposed to discuss, inter alia, safe sex, thus creating a link between the GSA and discussions about sex-related topics. 311 F. Supp. 2d 550, 556 (N.D. Tex. 2004). However, most GSAs have focused on promoting tolerance and understanding, and thus the assumption that these discussions require a discussion about sex is erroneous and frequently stems from discriminatory beliefs.

142. *See* Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 385–86 (1994) ("Though initially established by the United States Supreme Court under the Eighth Amendment to prohibit criminal law 'punishment' based on status, the status/conduct distinction has been accepted as part of Fourteenth Amendment jurisprudence to prohibit 'discrimination' based on status. . . . [This] distinction . . . [is] specifically applicable to lesbian and gay discrimination cases."). In tracing the evolution of the jurisprudence over the constitutionality of state laws prohibiting sodomy following *Doe v. Commonwealth Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976), one scholar described the importance of the status/conduct distinction thus:

> The conduct/status distinction, a distinction used by only some lesbian and gay parties in the post-Doe years of litigation, has now become the driving force in shaping new constitutional challenges to discrimination against gays and lesbians. Relying on the conduct/status distinction, gay men and lesbians as plaintiffs have challenged governmental discrimination in employment and other public spheres, always careful to separate questions about what they do in private from who they are in public.

Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617 (1993). *See also* Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 108 (2002) ("As a result of the *Hardwick* decision, gay activists, understandably, turned away from seeking protection based on conduct and privacy and instead sought protections

not always clear,[143] and courts and litigants sometimes conflate these two concepts,[144] the *Gonzalez* and *Colin* courts relied on the distinction in finding in favor of the GSAs. Based on the reasoning from these decisions, school districts cannot infer that improper discussions of sexual activity will occur merely because a student organization is organized around issues of LGBTQ identity.

The courts' analyses, however, miss an important point: school districts' conflation of LGBTQ status and conduct in arguing that GSAs are "sex-based clubs" is causally connected to discriminatory stereotypes and animus harbored by school administrators, parents, and community members. The assumption that GSA discussions will categorically focus on sexual acts simply because the student group is organized around issues of LGBTQ identity feeds into common stereotypes that portray LGBTQ people as hypersexual. Consequently, the "sex-based club" argument is a mechanism for school districts to express the discriminatory views held by school administrators, parents, and community members towards LGBTQ people.

To illustrate the connection between private discrimination and the "sex-based club" argument, consider the 1995 response to a GSA formation in Harrisonburg, Virginia. Parental opposition to the GSA's formation was so strong that a state representative was motivated to introduce legislation to ban student clubs that "encourage[] or promote[] sexual activity," in an attempt to target GSAs.[145] The language of the original bill not only invoked the § 4071(f) safe harbor exceptions, but it also explicitly prohibited tolerance of particular identities by banning "access or opportunity to use . . . school facilities or to distribute literature to any club or other group that is focused on supporting, assisting, or justifying any lifestyle involving sexual behavior."[146] This language was

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based on sexual orientation and identity.").

143. *See* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1457 (2004) ("[H]omosexuality straddles the line between conduct and status in ways that make it hard to apply conventional constitutional doctrine.").

144. *See* Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal,'* 97 GEO. L.J. 1155, 1185 n.168 (2009) ("Even after *Lawrence*, the law continues to conflate homosexuality and sodomy."); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 169 (2000) ("Judges have conflated sexual orientation with the criminal conduct of sodomy . . . ."); Valdes, *supra* note 142, at 426 ("In practice the distinction remains mostly unrealized because of disuse or misuse.").

145. *See* Melissa Scott Sinclair, *General Assembly Briefs*, VIRGINIAN-PILOT, Feb. 18, 2005, at B4 ("Del. Glenn M. Weatherholtz, R-Rockingham, said he sponsored HB2868 after a Gay-Straight Alliance club was started at Harrisonburg High School.").

146. H.D. 2868, 2005 Gen. Assem., Reg. Sess. (Va. 2005), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB2868.

omitted from the version of the bill that eventually passed the state House of Representatives before being defeated in the state Senate. The language of the final version focused more on actual sexual conduct than identity, stating that "pursuant to 20 U.S.C. [§] 4071(f), local school boards in their discretion may prohibit school facilities from being used by any student club or other student group that encourages or promotes sexual activity by unmarried minor students."[147]

Although the language of the final bill was focused on sexual conduct and did not appear to target GSAs specifically, statements by proponents of the bill made it clear that they were motivated by animus against LGBTQ people generally, as illustrated by their use of the "sex-based club" argument. For instance, John Elledge, chairman of the Republican Party of Harrisonburg, Virginia, was opposed to permitting the formation of GSAs because they "teach[] acceptance and that it's OK to be a homosexual and to practice homosexual sex acts."[148] Elledge's statement is both a clear reflection of his disagreement with homosexuality generally and an indicator that he has conflated teaching tolerance and acceptance with having conversations about sex acts.

Or, take the even more egregious statements of delegate Richard H. Black, another proponent of the bill. In disagreeing with the notion that GSAs serve to promote tolerance and respect among students, Black stated, "The whole agenda of the homosexual movement is to entice children to submit to sex practices."[149] Black observed further, "Those groups lead children to experiment with potentially fatal sex practices that spread AIDS and other sexually transmitted diseases."[150] Black's conception of, and opposition to, GSAs is at least partly rooted in misconceptions that all LGBTQ people are promiscuous. As explained below in further detail, courts enable schools to give effect to this discrimination when they fail to incorporate the *Tinker* standard into the EAA safe harbor exceptions.

B. The LGBTQ Student Safety Argument

Besides the "sex-based club" argument, school districts also contend that GSAs would impede the maintenance of school order and harm the well-being of students by increasing the harassment and violence experienced by LGBTQ students. While most district courts have refused

147. H.D. 2868E, 2005 Gen. Assem., Reg. Sess. (Va. 2005), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB2868E.

148. Christina Bellantoni, *'Gay-straight' Clubs in Schools Anger Foes*, WASH. TIMES, Nov. 18, 2004, at B01.

149. *Id.*

150. *Id.*

to grant much weight to these arguments, the fact that school officials continue to make them is troubling for LGBTQ students.

In *Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corporation*, a high school student attempted to form a GSA in order to "promot[e] a better understanding of homosexual students and provid[e] a safe and supportive place for them to discuss issues that are of special concern to them."[151] The school administration rejected the GSA's application.[152] The student filed suit, alleging an EAA violation.[153] During litigation, the school district claimed that the potential harassment that could result from the GSA's meetings supported its authority to prohibit the GSA.[154] The court rejected this argument, finding that the school district's "concern that the members of the GSA might become targets for harassment is not a justification for content-discrimination under the EAA."[155] The court concluded, "This line of reasoning was specifically rejected in *Tinker*" and therefore could not be used to justify regulations on student speech.[156]

Conversely, in *Caudillo ex rel. Caudillo v. Lubbock Independent School District*, the court agreed with the school district's claim that it could ban the GSA out of concern for the safety of LGBTQ students. There, the court had explicitly rejected the Second Circuit's incorporation of the *Tinker* standard into the § 4071(f) exceptions and agreed with the Seventh Circuit's suggestion that these exceptions should be governed by a reasonableness standard.[157] In *Caudillo*, students alleged an EAA violation after the school district refused to allow a GSA to distribute fliers in the school hallways, to make announcements over the school's PA system, or to meet on campus.[158] The high school received anonymous phone calls expressing concern about the students' safety.[159] Based in part on these phone calls, the school district argued that it could prohibit the

151. Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., No. IP01-1518, 2002 WL 32097530, at *4 (S.D. Ind. Aug. 30, 2002). Although the club intended to focus on "gay and lesbian" students, students of all sexual orientations were welcome to join. *See id.*

152. *Id.* at *6. While the court noted that "it is not clear from the evidentiary record who made the decision to reject [the GSA's application] or why," both the vice principal and the principal of the school were implicated by the court. *Id.*

153. *Id.* at *2.

154. *See id.* at *20.

155. *Id.*

156. *Id.* (citing Tinker v. Des. Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969)).

157. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 568–69 (N.D. Tex. 2004).

158. *Id.* at 556–58.

159. *Id.* at 569.

GSA from forming under the EAA because the organization would increase student harassment and violence.[160]

In agreeing with the school district, the *Caudillo* court was very explicit about affording deference to schools regarding the safety of LGBTQ students:

> [School] officials relied on their years of experience in the realm of public education to make a judgment call as to the safety of the students. Defendants argue that a potential for sexual-orientation harassment existed on [the school district's] campuses that could lead to disruptive and dangerous conditions for the students. The Court finds that in the opinion of those with years of experience, whose consideration included the circumstances of the anonymous phone calls, legitimate safety concerns existed as well as concerns for harassment.[161]

In line with this deference, the court observed, "It is not necessary that the school administration stay a reasonable exercise of restraint until disruption actually occurs."[162] Rather, school districts can limit student speech under the § 4071(f) exceptions when "demonstrable factors that would give rise to any reasonable forecast by the school administration of substantial and material disruption of school activities" are present.[163] While this use of a "substantial and material disruption" standard appears to mirror the language of *Tinker*,[164] the court significantly lowered the burden a school district must meet in order to satisfy the standard—rather than proving the actual disruption, school districts need only show "demonstrable factors" that satisfy a reasonableness standard. The application of this highly deferential reasonableness standard resulted in a victory for the school district.

C. The "Sex-Based Club" and LGBTQ Student Safety Arguments in Conjunction

School districts that are hostile to LGBTQ students because of their sexual orientations and gender identities are banning GSAs by claiming that these organizations will inhibit the maintenance of school order and harm the well-being of students. This claim is often based, not on a real threat to school order or student well-being, but on a conceptualization of GSAs as "sex-based clubs." The incorporation of a deferential

160. *Id.*
161. *Id.* at 569–70 (citation omitted).
162. *Id.* at 568.
163. *Id.*
164. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

reasonableness standard into the § 4071(f) exceptions allows school districts to invoke LGBTQ student safety as a basis for banning GSAs, and thereby gives effect to private discrimination.

It is undeniable that LGBTQ students suffer harassment and violence at school. A 2005 study released by the Gay, Lesbian and Straight Education Network (GLSEN)[165] revealed that large numbers of LGBTQ students report feeling unsafe at their schools.[166] The majority of students surveyed "experienced harassment and violence at school."[167]

Although empirical studies also overwhelmingly support the notion that GSAs are beneficial to LGBTQ students' mental health and do not increase harassment or violence,[168] school districts can rely on general statistics showing high incidences of harassment and violence experienced by LGBTQ students to construct a reasonable argument that the formation of GSAs could worsen the harassment and violence by mobilizing anti-LGBTQ opposition. If a reasonableness standard governs the § 4071(f) exceptions, then contrary statistics that demonstrate the benefits of GSAs become meaningless and courts will be able to defer to judgments made by local school officials, even when those decisions are actually erroneous or based in prejudice. Moreover, courts applying a reasonableness standard need not perform a searching review of the evidentiary record to determine whether LGBTQ students actually experience harassment or violence in a particular school district.

Under a reasonableness standard, school districts will be able to invoke LGBTQ student safety in every case to justify banning GSAs under the § 4071(f) exceptions, even when GSAs pose no documented threat to LGBTQ student safety. School districts will also be able invoke LGBTQ student safety as a justification to ban GSAs even if they are truly motivated by discrimination on the basis of sexual orientation and gender identity. Therefore, if a reasonableness standard governs the § 4071(f) exceptions, the LGBTQ student safety argument can become a tool for

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165. GLSEN's mission is to "assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression." GLSEN, About Us, http://www.glsen.org/cgi-bin/iowa/all/about/history/index.html (last visited May 12, 2010). As part of this mission, GLSEN provides a detailed guideline for potential and current gay-straight alliances with tips on "building, shaping and activating" GSAs. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE GLSEN JUMP-START GUIDE: BUILDING AND ACTIVATING YOUR GSA OR SIMILAR STUDENT CLUB, at pt. 1, at ii, *available at* http://www.glsen.org/cgi-bin/ iowa/all/news/record/2226.html.

166. JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, GAY, LESBIAN & STRAIGHT NETWORK, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, at xiii (2006), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/585-1.pdf.

167. *Id. See also infra* note 172 and accompanying text.

168. A review of the empirical research on the benefits of GSAs to LGBTQ students is provided in Part V.A.1, *infra.*

legitimizing private discrimination on the basis of sexual orientation and gender identity. This potential for abuse is antithetical to the antidiscrimination function of the EAA.

V.
WHY INCORPORATION MATTERS: SHIELDING STUDENTS FROM PRETEXTUAL DISCRIMINATION

For two reasons, incorporating the *Tinker* standard into the EAA safe harbor provisions decreases the likelihood that students who wish to form GSAs will be prohibited from doing so because of pretextual discrimination. First, unlike a deferential reasonableness standard, incorporating the *Tinker* standard into the EAA safe harbor exceptions forces judges to perform a searching review of the record to see if the evidence in a particular case supports a finding that a GSA would increase LGBTQ student harassment and violence. Second, incorporating the *Tinker* standard into the EAA safe harbor exceptions also prevents schools from giving effect to a heckler's veto, which occurs when speech is limited to avoid potentially disruptive responses by audiences.

A. Tinker *Requires a Clear Evidentiary Connection Between GSAs and Jeopardizing Student Safety*

In *Tinker*, the Supreme Court held that speech, including speech by students, could not be limited based on an "undifferentiated fear or apprehension of disturbance."[169] Rather, *Tinker* requires a clear evidentiary connection between the activities of student organizations and disruption of the school. Under this standard, school districts have the burden to demonstrate facts that might reasonably lead them "to forecast substantial disruption of or material interference with school activities"[170] before prohibiting student expression. Courts have affirmed the principle that *Tinker* does not require schools to wait for an actual disturbance before they may limit expression.[171] However, as illustrated in the following analysis, these courts have not given blanket deference to school districts to limit student speech; instead, these courts have required schools to establish a clear connection based on concrete evidence in the record that student speech could reasonably cause a substantial disturbance.

In the context of GSA litigation, under *Tinker*, school districts cannot prohibit GSAs by hypothetically or tenuously connecting LGBTQ student

169. *Tinker*, 393 U.S. at 508.

170. *Tinker*, 393 U.S. at 514.

171. *See, e.g.*, Barr v. Lafon, 538 F.3d 554, 565 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 63 (2009); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008); Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

harassment and violence with GSAs. School districts must present general research or specific facts to establish that GSAs will increase LGBTQ student harassment or violence.

1. Empirical Research on GSAs and LGBTQ Student Safety

Before discussing existing empirical research on whether GSAs foster LGBTQ student safety, it is important to introduce some of the challenges that LGBTQ students commonly face. LGBTQ youth are frequent targets of harassment and violence at school. A study conducted by GLSEN found: "Nearly two-thirds (64.3%) [of LGBTQ students] reported feeling unsafe at school because of their sexual orientation specifically, and 40.7% felt unsafe because of how they expressed their gender. The majority of students [surveyed] had also experienced harassment and violence at school . . . ."[172]

Besides difficulties at school, LGBTQ youth often endure social, family, and personal challenges. LGBTQ youth frequently struggle with the decision to reveal their sexual orientations or gender identities to friends and family.[173] Many LGBTQ youth also have negative and sometimes abusive relationships with their parents after revealing their sexual orientations and gender identities.[174] LGBTQ youth are at higher risk for homelessness because many feel forced to leave their homes in order to avoid harassment and violence by family members.[175] LGBTQ

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172. KOSCIW & DIAZ, *supra* note 166, at xiii. *See also* Diane E. Elze, *Gay, Lesbian, and Bisexual Youths' Perceptions of Their High School Environments and Comfort in School*, 25 CHILD. & SCHS. 225, 226 (2003) ("Several studies . . . have consistently found high rates of school problems related to sexual orientation . . . . The problems encountered included rude jokes and comments, discrimination and harassment, vandalism to their lockers, violence from peers, and threats from other students' parents.").

173. *See* JEAN M. BAKER, HOW HOMOPHOBIA HURTS CHILDREN: NURTURING DIVERSITY AT HOME, AT SCHOOL, AND IN THE COMMUNITY 7 (2002) ("Gay children often grow up with no one recognizing or accepting who they really are. As they become aware of their sexual feelings they also become aware of the stigma of homosexuality. They are afraid to tell anyone. They worry about their futures."). *See also* Anthony R. D'Augelli, *Mental Health Problems Among Lesbian, Gay, and Bisexual Youths Ages 14 to 21*, 7 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 433, 441 (2002). According to the sample of LGBTQ youth studied by D'Augelli:

> Telling families about their sexual orientation was seen as extremely troubling by 23 percent of the youth, very troubling by 19 percent, somewhat troubling by 28 percent, and no problem by only 29 percent. . . . Telling friends about one's sexual orientation was extremely troubling for 22 percent of the sample, very troubling for 19 percent, somewhat troubling for 25 percent, and no problem for 34 percent.

Id. at 441, 443. Additionally, "[o]ver one-third (36%) said that fear of losing friends influenced their openness about their sexual orientation." *Id.* at 449.

174. BAKER, *supra* note 173, at 11.

175. *See* Bryan N. Cochran, Angela J. Stewart, Joshua A. Ginzler & Ana Mari Cuace,

youth are also at higher risk than their heterosexual peers for substance abuse[176] and suicide.[177]

An examination of the existing empirical studies on the relationship between GSAs and LGBTQ student safety supports the claim that, contrary to the contentions of some school districts, GSAs affirmatively benefit LGBTQ students' mental and physical security. In 2000, a qualitative study of GSAs in Massachusetts public schools was performed.[178] The study's findings were based in part on detailed interviews of nine current and former staff members of the Safe Schools for Gay and Lesbian Students Program (SSGLSP),[179] as well as survey

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Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts, 92 AM. J. PUB. HEALTH 773, 773 (2002) (observing that many LGBT youth "are victims of parental physical abuse). A study of homeless LGBTQ youth found:

> The most common reasons reported by youths for leaving home were family conflict (59.9%), desire for freedom (51.5%), and difficulties with a family member (48.5%). GLBT youths were more likely to leave as a result of physical abuse in the home . . . and there was a trend toward more GLBT youths leaving as a result of alcohol use in the home . . . . Twelve (14.3%) GLBT youths indicated that they had left home because of conflicts with their parents over their sexual orientation.

Id. at 774. The correlation works both ways: LGBTQ youth are at a greater risk of becoming homeless and homeless youth are more likely than the general population to identify as a sexual minority. *See id.* at 773 ("[T]he few studies assessing sexual orientations of homeless adolescents have revealed rates [of gay and lesbian homeless adolescents] ranging from 11% to 35% [of the total homeless adolescent population]."). *See also* Andrew Jacobs, *For Young Gays on the Streets, Survival Comes Before Pride; Few Beds for Growing Class of Homeless*, N.Y. TIMES, June 27, 2004, § 1, at 23 (describing the lives of several young gay men who are homeless).

176. *See* Michael P. Marshal, Mark S. Friedman, Ron Stall, Kevin M. King, Jonathan Miles, Melanie A. Gold, Oscar G. Bukstein & Jennifer Q. Morse, *Sexual Orientation and Adolescent Substance Use: A Meta-analysis and Methodological Review*, 103 ADDICTION 546, 553 (2008) ("[T]he odds of substance use for LGB youth were 190% higher than for heterosexual youth and substantially higher within some subpopulations of LGB youth . . . .").

177. *See* Marla E. Eisenberg & Michael D. Resnick, *Suicidality Among Gay, Lesbian and Bisexual Youth: The Role of Protective Factors*, 39 J. ADOLESCENT HEALTH 662, 666 (2006) ("GLB youth are at greater risk for suicidal ideation and attempts than non-GLB youth."); Robert Li Kitts, *Gay Adolescents and Suicide: Understanding the Association*, 40 ADOLESCENCE 621, 623–24 (2005) ("Being a gay adolescent is a significant risk factor for suicidal thoughts and attempts. More than 15 different studies conducted within the last 20 years have consistently showed significantly higher rates of suicide attempts . . . among gay adolescents.").

178. Janice Evelyn Doppler, A Description of Gay/Straight Alliances in the Public Schools of Massachusetts (September 2000) (unpublished Ph.D. dissertation, University of Massachusetts, Amherst) (on file with author).

179. *Id.* at 56. The SSGLSP was established in response to the Massachusetts Board of Education's decision to adopt recommendations made by the Governor's Commission on Gay and Lesbian Youth. The recommendations sought "to improve the safety of schools and school-based support services" and included a recommendation that "[s]chools [be] encouraged to offer school-based support groups for gay, lesbian and heterosexual

responses from advisors of Massachusetts GSAs that were active at the beginning of the 1998-1999 school year.[180] GSA members were not participants in the study.[181] Data collection techniques included interviews, surveys, and observations of GSA events aimed at advisors and other education personnel.[182]

The study made several conclusions about the positive effects of GSAs. First, participants believed that "the greatest accomplishment of GSAs" was the "increased visibility for gay and lesbian and bisexual youth."[183] According to the study: "Several interviewees talked about their belief that visibility provides support because lesbian and gay students have concrete evidence that they are not alone. Not being alone, in turn, contributes to a sense of safety."[184] Moreover, the study concluded that GSAs combat the social isolation that queer youth face by providing a place to form peer connections.[185] Combating isolation decreases depression and facilitates suicide prevention.[186] The study also found that the participants believed that, by increasing the visibility of and discussions on sexual orientation, student harassment had decreased.[187] The increased visibility of gay, lesbian, and bisexual students also put increased pressure on teachers to respond to complaints of harassment.[188]

Similarly, in 2002, a researcher from the University of Utah performed another qualitative study examining the impact of belonging to a high school GSA.[189] The study documented the experiences of seven high

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students." *Id.* at 55.

180. *Id.* For a more detailed description of the participants in the study, see *id.* at 56–58.

181. *Id.* at 56.

182. *See id.* at 58–62.

183. *Id.* at 108 (internal quotation marks omitted). The study did not include transgender students as a focus.

184. *Id.*

185. *Id.* at 109.

186. One SSGLSP staff member observed:

> [W]hen you look at the literature around violence prevention and suicide prevention one thing that stands out is how problematic it is when kids don't have connection within their lives. So, one key thing that a gay/straight alliance does that contributes to violence prevention and suicide prevention would be to provide kids with connection.

Id.

187. Another SSGLSP staff member concluded that "through GSAs people are beginning 'to understand that you can't use derogatory comments or make jokes that are derogatory because you might hurt somebody.'" *Id.* at 116.

188. *Id.* ("One of the ways that understanding affects school climate is that teachers are now expected to confront derogatory remarks.").

189. Camille Lee, *The Impact of Belonging to a Gay/Straight Alliance*, HIGH SCH. J., Feb.-Mar. 2002, at 13.

school students who were members of Utah's first high school GSA.[190] Findings were based on "interviews, documents (academic records, and media and audio reports), and the researchers' personal reflections."[191]

The study made several conclusions that support the claim that GSAs have a positive effect on LGBTQ students. First, the study concluded that GSA members "believed that their academic performance improved due to their involvement in the [club]."[192] Second, the study found that GSA members "believed that their involvement in the [organization] positively affected relationships with school administrators, teachers, family and peers."[193] Third, the study concluded that students "became more comfortable with being known as gay, lesbian, bisexual, or as a heterosexual ally through their involvement in the [GSA]."[194] Fourth, the study found, "Students felt safer and believed they were harassed less due to their involvement in the [GSA]."[195] Finally, the study concluded, "Involvement in the [GSA] gave students an avenue for feeling a 'sense of belonging to,' and 'identification with,' the school."[196] All of these conclusions not only support the argument that GSAs are beneficial to student members, but also show that there is "dramatic need for school based support groups . . . in all high schools" in order to support LGBTQ students.[197] This evidence directly counters the claims made by school districts that GSAs jeopardize the well-being of students and increase harassment and violence experienced by LGBTQ students.

Prominent LGBTQ advocacy organizations have also published reports concluding that GSAs have positive effects on LGBTQ student mental and physical safety. For instance, in 2007, GLSEN released a research report that documented the benefits stemming from the presence of GSAs in public schools.[198] The report found, "The presence of GSAs may help to make schools safer for LGBT students by sending a message

190. *Id.* at 16.
191. *Id.* at 15.
192. *Id.* at 16.
193. *Id.* at 18.
194. *Id.* at 19.
195. *Id.* at 21.
196. *Id.* at 23.
197. *Id.* at 25.
198. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, GAY-STRAIGHT ALLIANCES: CREATING SAFER SCHOOLS FOR LGBT STUDENTS AND THEIR ALLIES (2007), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/000/930-1.pdf. Other advocacy organizations, such as Human Rights Watch, have also reported on the benefits of GSAs and recommended that schools develop GSAs to provide LGBTQ students with support. *E.g.*, HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS, at IX (2001), *available at* http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm.

that biased language and harassment will not be tolerated."[199] Based on the study's findings, more GSAs in schools may make for "a more positive school environment" for LGBT students, thus making it less likely that LGBT students will miss school because they feel unsafe.[200] The report also concluded that LGBT students had a higher sense of belonging at school due to their involvement in GSAs.[201]

In addition to qualitative studies, in 2006, Carol Goodenow, Laura Szalacha, and Kim Westheimer performed one of the first comprehensive quantitative studies on the relationship between GSAs, support groups, perceived staff support, and student safety.[202] Although the empirical study only focused on lesbian, gay, and bisexual students, it confirmed the work of prior qualitative studies that "the presence of a GSA or other support group for LGB students was significantly associated with greater safety."[203] The researchers found, "Sexual minority youth in schools with such groups were less than half as likely as those in other schools to report dating violence, being threatened/injured at school, or skipping school due to fear . . . and were less than one third as likely to report making multiple past-year suicide attempts."[204] Consequently, the researchers concluded that their "hypothesis that sexual minority youth would report less victimization and suicidality if they attended schools with a GSA or similar group was supported."[205]

Each of these studies rejects the notion that GSAs threaten LGBTQ student safety. Rather, these studies provide support for the argument that GSAs are important safe spaces for LGBTQ students to discuss issues that affect them on a daily basis without experiencing harassment,

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199. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 198, at 1. *See also* KOSCIW & DIAZ, *supra* note 166, at 82 ("There were small but significant relationships between having a GSA and feeling of safety in school because of one's sexual orientation or gender expression. Students whose school had a GSA were less likely to feel unsafe because of their sexual orientation (60.8%) and their gender expression (38.2%) compared to those students without GSAs (67.5% and 43.4%, respectively).").

200. *See* GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 198, at 2. *See also* KOSCIW & DIAZ, *supra* note 166, at 82 ("About a third of students whose school has no GSA missed at least one day of school in the past month (32.0%) compared to a quarter of students whose school had a GSA (25.5%).").

201. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 198, at 2. *See also* KOSCIW & DIAZ, *supra* note 166, at 82 ("Students whose school had a GSA reported higher levels of school belonging than students whose school did not . . . .").

202. Carol Goodenow, Laura Szalacha & Kim Westheimer, *School Support Groups, Other School Factors, and the Safety of Sexual Minority Adolescents*, 43 PSYCHOL. SCHS. 573 (2006). The study constituted "one of the first population-based studies to move beyond documenting the risk experiences of sexual minority youth toward empirically investigating school factors that might mitigate those risks." *Id.* at 583.

203. *Id.* at 580.

204. *Id.*

205. *Id.* at 583.

discrimination, or bias.

2. *Case-Specific Facts Establishing a Connection Between GSAs and LGBTQ Student Safety*

Even if a school district cannot present actual evidence of LGBTQ student harassment at a particular school, under a reasonableness standard, it could still ban a GSA's formation by merely asserting a potential link between the organization's formation and increases in harassment and violence.

The court's analysis in *Caudillo ex rel. Caudillo v. Lubbock Independent School District* exemplifies the lack of fact-specific evidentiary review when a deferential reasonableness standard is applied.[206] The school officials in *Caudillo* based their decision to prohibit the GSA in part on anonymous phone calls expressing concern for LGBTQ students—in fact, this is the only evidence the court's opinion pointed to in order to justify the school district's decision to prohibit the GSA on the grounds of student safety.[207] The *Caudillo* court deferred to the district's judgment that a GSA would jeopardize the safety of LGBTQ students, and, based on this sole piece of evidence, upheld the GSA prohibition. Without any examination of the credibility of the anonymous phone calls, it is difficult to believe that this would be sufficient evidence to justify banning a GSA out of fear for LGBTQ student safety if the school district were held to a more stringent standard.

In fact, after applying the *Tinker* rule, at least one district court has refused to defer to a school district's judgments about student safety to limit student expression on the basis of unsubstantiated phone calls. In *Mardis v. Hannibal Public School District #60*, a student was suspended for ten days after sending e-mails to another student that purportedly threatened other students.[208] The court refused to dismiss the student's First Amendment claim on summary judgment because the school district's proffered evidence was insufficient for the court to determine that, as a matter of law, the threats would have created a "substantial" disruption, as required by the *Tinker* standard.[209] The court noted that the only evidence proffered by the school district to punish the student was its own "self-supporting claims" and its unsubstantiated allegations that the district received numerous phone calls from parents, students, and

206. *See supra* note 161 and accompanying text.

207. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 569–70 (N.D. Tex. 2004).

208. Mardis v. Hannibal Pub. Sch. Dist. #60, No. 2:08CV63, 2009 WL 1140037, at *1 (E.D. Mo. Apr. 28, 2009).

209. *Id.* at *4.

media.[210]

Other cases applying the *Tinker* standard to student speech prohibitions also support the notion that incorporating the *Tinker* standard into the EAA safe harbor exceptions would create stronger protections against pretextual discrimination by forcing schools to present convincing evidence that GSAs would increase student harassment and violence. *Tinker*'s more stringent standard may especially safeguard GSAs when school districts present no, or very limited, evidence of actual harassment or violence against LGBTQ students. For instance, in *Gillman v. School Board*, a student filed suit after the school prohibited her and other students from wearing or displaying t-shirts or other items with pro-gay rights slogans or symbols.[211] In concluding that the students' expression was protected under the *Tinker* standard, the court relied on the fact that the school district had not presented evidence that students had been harassed on the basis of their sexual orientation; in fact, the principal of the school "testified that harassment of homosexual students ha[d] generally not been a problem . . . and that the school [was] considered to be safe and orderly."[212] Consequently, the court held that school district did not meet the *Tinker* standard because evidence of disruption was "speculative, theoretical, and de minimis."[213]

One district court, in *Bowler v. Town of Hudson*, refused to defer to a school district's assessment of the safety risks associated with the formation of a conservative student group under the *Tinker* rule, even though the student group was unpopular at school and the content of the group's advertisements was potentially offensive to students.[214] Students formed the conservative group because they felt that "fellow students at [the school] were prejudiced against conservative political views, and that the school lacked a forum for the expression of their beliefs."[215] In advertising the group, the students mounted posters that contained information about a national network of similar conservative groups and links to web sites which contained videos of violent and brutal hostage beheadings in Iraq and Afghanistan.[216] At least two unnamed teachers expressed concern that the group would "spread hate around the school, promote violence, be anti-gay and cause an uprising."[217] Despite acknowledging that the videos could be psychologically troubling to

210. *Id.*
211. Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008).
212. *Id.* at 1372–73.
213. *Id.* at 1373–74 (internal quotation marks omitted).
214. Bowler v. Town of Hudson, 514 F. Supp. 2d 168 (D. Mass. 2007).
215. *Id.* at 172.
216. *Id.* at 171.
217. *Id.* at 173.

students, even to the point of necessitating counseling for affected students, the court found that the evidence in the record did not give rise to a reasonable forecast that the expression would cause a substantial school disruption.[218] The court also noted that the school district had not presented evidence of a specific history of antagonism between conservative and nonconservative students.[219]

This is not to say that courts will always protect student speech after applying the *Tinker* rule. Many courts have found in favor of school districts, especially in the context of limiting racially charged speech or displays of the Confederate flag.[220] These courts, however, have not provided school districts with unfettered discretion to limit any speech that it finds offensive. Rather, these courts have upheld student speech prohibitions based on concrete evidence that reasonably supported the risk of substantial school disruptions.

In *B.W.A. v. Farmington R-7 School District*, the Eighth Circuit affirmed a school district's prohibition on student clothing depicting the Confederate flag after applying the *Tinker* rule.[221] The students relied on *Tinker* to argue that the school district illegitimately attempted to ban its display of the Confederate flag solely based on its offensiveness.[222] The Eighth Circuit disagreed and outlined specific evidence of race-related incidents, both in and out of school, supporting the school district's

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218. *Id.* at 178.

219. *Id.*

220. *See, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734 (8th Cir. 2009) (upholding school district's prohibition of Confederate flag based on evidence of race-related altercations at school); Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008) (permitting school district's prohibition on Confederate flag display based on documented racial violence at school); Scott v. Sch. Bd., 324 F.3d 1246 (11th Cir. 2003) (upholding prohibition of display of Confederate flag under *Tinker* in light of apparently racially-related school fights); LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001) (affirming school's decision to expel student after he showed a poem filled with imagery of violence and death to a teacher and evidence supported school's contention that the poem could reasonably give rise to a substantial disruption at school); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) (upholding prohibition of display of Confederate flag under *Tinker* after the school district presented ample evidence that display would cause a substantial disruption at school); DeFabio v. E. Hampton Union Free Sch. Dist., 658 F. Supp. 2d 461 (E.D.N.Y. 2009) (finding school district did not violate *Tinker* by expelling a high school student and refusing to allow him to communicate prepared statement about racially insensitive comment rumored to be uttered by him when there was overwhelming evidence in the factual record that his safety would be at risk if he returned to school); Boim *ex rel.* Boim v. Fulton County Sch. Dist., Nos. Civ.A.1:05CV2836, Civ.A.1:05CV3219, 2006 WL 2189733 (N.D. Ga. Aug. 1, 2006) (affirming under *Tinker* school district's suspension of student after a teacher discovered the student had written a story in the student's notebook about shooting her teacher and passed the story to another student), *aff'd*, 494 F.3d 978 (11th Cir. 2007).

221. *B.W.A.*, 554 F.3d 734.

222. *Id.* at 739.

argument that display of the Confederate flag may reasonably create a substantial disruption at school.[223]

Similarly, in *Barr v. Lafon*, the Sixth Circuit Court of Appeals affirmed a school district's prohibition of the Confederate flag after applying the *Tinker* rule.[224] In its analysis, the Sixth Circuit referenced extensive evidence of racial violence, threats, and tensions at the school.[225] The school also excerpted quotes from numerous students and school administrators supporting the notion that display of the Confederate flag may reasonably create a disturbance at school.[226] The court distinguished the facts of *Tinker* based on the compelling evidence of racial tension in the factual record.[227]

B.W.A. and *Barr* exemplify the balance *Tinker* struck between protecting student speech and permitting school districts to limit speech in instances when doing so is necessary to protect student safety and welfare. Applying the *Tinker* standard does not eliminate all judicial deference to school districts' judgments about student safety risks. Since *Tinker* does not require school districts to wait for an actual disruption to occur, courts may still defer to school districts' judgments that speech may reasonably create a substantial disruption at school if salient evidence in the record supports this assumption. The nature of this deference, however, is very different from the extreme and blanket deference that is being afforded to school districts by courts that incorporate a reasonableness standard into the EAA's exceptions. The *Tinker* standard places the burden on school districts to proffer evidence that supports the notion that student expression may cause a substantial disruption at school and also requires judges to justify their decisions to prohibit student expression based on specific evidence in the factual record. These requirements help to shield students who wish to form GSAs from pretextual discrimination.

B. Tinker *Repudiates Limiting Student Expression Based on a Heckler's Veto*

Incorporating a deferential reasonableness standard into the EAA

223. *Id.* The court pointed to evidence of several verbal and physical race-based altercations, including one instance when "a white student urinat[ed] on a black student, causing the black student to withdraw from the District." *Id.*

224. *Barr*, 538 F.3d 554.

225. *Id.* at 565–67. This evidence included "race-related physical fights," a complaint filed with the federal Office of Civil Rights, racially derogatory graffiti at the school, "hit lists" against named students, and "a school 'lockdown' . . . because of a breakdown in student discipline and the threat of race-related violence," among other incidents. *Id.* at 566–67.

226. *Id.* at 565–66.

227. *Id.* at 566–67.

safe harbor exceptions permits schools to prohibit GSAs merely to avoid potential disruptive responses from students and community members who oppose them—essentially giving effect to a heckler's veto. A vast majority of opposition to GSAs is rooted in discriminatory conceptions of sexual orientation and gender identity held by other students, parents, school administrators, and community members. Giving effect to a heckler's veto in cases involving GSAs legitimizes and perpetuates private discriminatory beliefs.

In *Terminiello v. Chicago*, the Supreme Court rejected limiting the political expression of an adult protester on the basis of a heckler's veto.[228] In *Tinker*, the Supreme Court extended *Terminiello*'s logic to reject a heckler's veto in the student speech context.[229] The incorporation of the *Tinker* standard into the EAA safe harbor exceptions would shield GSAs from being prohibited merely because other students, community members, or parents may react disruptively to their formations or oppose them because of prejudice.

In *Terminiello*, the petitioner delivered a controversial speech in an auditorium that was filled to capacity, with over 800 persons present.[230] Outside of the auditorium, a crowd of about 1000 protesters gathered.[231] The petitioner criticized "the conduct of the protesting crowd and vigorously, if not viciously, criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."[232] The district court found a "breach of the peace" in activity that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or [interferes with] the enjoyment of peace and quiet by arousing alarm."[233]

The Supreme Court found that the charge violated the petitioner's right to free expression guaranteed by the First Amendment. The Court held that officials could not punish the speaker for disorderly conduct arising from a disruption that occurred in response to the speaker's message.[234] The Court's reasoning affirmed the importance of the free exchange of ideas and the necessity of disagreement among ideas.[235]

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228. Terminiello v. Chicago, 337 U.S. 1 (1949).

229. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (finding that the Constitution does not permit prohibiting speech merely because it may lead to disagreement, but rather "says we must take [the] risk" that controversial speech will cause a disturbance).

230. *Terminiello*, 337 U.S. at 2–3.

231. *Id.* at 3.

232. *Id.*

233. *Id.*

234. *Id.* at 5.

235. *Id.* at 4. *See also* Cheryl A. Leanza, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1309 (2007) (identifying *Terminiello* as

In *Tinker*, the Court affirmed the principle that the government may not punish student speakers merely because their speech has the potential to invite disagreement. The school district in *Tinker* contended that the black armbands worn by students in protest of the Vietnam War could result in disruption at school.[236] The Court rejected this justification[237] and further held that "for the State in the person of school officials to justify a prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[238] Based on this notion, the Court ruled that the prohibition of student expression must be grounded in the disruptive potential of students who actually participate in the expression and not the students who respond to it.[239]

Federal district courts have interpreted and extended the heckler's veto rule developed in *Terminiello* and *Tinker* to prohibit school districts from banning GSAs simply because of community protest or disagreement among students over the organization's formation. For instance, the district court in *Franklin Central Gay/Straight Alliance v. Franklin Township Community School Corp.* relied on *Tinker* in suggesting that the school district could not prevent a GSA from meeting on school grounds when the reasons for prohibiting it were not rooted in potential disruptive violence from students who actually participated in the organization.[240]

Boyd County High School Gay Straight Alliance v. Board of Education[241] is another salient example of the rejection of a heckler's veto in GSA litigation. In *Boyd*, the GSA sought "to provide students with a safe haven to talk about anti-gay harassment and to work together to promote tolerance, understanding and acceptance of one another regardless of sexual orientation."[242] The evidentiary record contained documented examples of anti-gay harassment at the high school. In fact, "[o]ne student dropped out of [the high school] because of harassment based on sexual orientation and another student dropped out because of

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one of the "[d]ecisions upholding the state's obligation to protect controversial speakers[, in which the Court] fully embrace[s] the goal of developing a rich marketplace of ideas").

236. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

237. *See supra* note 39 and accompanying text.

238. *Tinker*, 393 U.S. at 509.

239. *See id.* at 508 ("The school officials . . . sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.").

240. *See* Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp., No. IP01-1518, 2002 WL 32097530, at *20 (S.D. Ind. Aug. 30, 2002).

241. Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667 (E.D. Ky. 2003).

242. *Id.* at 670.

both anti-gay harassment at school as well as problems at home."[243] After members of the student body learned that students were trying to form a GSA, some students came to school wearing shirts that said, "Adam and Eve, not Adam and Steve" or "I'm straight."[244] Controversy ensued in the hallways for close to one month.[245]

At the beginning of the 2002-2003 academic year, the school administration received and accepted applications from twenty-one new student organizations.[246] The GSA was the only application rejected.[247] Following the denial of the GSA's application, the ACLU wrote a letter to the school administration on behalf of the GSA, reminding the administration of its legal duties under the EAA.[248] In response, the board of education approved the GSA's application at the next board meeting.[249] Community members present at the meeting were vocally hostile and upset over the administration's decision to approve the GSA.[250]

Two days after the board approved the GSA, a group of approximately one hundred students congregated outside the school in the morning before classes started to protest the group's formation.[251] None of the GSA members spoke to any protestor or engaged in a counter-demonstration.[252] When it was time for classes to begin, the principal and assistant principal told the protesters to go to class or move to the parking lot to continue the protest.[253] Classes proceeded as scheduled that day without any disruptions.[254] One week later, approximately one half of the student body was absent from the school.[255] However, neither the original protest nor the school boycott "prevented teachers from teaching, or prevented students who came to school from learning."[256]

In response to increased community outrage over the GSA, the school district decided to suspend the activities of all clubs, whether curricular or noncurricular, for the remainder of the academic year.[257] Despite its decision, the school district continued to allow many student organizations

243. *Id.* at 671.
244. *Id.*
245. *Id.*
246. *Id.* at 672.
247. *Id.*
248. *Id.*
249. *Id.* at 673.
250. *Id.*
251. *Id.* at 674.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 675.

to meet on school grounds during noninstructional time.[258] The GSA, however, was consistently refused access to the school's facilities and resources.[259] As a result, members of the GSA filed suit, alleging that the school district's actions violated the EAA.[260]

After holding that the EAA was triggered because the school district allowed other student groups to continue to meet after its alleged ban, the court addressed whether the school district could invoke any of the EAA safe harbor exceptions.[261] The court began its analysis by acknowledging that disapproval over the GSA's formation "caused . . . uproar within the local community" and that many parents were concerned about the safety of students.[262] Despite these considerations, the court held that the school district could not ban the GSA under any of the EAA safe harbor exceptions.[263]

The court relied on the Second Circuit's approach of incorporating the *Tinker* standard into the EAA safe harbor exceptions.[264] The court then revisited the Supreme Court's analysis in *Tinker*, concluding that the Court refused "to allow a 'heckler's veto' to justify suppression of student speech" and that "the Court in *Tinker* . . . concluded that the protesting students' speech was protected because it was 'entirely divorced from actually or potentially disruptive conduct *by those participating in* [*the protest*].'"[265]

The *Boyd* court then applied the *Tinker* standard to the evidentiary record and held that, despite the community uproar and school protests, the school was required to allow the GSA to form under the EAA.[266] The evidentiary record showed that, with the exception of one incident, all of the disturbances were responsive incidents to the GSA caused by students who were not GSA members or supporters.[267] During these disruptions, the "regularly scheduled classroom activities were not altered in any way, teachers were not prevented from teaching, and students who attended

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258. *Id.* at 676.

259. *Id.*

260. *Id.* at 680. The students also alleged violations of the First Amendment and a state educational statute.

261. *Id.* at 688–91.

262. *Id.* at 688.

263. *See id.* at 690–91.

264. *Id.* at 689. For a discussion of the approach adopted by the Second Circuit in *Boyd*, see *supra* Part III.A.

265. *Boyd*, 258 F. Supp. 2d at 689 (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 505–06 (1969)) (emphasis added).

266. *Id.* at 690–91.

267. *Id.* at 691. The only incident involving a GSA member or supporter occurred when "a student left a particular classroom because of supposed pressure from GSA supporters." *Id.* at 675.

school were not prevented from learning."[268] Moreover, the meetings themselves presented no disruption to school order.[269]

The extension of *Tinker*'s rejection of the heckler's veto to GSA litigation reflects an important distinction that was advocated in the EAA's legislative history: the difference between inherently disruptive student speech and student speech that reflects a particular viewpoint but may invite disruption from others.[270] GSAs are not inherently disruptive student organizations. As the federal district court recognized in *Gay-Straight Alliance of Okeechobee High School v. School Board*, GSAs often seek to "promot[e] tolerance and equality among students, regardless of sexual orientation and/or gender identities."[271] These student groups often list awareness building, education, and prejudice and harassment prevention among their stated goals.[272] In other words, rather than seeking to disrupt the orderly conduct of school activities, GSAs seek to ensure that all students are able to participate safely in school activities. The quantitative and qualitative studies presented in Part IV.A.1, *supra*, further support the notion that GSAs foster LGBTQ student safety.

Given that the climate toward LGBTQ people was even more hostile during the early 1980s than it is now,[273] one would assume that any

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268. *Id.* at 691.

269. *Id.*

270. *See* 130 CONG. REC. 20,941 (1984) (statement of Rep. Goodling) (observing that the EAA will not require that schools grant equal access to hate groups).

271. *See* Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 483 F. Supp. 2d 1224, 1230 (S.D. Fla. 2007) (internal quotation marks omitted).

272. *See, e.g., id.*

273. Legal protections for LGBT people on the local, state, and federal levels were virtually nonexistent when the EAA was enacted in 1984. The 1990s, however, were characterized by a surge of civil rights legislation at the local and state levels. CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 140 (2002). *See also* Hastings Wyman, *New GLBT Political and Policy Developments: Five Years of Progress*, *in* HANDBOOK OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER ADMINISTRATION AND POLICY 91, 112–15 (Wallace Swan ed., 2004) (detailing legislation and policies surrounding civil unions and same-sex marriages enacted during the 1990s and early 2000s). Despite significant gains in public support for gay rights, current federal law does not recognize same-sex relationships or protect LGBTQ people from discrimination in public accommodations, housing, or employment. *See* 1 U.S.C. § 7 (2006) (defining "marriage" under federal law as "only a legal union between one man and one woman as husband and wife"); 28 U.S.C. § 1738C (2006) (allowing states to refuse to recognize same-sex relationships that are recognized as marriages under another state's laws); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 217–18 (2009) (noting that current federal law does not recognize employment discrimination claims on the basis of sexual orientation); Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 569–70 (2009) ("It is legally permissible in the majority of states and under federal law to discriminate on the basis of sexual orientation or gender identity in employment, housing, and in other important contexts.").

mention of GSAs in the EAA's legislative history would discuss risks to LGBTQ student safety posed by GSAs if such risks existed. The EAA's legislative history, however, makes no mention of potential violent disruptions that would occur in response to GSA formations.[274] Rather, GSAs were described as inherently disruptive only to the extent they promoted illegal behavior. The floor debates of the EAA reveal that congressional representatives were predominately concerned with whether GSAs would promote illegal activity where state anti-sodomy laws were in place. Senator Hatfield, a proponent of the § 4071(f) amendment, stated that in states with anti-sodomy laws, GSAs could be prohibited under the EAA's safe harbor provisions, because a GSA would constitute an "outside organization that is advocating or establishing some kind of purpose to violate" those state laws.[275] When he was questioned about whether GSAs could be prohibited in states that do not have anti-sodomy laws, he responded, "I would assume, if they want to talk about political rights on sexual choice or sexual preference, that political right would be one thing, but to carry on an activity that is clearly in violation of law would, of course, be out of bounds."[276]

The argument that GSAs could be banned because they might promote illegal activities because of state sodomy laws has lost most of its force after *Lawrence v. Texas*,[277] which found that criminal prohibitions of same-sex sexual activity were unconstitutional infringements on the right to liberty. As a result, GSAs qualify as a type of non-disruptive political organization, instead of as inherently disruptive organizations encouraging criminal conduct. Consequently, the legislative history of the EAA supports the notion that GSAs deserve protection under the EAA.

This distinction between inherently disruptive student speech and

274. *See generally EAA Hearings*, *supra* note 44; 130 CONG. REC. 19,211–49, 20,934–51 (1984).

275. 130 CONG. REC. 19,224 (1984) (statement of Sen. Hatfield).

276. *Id.*

277. Lawrence v. Texas, 539 U.S. 558 (2003). Of course, many states have laws prohibiting sexual activities involving minors, which have been upheld under the Constitution. *See, e.g.*, Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550, 558, 566 & n.9 (N.D. Tex. 2004) (observing that Texas law criminalized sexual conduct involving minors). Thus, to the extent that sexual activity between minors may still be criminalized, a school district could still seek to prohibit GSAs by arguing that a GSA would promote criminal activity among the students. To avoid such an argument, the GSA would have to show that its activities would not include a promotion of criminal activity—that is, that the GSA is not encouraging minors to engage in sexual activities—but rather, as is most often the case, that the GSA seeks to promote tolerance, understanding, and safety. In addition, First Amendment precedent recognizes that discussions of criminal activity cannot be prohibited unless such discussions are "directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

student speech that may invite disruption from others may also be an important difference between GSA cases and the line of cases in which courts affirmed prohibitions of Confederate flag displays after applying *Tinker*. For instance, in *Scott v. School Board*, the Eleventh Circuit Court of Appeals upheld a school's prohibition of Confederate flag displays after "school officials presented evidence of racial tensions existing at the school and provided testimony regarding fights which appeared to be racially based in the months leading up to the actions underlying [the] case."[278] The Eleventh Circuit, however, also alluded to the fact that the Confederate flag may be "innately offensive" and "perceived as offensive by so many people."[279] Consequently, the court noted that "one only needs to consult the evening news to understand the concern school administrators had regarding the disruption, hurt feelings, emotional trauma and outright violence which the display of the symbols involved in this case could provoke."[280] Based on this statement, the court seems to have reasoned that the inherently offensive nature of the Confederate flag increases the likelihood that its display would inspire a substantial disruption at school.

The essential feature of GSAs, however, is to provide a safe space free from harassment, violence, or bias for LGBTQ students and allies; the expression is not inherently disruptive. Therefore, a fundamental difference exists between the expression involved in Confederate flag displays and GSA meetings. Permitting school districts to prohibit GSAs under the EAA because of responsive community and student disagreement limits student expression on the basis of a heckler's veto. First Amendment precedent repudiates a heckler's veto as a legitimate reason for banning expression, even in the public school setting. The incorporation of the *Tinker* standard into the EAA safe harbor exceptions would prevent this illegitimate prohibition on student speech. If the *Tinker* standard is incorporated into these exceptions, then school districts cannot prohibit GSAs merely because students, parents, community members, or school administrators may react disruptively to their formations or oppose them for discriminatory reasons.

CONCLUSION

This article has argued that if a reasonableness standard governs the EAA safe harbor exceptions, then the statute, which was originally designed to be a measure of equality, risks turning into a tool of discrimination. Rather than protecting LGBTQ student organizations, the

278. Scott v. Sch. Bd., 324 F.3d 1246, 1249 (11th Cir. 2003).
279. *Id.* at 1248.
280. *Id.* at 1249.

EAA safe harbor provisions could be used to legitimize private discrimination and further marginalize LGBTQ students. Only through the incorporation of the *Tinker* standard into the EAA safe harbor exceptions can courts prevent the exact discrimination that the EAA was designed to prohibit from becoming a way to evade its intended purpose.

Incorporating the *Tinker* standard into the § 4071(f) exceptions does not mean that school districts must recognize GSAs under all circumstances. Rather, incorporation means that school districts have the high burden of showing that GSAs will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" in order for schools to prohibit them.[281] A few principles can be derived from my analysis to clarify how the incorporation of this standard into the § 4071(f) exceptions operates in regard to GSA formations.

First, school districts may still prohibit GSAs when the organizations' specific actions, as opposed to their general purpose or mission, cause a material or substantial disruption to school order or threaten the safety of students. For instance, the school district in *Caudillo* could have prohibited the GSA from publicizing itself under this standard because the group attempted to distribute fliers with links to websites containing sexually explicit content.[282] The sexually explicit content of the fliers, as opposed to disagreement with LGBTQ identities, could justify prohibiting the GSA or limiting its actions.

Second, school districts should not be able to prohibit GSAs merely because their formations invite potential disruptive responses from other students, parents, community members, or school administrators. Prohibiting GSAs on this basis gives effect to private discrimination by legitimizing a heckler's veto. The incorporation of First Amendment precedent into the § 4071(f) exceptions requires that GSAs, and not their opponents, engage or threaten to engage in disruptive activity before they may be banned.

The only exception to this principle is if school districts present concrete evidence that the formation of a GSA will increase student harassment and violence to the extent that the organization's meetings create a substantial disruption at school. School districts cannot rely on general statistics on the harassment and violence experienced by LGBTQ students to argue that GSAs will increase harassment and violence at a particular school. School districts must present actual incidents of LGBTQ harassment and violence to establish a history of harassment and violence

281. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

282. Caudillo *ex rel.* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550 (N.D. Tex. 2004).

at their school. School districts must also present evidence that they will not be able to control any increases in harassment and violence through normal disciplinary measures. Moreover, if students present evidence of the benefits of GSAs during litigation, then school districts should be required to show that the potential threat to LGBTQ student safety from the GSAs formation would substantially outweigh the organization's probable benefit to LGBTQ students' mental and physical safety.