NO. 11-17858

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

JOHN DARIANO, **DIANNA DARIANO**, ON BEHALF OF THEIR MINOR CHILD, **M.D.**; **KURT FAGERSTROM**, **JULIE ANN FAGERSTROM**, ON BEHALF OF THEIR MINOR CHILD, **D.M.**; **KENDALL JONES**, AND **JOY JONES**, ON BEHALF OF THEIR MINOR CHILD, **D.G.**,

Plaintiffs-Appellants,

V.

MORGAN HILL UNIFIED SCHOOL DISTRICT; **NICK BODEN**, IN HIS OFFICIAL CAPACITY AS PRINCIPAL, LIVE OAK HIGH SCHOOL; AND **MIGUEL RODRIGUEZ**, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS ASSISTANT PRINCIPAL, LIVE OAK HIGH SCHOOL,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE JAMES WARE
Case No. CV10-02745 JW

PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

A. Purpose for Rehearing and Rehearing En Banc.

In counsel's judgment, a rehearing is necessary because the panel overlooked material points of fact and law, including a recent Circuit decision involving student speech. *See Frudden v. Pilling*, No. 12-15403, 2014 U.S. App. LEXIS 2832 (9th Cir. Feb. 14, 2014).[1] More fundamentally, the panel's decision conflicts with an existing Supreme Court opinion (*Tinker*), as well as Supreme Court and Circuit precedent regarding the "heckler's veto," which is an additional point of law that the panel failed to address. In sum, this case involves questions of exceptional importance regarding the application of the First and Fourteenth Amendments in a public school context. Therefore, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions. *See* Fed. R. App. P. 35 & 40; 9th Cir. R. 35-1.

B. Question Presented and the Panel's Erroneous Conclusion.

This case presents the question of whether the First Amendment permits public school officials to ban the silent and passive display of the American flag on a student's clothing because some students might take offense.[2] In *Tinker v. Des*

[1] On February 17, 2004, Plaintiffs filed a letter of supplemental authority (DktEntry: 35), bringing to the panel's attention the court's recent decision in *Frudden*. However, the panel failed to address the decision in its opinion.

[2] The panel's decision holds that school officials reasonably "anticipated" that the wearing of clothing depicting the American flag—the symbol of our nation—on

Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), the Supreme Court answered that question in the negative. The panel, however, reached a different conclusion—a conclusion that not only violates the central holding of *Tinker*, but also impermissibly incorporates into the First Amendment a "heckler's veto," contrary to controlling precedent, including *Tinker* itself. *See, e.g., Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) (rejecting "a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content" in a case involving speech in a public school context).

Additionally, as noted above, the panel's decision is at odds with a recent Circuit decision involving student speech—a decision that the panel did not address. *See Frudden*, 2014 U.S. App. LEXIS 2832 at *21 (holding that a content-

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May 5, 2010 (Cinco de May) would cause "violence or substantial disruption of or material interference with school activities." (Op. at 4). The panel went so far as to compare the wearing of American flag images with the wearing of the Confederate flag—an arguable symbol of racism—and to liken relations between "American" and "Mexican" youth in an American school—a distinction not clearly apparent on this record in that it is unclear whether the students referred to as "Mexicans" were citizens of Mexico or of the United States—with racial tensions between white and black students. (*See, e.g.*, Op. at 13 [citing cases banning the Confederate flag on student clothing]; Op. at 11 ["The events of 2010 . . . pitted racial or ethnic groups against each other."]). Of course, Plaintiffs had a constitutional right to wear shirts bearing the American flag on their public school campus, even on Cinco de Mayo or any other holiday and regardless of the expression of ethnic pride asserted by people aligned with another culture. The obvious and odious premise underlining the panel's opinion is that the American flag is a symbol of racial animus—an inherently flawed premise.

and viewpoint-based restriction on student speech must survive strict scrutiny review).

Indeed, the panel's decision affirms a dangerous lesson by rewarding student resort to disruption rather than reason as the default means of resolving disputes. And this point is highlighted by the panel's rejection of Plaintiffs' equal protection claim:

> As the district court noted, the students offered no evidence "demonstrating that students wearing the colors of the Mexican flag were targeted for violence." The students offered no evidence that students at a similar risk of danger were treated differently, and therefore no evidence of impermissible viewpoint discrimination.

(Op. at 14).

Consequently, because the students wearing the colors of the Mexican flag were not "targeted for violence," they were permitted to express their message. Yet, because school officials perceived that those who oppose the message conveyed by Plaintiffs' American flag clothing would adversely react to the message, Plaintiffs were not permitted to speak. This not only creates perverse incentives for student hecklers, it effectively turns the First Amendment on its head. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citations omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock

principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

As this court observed in *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003), "It is far better to teach students about the First Amendment [and] why we tolerate divergent views. The school's proper response is to educate the audience rather than squelch the speaker." (internal punctuation, quotations, and citation omitted).

SUMMARY OF FACTS[3]

On May 5, 2010, Plaintiffs and two other students "wore American flag shirts to school."[4] (Op. at 5). On this particular day, however, school officials approved the on-campus celebration of a holiday known as Cinco de Mayo—a celebration that was co-sponsored by M.E.Ch.A, a school-sanctioned student group that rejects assimilation by Mexicans into American culture and promotes a pro-Mexican culture and heritage.[5] The students participating in the Cinco de Mayo

[3] Because this case is before the court on the district court's granting of summary judgment in favor of Defendants, the panel was required to draw all reasonable inferences supported by the evidence in favor of Plaintiffs. *See Porter v. Cal. Dept. of Corrections*, 383 F.3d 1018, 1024 (9th Cir. 2004).

[4] (R-1; ER-251, 260-66; Vol. III [Compl. at ¶ 14, Exs. 1, 2, 3]; R-37; ER-463; Vol. III [Answer at ¶ 14]).

[5] (R-52; ER-387-89; Vol. III [Boden Dep. at 25-27 at Ex. 4]; R-52; ER-331-33; Vol. III [Rodriguez Dep. at 54-56 at Ex. 1]; R-52; ER-357-58; Vol. III [Rodriguez Dep. at 159-60 at Ex. 1]; *see also* R-52; ER-360-75; Vol. III [Dep. Ex. 15 at Ex. 2];

celebration were permitted to wear clothing that had the colors of the Mexican flag.[6]

Because Plaintiffs were wearing their American flag shirts to school on Cinco de Mayo, "Boden directed Rodriguez to have the students either turn their shirts inside out or take them off." (Op. at 6). Defendants were allegedly responding to a few, vague comments from a "Caucasian student," who told Rodriguez that "there might be some issues," a female student, who told Rodriguez that "there might be problems," and "[a] group of Mexican students" who asked Rodriguez why Plaintiffs "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"[7] (Op. at 5-6).

Upon refusing to abide by the directive to dishonor the American flag, the students were instructed to go to the principal's office where a subsequent meeting was held with the students, their parents, Defendant Boden, and Defendant Rodriguez. (*See infra* nn. 8-12). During this meeting, Defendants told Plaintiffs that their message was objectionable because "this is their [*i.e.*, Mexicans students'] day," referring to Cinco De Mayo, "an important day in [Mexican]

R-52; ER-377; Vol. III [Club Charter / Constitution at Ex. 3]).

[6] (R-52; ER-406; Vol. III [Boden Dep. at 57 at Ex. 4 ("Q: Was there any prohibition on any of these dancers that were engaged in these Cinco de Mayo activities from wearing any clothing that had colors of the Mexican flag? A: No.")].

[7](R-52; ER-392, 402-03; Vol. III [Boden Dep. at 33, 50-51 at Ex. 4]; R-52; ER-330, 333-35, 343-44; Vol. III [Rodriguez Dep. at 50, 56, 57, 59, 90-91 at Ex.1]).

culture."[8] According to Defendants, they "wanted to make sure also that there was an understanding of the importance, the cultural significance of Cinco De May to our Hispanic students."[9] Defendant Rodriguez testified: "[T]he fact that it was Cinco de Mayo that day, I asked them, 'Why today out of all days? Why today?'"[10]

After being in the principal's office for over 90 minutes, Plaintiff M.D. and the two non-plaintiff students were permitted to return to class because the depictions on their clothing were not *clearly* American flags[11] (further demonstrating that the speech restriction was based on the content *and* the viewpoint of Plaintiffs' message). Defendant Rodriguez warned the returning students to be "respectful" of the Cinco De Mayo activities that were to occur during lunch that day.[12] (*N.b.*: The panel failed to address any of these facts related to the office meeting—facts which demonstrate that Defendants' safety concerns were a pretext for their content- and viewpoint-based restriction on Plaintiffs' speech.)

Because the depiction of the American flag on the clothing worn by

[8] (R-52; ER-400; Vol. III [Boden Dep. at 47 at Ex. 4]).
[9] (R-52; ER-398; Vol. III [Boden Dep. at 45 at Ex. 4]).
[10] (R-52; ER-341-42; Vol. III [Rodriguez Dep. at 88-89 at Ex. 1]).
[11] (R-52; ER-401-02; Vol. III [Boden Dep. at 49-50 at Ex. 4]; R-52; ER-349-50; Vol. III [Rodriguez Dep. at 111-12 (admitting that "they were allowed to go back because the clothing that they wore was not explicitly American flags") at Ex. 1]; R-37; ER-464; Vol. III [Answer at ¶ 29]).
[12] (R-52; ER-350-351; Vol. III [Rodriguez Dep. at 112-13 at Ex. 1]).

Plaintiffs D.M. and D.G was "very, very large," "blatant and prominent," Defendant Boden directed them to change clothing, turn their shirts inside out, cover them up, or go home. (Op. at 7 ["The officials offered the remaining students the choice either to turn their shirts inside out or to go home for the day . . . ."]). Plaintiffs refused to change or remove their flag clothing. Accordingly, they were required to leave school with their parents.[13]

Prior to restricting Plaintiffs' speech, school officials had no information that Plaintiffs' silent and passive expression of opinion had caused any disruption at the school, even though the students had been on campus for over 3 hours and attended at least two classroom periods as well as homeroom. In fact, the school day "went as planned."[14]

Moreover, contrary to the panel's conclusion, (*see* Op. at 4-5), the events surrounding the 2009 Cinco de Mayo celebration do not support Defendants' censorship of the American flag. During this 2009 school-approved celebration, a group of "Hispanic" students "paraded around the campus with a Mexican flag" during lunch.[15] The students were confrontational, which caused approximately

[13] (R-52; ER-405; Vol. III [Boden Dep. at 55 at Ex. 4]; R-52; ER-353; Vol. III [Rodriguez Dep. at 120 at Ex. 1]).
[14] (R-52; ER-391-92, 407; Vol. III [Boden Dep. at 32-33; *see also* 59 (stating that the school day "went as planned") at Ex. 4]; R-52; ER-328-29; Vol. III [Rodriguez Dep. at 44-45; *see also* 84, 121-22 at Ex. 1]).
[15] (R-59; ER-288-89; Vol. III [Boden Dep. at 29-30 at Ex. 13]).

"[f]ive minutes" of commotion during the lunch period.[16] No student was disciplined as a result of this incident. No violence occurred as a result of this incident. No classes were canceled as a result of this incident. No classes were delayed or changed in any way as a result of this incident. In fact, the school day began and ended as normal.[17] Moreover, while testifying on behalf of the School District pursuant to Rule 30(b)(6), the Superintendent candidly admitted that he "can find no evidence that [the 2009 incident involving some Mexican students] was related to [the 2010 restriction on Plaintiffs' speech]."[18]

Indeed, despite the 2009 incident and Defendants' claims of racial tension between American and Mexican students, Defendant Boden approved the Cinco de Mayo activities for May 5, 2010,[19] thereby further undermining Defendants' claim that racial tension was a serious concern for the School District.

While Live Oak High School has experienced some gang activity, this activity involves rival *Mexican* gangs (*i.e.*, Surenos vs. Nortenos)—it does not involve Plaintiffs.[20] Moreover, neither the American flag nor its red, white, and blue color scheme is affiliated with any gangs at the school. Consequently, there

[16] (R-59; ER-289; Vol. III [Boden Dep. at 30 at Ex. 13]).
[17] (R-59; ER-289-90; Vol. III [Boden Dep. at 30-31 at Ex. 13]).
[18] (R-59; ER-281; Vol. III [Smith Dep. at 35 at Ex. 12]; R-59; ER-281-83; Vol. III [Smith Dep. at 35-37 at Ex. 12) ("I think what I said was I couldn't say with any certainty that one was causal of the other.")]).
[19] (R-52; ER-387-89; Vol. III [Boden Dep. at 25-27 at Ex. 4]).
[20] (*See* R-59; ER-294-95; Vol. III [Rodriguez Dep. at 61-62 at Ex. 14]).

is no *per se* restriction on wearing American flag clothing because of purported gang violence.[21] And there is *no* basis for asserting that the American flag is a symbol of racism, similar to claims made about the Confederate flag and the inferences made by the panel. (*See supra* n.2).

In sum, the evidence shows that Plaintiffs were discriminated against because they wore American flag shirts to school on May 5th (Cinco de Mayo) (*i.e.*, because of the content and viewpoint of their message). And lest there remains *any* doubt about this uncontroverted fact, Defendant Rodriguez removes it when he testified as follows:

> Q: Just so I'm clear, the five students that were brought from the quad area to your conference room, they were brought there *because every one of those students was wearing something that depicted the American flag; isn't that correct*?
> * * * *
> THE WITNESS: *Yes*.
> Q: *That was the reason why they were brought to the office, right*?
> A: *Yes*.

(ER-355-56 [Rodriguez Dep. at 125-26 at Ex. 1]).

ARGUMENT

I. The Panel's Decision Conflicts with Supreme Court and Circuit Precedent by Misconstruing *Tinker* and Incorporating into the First Amendment a "Heckler's Veto."

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), does not countenance the School District's restriction on the students' silent, passive

[21] (R-59; ER-286-87; Vol. III [Boden Dep. at 23-24 at Ex. 13]).

expression of opinion—rather, it *forbids* it. Contrary to the panel's decision, *Tinker* does not authorize school officials to restrict student speech apart from its current or forecasted disruption *due to the time, place or manner* of the student's speech activity.[22] As the Court affirmed in *Tinker*:

> Any word spoken, in class, in the lunchroom, or on 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*.

Tinker, 393 U.S. at 508 (emphasis added).

In fact, the Court in *Tinker* described the "problem posed by the present case" as follows: "The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or

[22] Plaintiffs' reading of *Tinker* is further supported by the Supreme Court's decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which relied upon *Tinker* as support for upholding a city's anti-noise ordinance that prohibited a person while on grounds adjacent to a building in which a school was in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session. *See id*. at 117 (stating that "[o]ur touchstone is *Tinker* . . . in which we considered the question of how to accommodate First Amendment rights with the 'special characteristics of the school environment'") (quoting *Tinker*, 393 U.S. at 506). As the Court stated, "[T]he crucial question is whether *the manner of expression* is basically incompatible with the normal activity of a particular place at a particular time." *Id*. at 116 (emphasis added). To emphasize its point, the Court compared on one hand permissible expressive conduct such as "quiet and peaceful" picketing, which would "no way disturb the normal functioning of the school," and on the other hand, impermissible conduct such as "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id*. at 119-20 (concluding that the ordinance "punishes only *conduct which disrupts or is about to disrupt normal school activities*" and that "*the ordinance gives no license to punish anyone because of what he is saying*") (emphasis added).

disturbance *on the part of petitioners*." *Id*. at 508 (emphasis added). As the Court noted, the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not an acceptable justification for censorship. Consequently, a regulation forbidding the discussion of the Vietnam conflict or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise would be unconstitutional "if it could not be justified by a showing that the *students' activities* would materially and substantially disrupt the work and discipline of the school." *Id*. at 513 (emphasis added). As the Court found, school officials had no reason "to anticipate that the *wearing of the armbands* would substantially interfere with the work of the school or impinge upon the rights of other students"—despite their "urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands." *Id*. at 510 (emphasis added). "But conduct by the student, in class or out of it, which for any reason—*whether it stems from time, place, or type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id*. at 513.

Like the armbands worn in *Tinker*, our Constitution does not permit public school officials to deny Plaintiffs' form of expression—the peaceful, passive, and silent expression of a pro-America message through the wearing of a shirt

depicting the American flag. *Tinker*, 393 U.S. at 505-06 (holding that the wearing of armbands by students was "closely akin to 'pure speech,' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

Indeed, there is *no* principled way to distinguish Plaintiffs' wearing of their American flag shirts to school on Cinco de Mayo with the *Tinker* plaintiffs' wearing of black armbands in protest of the Vietnam War—a contentious and predictably disputatious act on behalf of the *Tinker* students:

> These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, *our Constitution does not permit officials of the State to deny their form of expression*.

Tinker, 393 U.S. at 514 (emphasis added).

Moreover, one of the "bedrock First Amendment principles" that the panel's decision disregards (and, indeed, fails to mention) is that government officials may not "restrict speech based on listener reaction," even if the listeners are minors on a public school campus. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) ("There is . . . no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its

content."). This is known in First Amendment parlance as a "heckler's veto." *Id*. at 788, n.4; *Lewis v. Wilson*, 253 F3d 1077, 1082 (8th Cir. 2001) ("The [F]irst [A]mendment knows no heckler's veto.").

Here, there is no evidence that Plaintiffs did anything but engage in the silent, passive expression of a pro-America viewpoint on May 5, 2010, and any perceived negative response, reaction, or potential disruption was from those who opposed this viewpoint—*i.e.*, from the "hecklers." *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (holding that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Ctr. for Bio-Ethical Reform, Inc.*, 533 F.3d at 789 ("Whether prospectively, as in *Forsyth County*, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction.").

In the final analysis, there is no dispute that the *content* of Plaintiffs' speech and the *viewpoint* expressed by it are protected by the First Amendment. And the *manner* in which Plaintiffs engaged in their speech was nothing short of silent and peaceful (*i.e.*, it was not materially or substantially disruptive).[23] As the Court

[23] Contrary to the panel's decision, neither *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973), nor *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), supports Defendants' restriction on Plaintiffs' speech. (*See* Op. at 9-12). Indeed, *Karp* is properly viewed as a restriction on the *manner* of speech (staging a walkout with chanting and signs) that school officials reasonably believed would cause a material disruption to the learning environment at the school. Contrary to the present case, the evidence in *Karp* showed that there was in fact disruption

noted in *Tinker* (and similar to this case), "[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct *by those participating in it*." *Tinker*, 393 U.S. at 505 (emphasis added). In sum, *Tinker* does not permit Defendants' restriction on Plaintiffs' speech, and it compels a reversal of the panel's decision.

II. Circuit Precedent Requires Application of Strict Scrutiny to Defendants' Speech Restriction.

In light of this court's recent ruling in *Frudden v. Pilling*, No. 12-15403, 2014 U.S. App. LEXIS 2832 (9th Cir. Feb. 14, 2014), Defendants' content- and viewpoint-based restriction on Plaintiffs' speech must survive strict scrutiny, which it cannot.

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occurring as a result of the student's activity. *Id*. at 173 (noting that students "began chanting, and pushing and shoving"). There was no evidence in *Karp* that school officials were concerned with the content or viewpoint of the message expressed by the student (or the listener's reaction to the message), as in this case.

In *LaVine*, a high school junior was expelled for writing a poem for his English class containing violent imagery of him shooting his classmates. The student also divulged to his school counselor that he was having suicidal thoughts. At the time, school shootings, including the Columbine shooting, were attracting national attention. A Circuit panel observed that educators are granted "substantial deference as to what speech is appropriate," and that at the time the school officials decided to expel the student they had facts that "might reasonably have led them to forecast a substantial disruption of or material interference with school activities," as required by *Tinker*. That is, the school officials had information that it was the *speaker* who was likely to engage in disruptive conduct. *See LaVine*, 257 F.3d at 981.

In short, neither case involved any suggestion of a heckler's veto—the source of the potential disruption *was the speaker's activities* and not the potential response by listeners to the content and viewpoint of the speaker's message, as in this case.

In *Frudden*, the court reversed the district court's dismissal of a student free speech cause of action for failure to state a claim, concluding that a public school's mandatory uniform policy was a content- and viewpoint-based restriction on student speech under the First Amendment, thereby requiring strict scrutiny review. More specifically, the court held that a content- or viewpoint-based restriction on student speech (even "in light of the special characteristics of the school environment") must pass "the most exacting scrutiny" to survive a First Amendment challenge. *Id.* at *21 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994)). That is, a school district's restriction on student speech that is content or viewpoint based "must be 'a narrowly tailored means of serving a compelling state interest.'" *Frudden*, 2014 U.S. App. LEXIS 2832, at *20-*21 (quoting *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 n.4 (9th Cir. 1999)). And because a "[l]istener's reaction to speech is not a content-neutral basis for regulation," *Forsyth Cnty.*, 505 U.S. at 134, the restriction on Plaintiffs' speech must therefore pass this exacting scrutiny, which it cannot. Indeed, despite having "[a] police officer . . . stationed on campus every day to ensure safety on school," (Op. at 4), Defendants did *nothing* to protect Plaintiffs and their right to freedom speech. Defendants' *only* action was to silence Plaintiffs' message, in violation of the First Amendment.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request rehearing and en banc review.

Respectfully submitted,

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FREEDOM X

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing/petition for rehearing en banc is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 4,154 words.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2014, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I also certify that all participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

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