No. _____

In the Supreme Court of the United States

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; JOY JONES, on behalf of their minor child, D.G.,

Petitioners,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT; NICK BODEN, in his official capacity as Principal, Live Oak High School; MIGUEL RODRIGUEZ, in his individual and official capacity as Assistant Principal, Live Oak High School,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On May 5, 2010, students at a California public high school were directed to remove their American flag shirts because school officials thought that other students who were celebrating Cinco de Mayo might react negatively to the pro-America message.

As Ninth Circuit Judge O'Scannlain observed in his dissent from the denial of rehearing en banc:

> [I]t is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.
>
> In doing so, the panel creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools.

App. 5 (dissent).

The question presented is whether the Ninth Circuit erred by allowing school officials to prevent students from engaging in a silent, passive expression of opinion by wearing American flag shirts because other students might react negatively to the pro-America message, thereby incorporating a heckler's veto into the free speech rights of students contrary to *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), and the decisions of other United States courts of appeals.

PARTIES TO THE PROCEEDING

The Petitioners are John Dariano and Dianna Dariano, on behalf of their minor child, M.D.; Kurt Fagerstrom and Julie Ann Fagerstrom, on behalf of their minor child, D.M.; and Kendall Jones and Joy Jones, on behalf of their minor child, D.G. (the students at Live Oak High School, who were minors at the time, are collectively referred to as "Petitioners").

The Respondents are 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 (collectively referred to as "Respondents").

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The opinion of the court of appeals, as amended, appears at App. 1, 20-37 and is reported at 767 F.3d 764. The opinion of the district court appears at App. 38-62 and is reported at 822 F. Supp. 2d 1037. The dissent from the denial of the petition for rehearing en banc appears at App. 5-20 and is reported at 767 F.3d 764.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2014. App. 2. A petition for rehearing was denied on September 17, 2014. App. 4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

On May 5, 2010, Petitioners and two other students "wore American flag shirts to school." App. 22. On this day, some students were celebrating the holiday known as Cinco de Mayo, which, in the United States, is a celebration of Mexican culture and heritage. *See* App. 21. School officials had approved the on-campus, student-sponsored celebration of the holiday, which "was presented in the 'spirit of cultural appreciation.'" App. 21.

Because it was Cinco de Mayo, Respondents were concerned that some students on campus might react negatively toward Petitioners' American flag shirts. Consequently, "Boden directed Rodriguez to have the students either turn their shirts inside out or take them off." App. 23. Petitioners refused.

Respondents' directive was in response to a few vague comments: a "Caucasian student" told Rodriguez that "there might be some issues"; a female student told Rodriguez that "there might be problems"; and "[a] group of Mexican students" asked Rodriguez why Petitioners "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"[1] App. 23.

Respondents also allegedly took into account an incident that occurred at Live Oak High School during a 2009 Cinco de Mayo Celebration involving a group of Caucasian students and a group of Mexican students. App. 21. The incident was triggered by a Mexican student parading around campus with a Mexican flag. App. 22. In response to this display of Mexican nationalism, some Caucasian students hung a makeshift American flag on a tree and began chanting "U–S–A." App. 22. "[I]n response to the white students' flag-raising, one Mexican student shouted "f*** them white boys, f*** them white boys." App. 22. Rodriguez intervened and asked the Mexican students

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[1] The record makes a distinction between "Caucasian" and "Mexican" students. The Ninth Circuit "use[d] the ethnic and racial terminology employed by the district court (Caucasian, Hispanic, Mexican). For example, the district court at times referred to students of Mexican origin born in the United States and students born in Mexico collectively as 'Mexican.'" App. 21 n.2.

to stop using profane language, to which one Mexican student responded, "But Rodriguez, they are racist. They are being racist. F*** them white boys. Let's f*** them up." App. 22.

Despite Respondents' alleged concerns, "the following facts are undisputed: 'no classes were delayed or interrupted by [Petitioners'] attire, no incidents of violence occurred on campus that day, and prior to asking [Petitioners] to change . . . Rodriguez had heard no reports of actual disturbances being caused in relation to [Petitioners'] apparel.'" App. 9 n.2 (dissent).[2]

Moreover, despite Respondents' concerns related to the 2009 Cinco de Mayo incident and their claims of racial tension, *see* App. 27, Boden approved the Cinco de Mayo activities for May 5, 2010, *see* App. 21.

Because Petitioners were not allowed to wear their American flag shirts to school on Cinco de Mayo, they brought a civil rights lawsuit against Respondents, alleging, *inter alia*, a violation of their First Amendment right to freedom of expression. App. 20.

The district court granted Respondents' motion for summary judgment and denied Petitioners' motion for summary judgment, concluding that "the school officials reasonably forecast that [Petitioners'] clothing could cause a substantial disruption with school activities, and therefore did not violate the standard set forth in *Tinker* by requiring that [Petitioners] change." App. 54.

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[2] Judge O'Scannlain's dissent from the denial of rehearing en banc is cited and referred to throughout this petition as the "dissent."

The Ninth Circuit affirmed the district court's decision and denied Petitioners' rehearing request over the dissent of Circuit Judge O'Scannlain, who was joined by Circuit Judges Tallman and Bea. App. 1-37.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts with *Tinker*, Incorporates a "Heckler's Veto" into the First Amendment, and Creates a Circuit Split.

The important constitutional question this case presents for the free speech rights of students cannot be overstated. The Ninth Circuit's "opinion contravenes foundational First Amendment principles, creates a split with the Seventh and Eleventh Circuits, and imperils minority viewpoints of all kinds."[3] App. 19 (dissent); *see* Sup. Ct. R. 10(a) & (c).

Indeed, if this decision is permitted to stand, it will have a detrimental impact on *all* student speech by rewarding violence over civil discourse and effectively invalidating *Tinker*. As Judge O'Scannlain forewarned:

> In this case, the disfavored speech was the display of an American flag. But let no one be fooled: by interpreting *Tinker* to permit the heckler's veto, the panel opens the door to the

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[3] Judge O'Scannlain summed up the question presented by this case as follows: "I would hold that the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech absent a showing that the speech in question constitutes fighting words, a true threat, incitement to imminent lawless action, or other speech outside the First Amendment's protection." App. 19.

> suppression of any viewpoint opposed by a vocal and violent band of students. The next case might be a student wearing a shirt bearing the image of Che Guevara, or Martin Luther King, Jr., or Pope Francis. It might be a student wearing a President Obama "Hope" shirt, or a shirt exclaiming "Stand with Rand!" It might be a shirt proclaiming the *shahada,* or a shirt announcing "Christ is risen!" It might be any viewpoint imaginable, but whatever it is, it will be vulnerable to the rule of the mob. The demands of bullies will become school policy.

App. 14 (dissent).

This Court's review is warranted to preserve the free speech rights of students and to prevent the dire consequences articulated by Judge O'Scannlain.

A. The Ninth Circuit's Decision Conflicts with *Tinker*.

In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), this Court held that school officials violated the First Amendment by suspending students for wearing black armbands in protest of the Vietnam War. *Id.* at 508, 513–14. In reaching this conclusion, the Court famously stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506.

Respondents' decision banning Petitioners' American flag clothing to avoid unrealized and unarticulated student unrest ratifies a policy inconsistent with *Tinker.* Indeed, *Tinker* does not countenance Respondents' restriction on Petitioners'

silent, passive expression of opinion—rather, it forbids it. That is, *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. *See id*. at 513 ("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.") (emphasis added).

In *Tinker*, the Court 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 disturbance *on the part of petitioners.*" *Id*. at 508 (emphasis added). As this 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 restriction on student speech is prohibited by the First Amendment "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).

Like the armbands worn in *Tinker*, the Constitution does not permit public school officials to deny Petitioners' *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").

There is no principled way of distinguishing Petitioners' wearing of their American flag shirts to school on Cinco de Mayo from the *Tinker* students' wearing of black armbands to protest the Vietnam War—a provocative act during a time of deep social unrest in a divided nation:

> 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).

Although the majority opinion in *Tinker* did not emphasize nor rely upon any disturbances caused by students reacting to the armbands, Justice Black's dissent identified evidence in the record revealing that "the armbands caused comments, warnings by other students . . . and a warning by an older football player that other, non-protesting students had better let them alone. There [was] also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.'" *Id*. at 517 (Black, J., dissenting). And despite this evidence of disruption caused by others, the Court protected the students' right to engage in this form of expression on a public school campus, thereby rejecting any heckler's attempt to veto the expression of Ms. Tinker's and others' unpopular opinion. *See infra* part. I.B.; App. 10 (dissent) (noting that "*Tinker* went out of its way to reaffirm the heckler's veto doctrine").

Here, there is no dispute that the *content* of Petitioners' speech and the *viewpoint* expressed by it are protected by the First Amendment. And the *manner* in which Petitioners engaged in their speech was nothing short of silent and peaceful (*i.e.*, it was not materially or substantially disruptive). As this Court noted in *Tinker*, "[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).

The principles outlined in *Tinker* embody the longstanding recognition that our public schools serve as a unifying social force and must, therefore, provide

the basic tools for shaping democratic values. *See*, *e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203, 216, 231 (1948) (Frankfurter, J.) (describing the American public school as "the most powerful agency for promoting cohesion among a heterogeneous democratic people" and "the symbol of our democracy and the most pervasive means for promoting our common destiny"). And because our schools "are educating the young for citizenship," the obligation to ensure the "scrupulous protection of constitutional freedoms of the individual" is mandatory "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Indeed, it is far better in our civilized society to teach students about the First Amendment and why we tolerate divergent views than to suppress speech. Thus, the better and proper response is for school officials to educate the audience rather than silence the speaker. By restricting Petitioners' speech, Respondents failed to fulfill this fundamental obligation of our government-operated schools and violated the First Amendment in the process.

B. The Ninth Circuit's Decision Impermissibly Incorporates a Heckler's Veto into the First Amendment.

One of the "bedrock First Amendment principles" that the Ninth Circuit's decision disregards 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 F.3d 1077, 1082 (8th Cir. 2001) ("The [F]irst [A]mendment knows no heckler's veto.").

In *Tinker*, this Court "went out of its way to reaffirm the heckler's veto doctrine; the principle that 'the government cannot silence messages simply because they cause discomfort, fear, or even anger.'" App. 10 (dissent) (quoting *Ctr. for Bio–Ethical Reform, Inc.*, 533 F.3d at 788 (citing *Tinker*, 393 U.S. at 508)). The Ninth Circuit did precisely what *Tinker* cautions against by permitting school officials to punish students engaged in a passive expression of opinion to pacify, and indeed reward, those students opposed to the message.

Petitioners did nothing more than engage in a silent, passive expression of a pro-America viewpoint on May 5, 2010, and any perceived negative response, reaction, or potential disruption was from the "hecklers" who opposed this viewpoint. *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.").

As Judge O'Scannlain noted, "[t]he heckler's veto doctrine is one of the oldest and most venerable in First Amendment jurisprudence." App. 12 (dissent).

Affirming the heckler's veto doctrine in the public school context, *Tinker* explains:

> [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 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.

As Judge O'Scannlain emphasized, and the majority panel ignored, exceptions to the heckler's veto doctrine have only been applied to "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." App. 12-13 (dissent) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72) (1942)); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012) (listing categories of speech in which content-based restrictions are generally permitted). These limited categories include "fighting words"—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572; speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); and true threats, *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

"[G]iven the central importance of the heckler's veto doctrine to First Amendment jurisprudence," Judge O'Scannlain notes, it "should come as no surprise" that *Tinker* "stands as a dramatic reaffirmation" of it. App. 10-11 (dissent); *see also* App. 10 (dissent) ("*Tinker* went out of its way to reaffirm the heckler's veto doctrine . . . .").

In the final analysis, the Ninth Circuit's decision affirms a dangerous lesson by rewarding students who resort to disruption rather than reason as the default means of resolving disputes. *See* App. 13-14 (dissent) ("Live Oak's reaction to the possible violence against the student speakers, and the panel's blessing of that reaction, sends a clear message to public school students: by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them. This perverse incentive created by the panel's opinion is precisely what the heckler's veto doctrine seeks to avoid."). Because school officials perceived that those who oppose the message conveyed by Petitioners' American flag clothing would adversely react to the message, Petitioners 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.").

C. The Ninth Circuit's Decision Creates a Circuit Split.

In addition to contravening *Tinker* and impermissibly incorporating a heckler's veto into the First Amendment, the Ninth Circuit's decision creates a split with the Seventh and Eleventh Circuits, both of which have held, consistent with *Tinker*, that school officials cannot suppress student speech based on the negative reaction of its audience.

In *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874, 875 (7th Cir. 2011), a student wore a shirt to school on the Day of Silence bearing the slogan, "Be Happy, Not Gay." The school sought to prohibit the student from wearing the shirt based, in part, on "incidents of harassment of plaintiff Zamecnik." *Id.* at 879. The Seventh Circuit squarely rejected that rationale as "barred by the doctrine . . . of the 'heckler's veto.'" *Id.* In *Zamecnik*, the Seventh Circuit made clear that *Tinker* "endorse[s] the doctrine of the heckler's veto" and described the rationale behind that doctrine:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of

> their disapproval of her message is not a permissible ground for banning it.

Id. Indeed, in the absence of evidence indicating a true threat, speculation that a message might provoke violence constitutes "too thin a reed on which to hang a prohibition of the exercise of a student's speech." *Id.* at 877. The court observed:

> As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students. But we thought it speculative that allowing the plaintiff to wear a T-shirt that said "Be Happy, Not Gay" would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere.

Id. The court affirmed the grant of summary judgment to Zamecnik. *Id.* at 882.

Consistent with the Seventh Circuit, the Eleventh Circuit has held that school officials cannot suppress a student's speech based on the listener's (or viewer's) reaction. In *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004), the court affirmed the First Amendment right of a student to silently hold up a fist as other students recited the Pledge of Allegiance. School officials justified punishing the student based on a "concern that his behavior would lead to further disruptions by other students." *Id.* at 1274. Applying *Tinker*, the court rejected the school officials' asserted justification, which was based on a heckler's veto, reasoning:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason

> on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.

Id. at 1275.

While the Ninth Circuit eschews any responsibility on the part of school officials to protect the speech rights of students, *Holloman*, in contrast, takes a different and more principled approach:

> While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason. If the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.

Id. at 1276.

In this case, "[t]he panel claims that the *source* of the threatened violence at Live Oak is irrelevant: apparently requiring school officials to stop the source of a threat is too burdensome when a more 'readily-available' solution is at hand, . . . namely, silencing the

target of the threat. Thus the panel finds it of no consequence that the students exercising their free speech rights did so peacefully, that their expression took the passive form of wearing shirts, or that there is no allegation that they threatened other students with violence." App. 8-9 (dissent).

By curtailing Petitioners' freedom of expression and turning a blind eye to basic notions of right and wrong, the Ninth Circuit's decision marks a dramatic departure from *Tinker* and the decisions of other United States courts of appeals, thereby creating a circuit split that should be resolved by this Court.[4]

II. The Ninth Circuit's Reliance on Confederate Flag Cases to Justify Banning the American Flag Is Wholly Misplaced.

The Ninth Circuit's approach goes so far as to derogate America's national symbol of unity by essentially analogizing the American flag to the

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[4] It should be noted that protecting the student speech and the constitutional principles at issue in this case poses no challenge to "the traditional authority of teachers to maintain order in public schools" nor requires them "to surrender control of the American public school system to public school students." *Morse v. Frederick*, 551 U.S. 393, 421 (2007) (Thomas, J., concurring) (internal quotations and citations omitted). Students at Live Oak High School were permitted to wear message-bearing shirts to school, including shirts bearing American flag images on days other than Cinco de Mayo. *See, e.g.,* App. 23, 28. Thus, a ruling in favor of protecting Petitioners' speech would not prevent a school district from adopting an appropriate policy, such as a uniform requirement, for example, that would allow school officials to avoid entangling themselves in impermissible, viewpoint-based speech restrictions such as the one at issue here.

Confederate flag and its racially divisive elements. App. 31-32; *but see* App. 17-19 (dissent) (criticizing the panel's reliance on the Confederate flag cases for upholding the restriction on the American flag).

There is no question that the American flag is fertile with meaning, not merely as the "symbol of our country" but as the "one visible manifestation of two-hundred years of nationhood." *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (quoting *Smith v. Goguen*, 415 U.S. 566, 588 (1974)). Indeed, our flag is "[p]regnant with expressive content," and "readily signifies this Nation as does the combination of letters found in 'America.'" *Johnson*, 491 U.S. at 405. Because "government may not . . . proscribe particular conduct *because* it has expressive elements," flag-*burning* constitutes expressive activity protected by the First Amendment. *Id.* at 406 (emphasis added). Respondents' decision banning students from *wearing* the American flag puts before the Court *Johnson*'s contextual inverse. The discordant message it sends to students is that the American flag's *desecration* deserves the full protection of the First Amendment, but *celebrating* it does not.

The Ninth Circuit's flawed analysis succumbed to a somewhat novel pretense: because the Confederate flag cases do not, *per se*, disapprove of a heckler's veto, they stand for the broad proposition that the heckler's veto doctrine does not apply in our public schools. *See* App. 17-19 (dissent). But as Judge O'Scannlain recognized, what the "[Confederate flag] cases actually illustrate is a permissive attitude towards regulation of the Confederate flag that is based on the flag's unique and racially divisive history." App. 18 (dissent).

There is nothing in American jurisprudence that admits to an ethical or moral equivalency between the American flag (a symbol of freedom and national unity) and the Confederate flag (arguably, a symbol of slavery and racism). As Judge O'Scannlain concluded, "Whether or not this history [*i.e.*, the Confederate 'flag's unique and racially divisive history'] provides a principled basis for the regulation of Confederate icons, it certainly provides no support for banning displays of the American flag."[5] App. 18-19 (dissent); *see also* App. 18 n.8 (dissent) (citing Confederate flag cases and noting that "all emphasize that, across America, Confederate symbols carry an inherently divisive message").

In closing, there is never a legitimate basis for banning the display of an American flag on an American public school campus. And by incentivizing and rewarding violence as a legitimate response to unpopular speech, the Ninth Circuit's decision is contrary to our foundational First Amendment principles and provides a dangerous lesson in civics to our public school students. The Court should grant review and reverse.

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[5] As Judge O'Scannlain points out, the Eleventh Circuit has suggested that the display of the Confederate flag may not be deserving of the full protection of *Tinker,* but may be restricted as offensive under the standard of *Bethel School District v. Fraser,* 478 U.S. 675 (1986). *See Scott v. Sch. Bd. of Alachua Cnty.,* 324 F.3d 1246, 1248 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. of Volusia Cnty., Fla.,* 218 F.3d 1267, 1273–74 (11th Cir. 2000). App. 17 n.7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17858
D.C. No. 5:10-cv-02745-JW

[Filed September 17, 2014]

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; 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; MIGUEL RODRIGUEZ, in his individual and official capacity as Assistant Principal, Live Oak High School,	)
Defendants-Appellees.	)

ORDER AND AMENDED OPINION

App. 2

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
October 17, 2013—San Francisco, California

Filed February 27, 2014

Amended September 17, 2014

Before: Sidney R. Thomas and M. Margaret McKeown, Circuit Judges, and Virginia M. Kendall, District Judge.[*]

Order;
Dissent to Order by Judge O'Scannlain
Opinion by Judge McKeown

SUMMARY[**]

Civil Rights

The panel amended its prior opinion, appearing at 745 F.3d 354 (9th Cir. 2014), filed an amended opinion, denied a petition for panel rehearing, denied a petition for rehearing en banc on behalf of the court, and ordered that no further petitions shall be permitted.

[*] The Honorable Virginia M. Kendall, District Judge for the U.S. District Court for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed the district court's summary judgment in a civil rights suit brought by high school students who were asked to remove clothing bearing images of the American flag after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo.

The panel held that school officials did not violate the students' rights to freedom of expression, due process, or equal protection. Recognizing that, in certain contexts, limiting speech because of reactions to the speech may give rise to concerns about a "heckler's veto," the panel held that in the school context, the crucial distinction is the nature of the speech, not the source of it. The panel noted that prior cases do not distinguish between "substantial disruption" caused by the speaker and "substantial disruption" caused by the reactions of others. The panel held that given the history of prior events at the school, including an altercation on campus, it was reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real. The panel held that school officials anticipated violence or substantial disruption of or material interference with school activities, and their response was tailored to the circumstances.

Dissenting from the denial of rehearing en banc, Judge O'Scannlain, joined by Judges Tallman and Bea, would hold that the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech absent a showing that the speech in question constitutes fighting words, a true threat, incitement to imminent lawless action, or other speech outside the First Amendment's protection.

COUNSEL

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ORDER

The opinion filed on February 27, 2014, appearing at 745 F.3d 354 (9th Cir. 2014), is hereby amended. An amended opinion is filed concurrently with this order.

With these amendments, the panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are **DENIED**. No further petitions for en banc or panel rehearing shall be permitted.

Judge O'Scannlain's dissent from denial of rehearing en banc is filed concurrently with this Order.

The motion for en banc consideration of the motion of the Alliance Defending Freedom for leave to file an amicus brief is moot.

O'SCANNLAIN, Circuit Judge, joined by TALLMAN and BEA, Circuit Judges, dissenting from the denial of rehearing en banc:

The freedom of speech guaranteed by our Constitution is in greatest peril when the government may suppress speech simply because it is unpopular. For that reason, it is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.

In doing so, the panel creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools. For these reasons, I must respectfully dissent from our refusal to hear this case en banc.

I

On May 5, 2010, Cinco de Mayo, a group of Caucasian students at Live Oak High School ("Live Oak") wore shirts depicting the American flag to school.[1] *Dariano v. Morgan Hill Unified Sch. Dist.*, No.

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[1] Like the panel, I use the ethnic and racial terminology employed by the district court, referring, for instance, to students of Mexican

11-17858, amended slip op. at 22 (9th Cir. 2014). In the six preceding years, there had been at least thirty fights on campus, some between gangs and others between Caucasians and Hispanics, *id.* at 21, although the district court made no findings as to whether these fights were related to ethnic tensions, *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037, 1043 (N.D. Cal. 2011). A year earlier, during Cinco de Mayo 2009, a group of Caucasian students and a group of Mexican students exchanged profanities and threats. *Dariano*, amended slip op. at 21. When the Caucasian students hung a makeshift American flag and began chanting "U–S–A," Assistant Principal Miguel Rodriguez intervened and asked the Mexican students to stop using profane language, to which one Mexican student responded, "But Rodriguez, they are racist. They are being racist. F*** them white boys. Let's f*** them up." *Id.*

One year later, during Cinco de Mayo 2010, three of the students wearing American flag shirts were confronted by other students about their choice of apparel. *Id.* at 22. One student asked M.D., a plaintiff in this case, "Why are you wearing that? Do you not like Mexicans[?]" *Id.* A Caucasian student later told Assistant Principal Rodriguez before brunch break, "You may want to go out to the quad area. There might be some—there might be some issues." *Id.* During the break, a Mexican student informed Rodriguez that she was concerned "there might be problems" due to the American flag shirts. *Id.* Another asked Rodriguez why Caucasian students "get to wear their flag out when we

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origin—whether born in the United States or in Mexico—as "Mexican."

don't get to wear our flag?" *Id.* (alterations omitted). Principal Nick Boden instructed Rodriguez to have the students wearing the American flag shirts turn their shirts inside out or take them off. *Id.*

Rodriguez met with the students wearing the shirts, who did not dispute that they were at risk of violence due to their apparel. *Id.* The school officials allowed two students to return to class with their American flag shirts on because their shirts had less prominent imagery and were less likely to cause an incident. *Id.* at 23. Two other students were given the choice to turn their shirts inside out or to go home. *Id*. They chose to go home. *Id.* All plaintiffs in this appeal received threatening messages in the days after the incident. *Id.*

The students, through their guardians, brought this § 1983 action alleging violations of their First and Fourteenth Amendment rights. *Id*. at 23–24.

II

In *Tinker v. Des Moines Independent Community School District*, a group of high school students was suspended for wearing black armbands as a way of protesting the Vietnam War. 393 U.S. 503, 504 (1969). In what has become a classic statement of First Amendment law, the Supreme Court declared, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Of course, as the Court has subsequently made clear, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Nonetheless, *Tinker*

established that, "where students in the exercise of First Amendment rights collide with the rules of the school authorities," *Tinker*, 393 U.S. at 507, students' free speech rights "may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Tinker*, 393 U.S. at 513).

Invoking *Tinker*, the panel holds that the school acted properly to prevent a substantial and material disruption of school activities. *Dariano*, amended slip op. at 26–28, 33. In the panel's view, school officials acted reasonably given the history of ethnic violence at the school, the 2009 Cinco de Mayo incident, and the indications of possible violence on the day in question. *Id.* at 28. Because the officials tailored their actions to address the threat, the panel held that there was no violation of the students' free speech rights. *Id.* at 31. The panel also granted summary judgment with regard to the students' equal protection and due process claims. *Id.* at 32–35.

III

With respect, I suggest that the panel's opinion misinterprets *Tinker*'s own language, our precedent, and the law of our sister circuits. The panel claims that the *source* of the threatened violence at Live Oak is irrelevant: apparently requiring school officials to stop the source of a threat is too burdensome when a more "readily-available" solution is at hand, *id.* at 28, namely, silencing the target of the threat. Thus the panel finds it of no consequence that the students exercising their free speech rights did so peacefully, that their expression took the passive form of wearing

shirts, or that there is no allegation that they threatened other students with violence.[2] The panel condones the suppression of the students' speech for one reason: other students might have reacted violently against them. Such a rationale contravenes fundamental First Amendment principles.

A

The panel claims to be guided by the language of *Tinker*, *Dariano*, amended slip op. at 28, but in fact the panel ignores such language. Indeed *Tinker* counseled directly against the outcome here: relying on the earlier heckler's veto case of *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court explained that students' speech, whether made "in class, in the lunchroom, or on the campus," cannot be silenced merely because those who disagree with it "may start an argument or cause a disturbance." 393 U.S. at 508 (citing *Terminiello*). *Tinker* made clear that the "Constitution says we must take th[e] risk" that speech may engender a violent response. *Id*. Yet, rather than heed *Tinker*'s guidance, the panel undermines its holding, and, in the process, erodes the "hazardous freedom" and "openness" that "is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker*, 393 U.S. at 508–09.

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[2] The district court stated that the following facts are "undisputed": "no classes were delayed or interrupted by Plaintiffs' attire, no incidents of violence occurred on campus that day, and prior to asking Plaintiffs to change Defendant Rodriguez had heard no reports of actual disturbances being caused in relation to Plaintiffs' apparel." *Dariano*, 822 F. Supp. 2d at 1045.

What the panel fails to recognize, and what we have previously held, is that *Tinker* went out of its way to reaffirm the heckler's veto doctrine; the principle that "the government cannot silence messages simply because they cause discomfort, fear, or even anger." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty.*, 533 F.3d 780, 788 (9th Cir. 2008) (citing *Tinker*, 393 U.S. at 508). Quoting *Tinker*, we have explained:

> [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 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 . . . .

Bio-Ethical Reform, 533 F.3d at 788 (quoting *Tinker*, 393 U.S. at 508).[3] Our precedents take the position, then, that far from abandoning the heckler's veto doctrine in public schools, *Tinker* stands as a dramatic reaffirmation of it.[4] Given the central importance of the

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[3] *Bio-Ethical Reform* was not a school case, but this is irrelevant. What *is* relevant is that in *Bio-Ethical Reform* we correctly held that *Tinker*, which *is* a school case, applied the heckler's veto doctrine. *Bio-Ethical Reform*, in other words, makes clear that the heckler's veto doctrine applies in public schools, as it did in *Tinker*.

[4] We also recognized the importance of the heckler's veto doctrine to *Tinker*'s analysis in *Jones v. Board of Regents of University of Arizona*, 436 F.2d 618 (9th Cir. 1970). The plaintiff had been

doctrine to First Amendment jurisprudence, that should come as no surprise.[5]

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ordered by campus police to cease distributing handbills on university grounds, in part due to "the fact that two members of the crowd were moved to tear the sandwich boards from Jones' body" and that "certain unidentified members of the community had threatened to remove him from the campus." *Id.* at 621. Citing *Tinker* for the heckler's veto doctrine, we said:

> Jones was lawfully and nonviolently exercising rights guaranteed to him by the Constitution of the United States . . . . [I]n this case, the action of the police was misdirected. It should have been exerted so as to prevent the infringement of Jones' constitutional right by those bent on stifling, even by violence, the peaceful expression of ideas or views with which they disagreed.

Id. Those wise principles are just as applicable in the context of this case.

[5] None of the precedents cited by the panel are to the contrary. In *Wynar v. Douglas County School District*, it was *the speaker* who "threatened the student body as a whole and targeted specific students by name," and we held that the school was justified in punishing the student for engaging in speech of that nature. 728 F.3d 1062, 1070–72 (9th Cir. 2013). The same was true in *LaVine v. Blaine School District*, where we stated that the speech in question indicated that the student "was intending to inflict injury upon himself or others," 257 F.3d 981, 990 (9th Cir. 2001). Although *Karp v. Becken* mentions concerns about "the provocation of an incident, including possible violence," the conduct and speech *of the speaker* was itself disruptive. *See* 477 F.2d 171, 173, 176 (9th Cir. 1973) (describing the speaker as attempting to lead a "chant" and walk-out while also bringing news media to campus "to publicize [his] demonstration"). None of these cases stand for the proposition that peaceful, passive expression can be suppressed based on the reactions of *other students*.

B

The heckler's veto doctrine is one of the oldest and most venerable in First Amendment jurisprudence. *See Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949). Indeed, the Court has gone far to protect speech where it might incur a hostile and even violent reaction from an audience. In *Street v. New York*, for example, a man was convicted for "publicly defy[ing] . . . or cast[ing] contempt upon (any American flag) by words." 394 U.S. 576, 590 (1969). The Court invalidated the conviction, rejecting the state's justification that the man's speech had a "tendency . . . to provoke violent retaliation." *Id.* at 592. The heckler's veto doctrine also protected a civil rights leader's peaceful speech during a lunch counter sit-in protest, despite the state's alleged fear that "'violence was about to erupt' because of the demonstration." *Cox v. Louisiana*, 379 U.S. 536, 550 (1965). As the Court said in *Cox*, "[T]he compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.* at 551 (internal quotation marks omitted).

Of course, this doctrine does not apply to all categories of speech. The Court has recognized that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing types of speech that are not part of "the freedom of speech"). Where, for instance, speech constitutes "'fighting' words—those which by their very

utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572; is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); or is a "true threat," *Virginia v. Black*, 538 U.S. 343, 358–60 (2003), such speech may be prohibited, subject to certain limitations, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–86 (1992). But apart from these well-recognized categories, "the government may not give weight to the audience's negative reaction" as a basis for suppressing speech. *Ctr. for Bio-Ethical Reform, Inc.*, 533 F.3d at 789; *see also Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) ("[A] principal function of free speech under our system of government is to invite dispute.") (internal quotation marks omitted) (quoting *Terminiello*) (citing *Tinker*).

C

Despite *Tinker*'s emphasis on the actions of the speaker and its reaffirmation of the heckler's veto doctrine, the panel ignores these foundational precepts of First Amendment jurisprudence and condones using the heckler's veto as a basis for suppressing student speech.

The established First Amendment principles that the panel disregards exist for good reason. Rather than acting to protect the students who were peacefully expressing their views, Live Oak decided to suppress the speech of those students because *other students* might do them harm. Live Oak's reaction to the possible violence against the student speakers, and the panel's blessing of that reaction, sends a clear message to public school students: by threatening violence

against those with whom you disagree, you can enlist the power of the State to silence them. This perverse incentive created by the panel's opinion is precisely what the heckler's veto doctrine seeks to avoid.

In this case, the disfavored speech was the display of an American flag. But let no one be fooled: by interpreting *Tinker* to permit the heckler's veto, the panel opens the door to the suppression of any viewpoint opposed by a vocal and violent band of students. The next case might be a student wearing a shirt bearing the image of Che Guevara, or Martin Luther King, Jr., or Pope Francis. It might be a student wearing a President Obama "Hope" shirt, or a shirt exclaiming "Stand with Rand!" It might be a shirt proclaiming the *shahada*, or a shirt announcing "Christ is risen!" It might be any viewpoint imaginable, but whatever it is, it will be vulnerable to the rule of the mob.

The demands of bullies will become school policy. That is not the law.

IV

The Seventh and Eleventh Circuits agree that a student's speech cannot be suppressed based on the violent reaction of its audience. Thus the panel is simply wrong that our sister circuits' cases "do not distinguish between 'substantial disruption' caused by the speaker and 'substantial disruption' caused by the reaction of onlookers." *Dariano*, amended slip op. at 29. In *Zamecnik v. Indian Prairie School District No. 204*, a student wore a t-shirt to school on the Day of Silence bearing the slogan, "Be Happy, Not Gay." 636 F.3d 874, 875 (7th Cir. 2011). The school sought to prohibit the

student from wearing the shirt based, in part, on "incidents of harassment of plaintiff Zamecnik." *Id.* at 879. The Seventh Circuit squarely rejected that rationale as "barred by the doctrine . . . of the 'heckler's veto.'" *Id. Zamecnik* made clear that *Tinker* "endorse[s] the doctrine of the heckler's veto" and described the rationale behind that doctrine:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.

Id. The court affirmed the grant of summary judgment to Zamecnik. *Id.* at 882.

The Eleventh Circuit is of the same opinion. In *Holloman ex rel. Holloman v. Harland*, a school punished a student for silently holding up a fist rather than reciting the Pledge of Allegiance. 370 F.3d 1252, 1259 (11th Cir. 2004). School officials justified their actions, in part, by citing "concern that [the student's] behavior would lead to further disruptions by other students." *Id.* at 1274. The Eleventh Circuit acknowledged that *Tinker* governed its analysis, and in an impassioned paragraph, the court invoked the heckler's veto doctrine:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter [*sic*] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.

Id. at 1275. Particularly relevant here, the Eleventh Circuit squarely rejected the claim that the heckler's veto doctrine does not apply in public schools:

> While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason. If the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.

Id. at 1276. The court reversed the district court's grant of summary judgment to the school and reinstated Holloman's claims. *Id.* at 1294–95.

The panel's holding, then, represents a dramatic departure from the views of our sister circuits.[6] Yet, one would never know it from reading the panel's opinion, since the contrary decisions of those circuits are barely mentioned and completely mischaracterized.

V

Finally, the panel attempts to analogize this case to those involving school restrictions on Confederate flags. *See Dariano*, amended slip op. at 30–31. But these cases, dealing solely with a symbol that is "widely regarded as racist and incendiary," *Zamecnik*, 636 F.3d at 877, cannot override *Tinker* here.[7]

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[6] Unable to distinguish *Zamecnik* or *Holloman* convincingly, the panel looks for support from *Taylor v. Roswell Independent School District*, 713 F.3d 25 (10th Cir. 2013). But *Taylor* offers no support for its view. *Taylor* did not involve a heckler's veto, and, in fact, the Tenth Circuit implied that the heckler's veto doctrine would have applied if the facts had implicated it. This is revealed in a footnote, quoted only in part by the panel. *Dariano*, amended slip op. at 29 (quoting *Taylor*, 713 F.3d at 38 n.11). In the footnote's omitted conclusion, the Tenth Circuit observes:

> Moreover, there is no indication *in this case* that the problematic student disruptions *were aimed at stopping plaintiffs' expression*, and plaintiffs did not otherwise develop such an argument.

713 F.3d at 38 n.11. (emphasis added). Thus, contrary to what the panel implies, the speech restriction in *Taylor* was permissible *not* because the heckler's veto doctrine was inapplicable to Roswell public schools, but because *Taylor*'s facts simply did not involve a heckler's veto.

[7] In fact the Eleventh Circuit has suggested that displays of the Confederate flag may not even be deserving of the full protection

The panel takes the Confederate flag cases to be a single "illustrat[ion]" of the much broader "principle" that the heckler's veto doctrine does not apply to schools. *Dariano*, amended slip op. at 30. But as that broad "principle" is incorrect, the Confederate flag cases cannot illustrate it. Indeed, what the cases actually illustrate is a permissive attitude towards regulation of the Confederate flag that is based on the flag's unique and racially divisive history.[8] Whether or

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of *Tinker*, but rather are offensive under the standard of *Bethel School District v. Fraser*, 478 U.S. 675 (1986). *See Scott v. School Bd. Of Alachua Cty.*, 324 F.3d 1246, 1248 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. Of Volusia Cty., Fla.*, 218 F.3d 1267, 1273–74 (11th Cir. 2000).

[8] The Confederate flag cases cited by the panel all emphasize that, across America, Confederate symbols carry an inherently divisive message. *See, e.g.*, *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 436 (4th Cir 2013) (describing the flag as a "symbol of racial separation and oppression"); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 223 (5th Cir. 2009) (justifying regulation in part on "the racially inflammatory meaning associated with the Confederate flag"); *Barr v. Lafon*, 538 F.3d 554, 570 (6th Cir. 2008) (describing the perception that Confederate icons celebrate "white supremacy"); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 742 (9th Cir. 2009) (explaining that some view the Confederate flag "as a statement of racism"); *West v. Derby Unified Sch. Dist. No. 260*, 23 F.Supp.2d 1223, 1233 (D. Kan. 1998) (describing the Confederate flag as representing "[t]o many" an "expression of continuing contempt for the rights of African-Americans"), *aff'd*, 206 F.3d 1358 (10th Cir. 2000) (adopting the reasoning of the district court); *Scott v. Sch. Bd of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam) (finding it "correct" to assert that the Confederate flag represents "approval of white supremacy" and "has acquired numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol").

not this history provides a principled basis for the regulation of Confederate icons, it certainly provides no support for banning displays of the American flag.

VI

The panel's opinion contravenes foundational First Amendment principles, creates a split with the Seventh and Eleventh Circuits, and imperils minority viewpoints of all kinds. Like our sister circuits, I would hold that the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech absent a showing that the speech in question constitutes fighting words, a true threat, incitement to imminent lawless action, or other speech outside the First Amendment's protection. *See Zamecnik*, 636 F.3d at 879 (rejecting the heckler's veto "because the speech had contained no fighting words"); *Holloman*, 370 F.3d at 1275–76 (citing *Street* for the proposition that "the possible tendency of appellant's words to provoke violent retaliation is not a basis for banning those words unless they are 'fighting words'" (internal quotation marks omitted)).

Indeed, in another case upholding a ban on Confederate flags in schools, the Sixth Circuit supported its decision with the observation that several federal appellate courts have commented "on the Confederate flag's *inherent* racial divisiveness." *D.B. ex rel. Brogdon v. Lafon*, 217 Fed.Appx. 518, 523–24 (6th Cir. 2007) (emphasis added) (citing *NAACP v. Hunt*, 891 F.2d 1555, 1564 (11th Cir. 1990); *Briggs v. State of Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003), cert. denied, 540 U.S. 1108 (2004); *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001)).

I respectfully dissent from our regrettable decision not to rehear this case en banc.

OPINION

McKEOWN, Circuit Judge:

We are asked again to consider the delicate relationship between students' First Amendment rights and the operational and safety needs of schools. As we noted in *Wynar v. Douglas County School District*, 728 F.3d 1062, 1064 (9th Cir. 2013), "school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights." In this case, after school officials learned of threats of race-related violence during a school-sanctioned celebration of Cinco de Mayo, the school asked a group of students to remove clothing bearing images of the American flag.[1]

The students brought a civil rights suit against the school district and two school officials, alleging violations of their federal and state constitutional rights to freedom of expression, equal protection, and due process. We affirm the district court's grant of summary judgment as to the only defendant party to this appeal, Assistant Principal Miguel Rodriguez, and its denial of the students' motion for summary judgment, on all claims. School officials anticipated violence or substantial disruption of or material

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[1] Because the students' names are confidential, we refer to them collectively as "the students," or by their initials, M.D., D.G., and D.M.

interference with school activities, and their response was tailored to the circumstances. As a consequence, we conclude that school officials did not violate the students' rights to freedom of expression, due process, or equal protection.

BACKGROUND

This case arose out of the events of May 5, 2010, Cinco de Mayo, at Live Oak High School ("Live Oak" or "the School"), part of the Morgan Hill Unified School District in Northern California. The Cinco de Mayo celebration was presented in the "spirit of cultural appreciation." It was described as honoring "the pride and community strength of the Mexican people who settled this valley and who continue to work here." The school likened it to St. Patrick's Day or Oktoberfest. The material facts are not in dispute.

Live Oak had a history of violence among students, some gang-related and some drawn along racial lines. In the six years that Nick Boden served as principal, he observed at least thirty fights on campus, both between gangs and between Caucasian and Hispanic students. A police officer is stationed on campus every day to ensure safety on school grounds.

On Cinco de Mayo in 2009, a year before the events relevant to this appeal, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students.[2] The groups

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[2] We use the ethnic and racial terminology employed by the district court (Caucasian, Hispanic, Mexican). For example, the district court at times referred to students of Mexican origin born in the United States and students born in Mexico collectively as

exchanged profanities and threats. Some students hung a makeshift American flag on one of the trees on campus, and as they did, the group of Caucasian students began clapping and chanting "USA." A group of Mexican students had been walking around with the Mexican flag, and in response to the white students' flag-raising, one Mexican student shouted "f*** them white boys, f*** them white boys." When Assistant Principal Miguel Rodriguez told the student to stop using profane language, the student said, "But Rodriguez, they are racist. They are being racist. F*** them white boys. Let's f*** them up." Rodriguez removed the student from the area.

At least one party to this appeal, student M.D., wore American flag clothing to school on Cinco de Mayo 2009. M.D. was approached by a male student who, in the words of the district court, "shoved a Mexican flag at him and said something in Spanish expressing anger at [M.D.'s] clothing."

A year later, on Cinco de Mayo 2010, a group of Caucasian students, including the students bringing this appeal, wore American flag shirts to school. A female student approached M.D. that morning, motioned to his shirt, and asked, "Why are you wearing that? Do you not like Mexicans[?]" D.G. and D.M. were also confronted about their clothing before "brunch break."

As Rodriguez was leaving his office before brunch break, a Caucasian student approached him, and said,

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"Mexican." We adopt the same practice here, for the limited purpose of clarifying the narrative.

"You may want to go out to the quad area. There might be some—there might be some issues." During the break, another student called Rodriguez over to a group of Mexican students, said that she was concerned about a group of students wearing the American flag, and said that "there might be problems." Rodriguez understood her to mean that there might be a physical altercation. A group of Mexican students asked Rodriguez why the Caucasian students "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"

Boden directed Rodriguez to have the students either turn their shirts inside out or take them off. The students refused to do so.

Rodriguez met with the students and explained that he was concerned for their safety. The students did not dispute that their attire put them at risk of violence. Plaintiff D.M. said that he was "willing to take on that responsibility" in order to continue wearing his shirt. Two of the students, M.D. and D.G., said they would have worn the flag clothing even if they had known violence would be directed toward them.

School officials permitted M.D. and another student not a party to this action to return to class, because Boden considered their shirts, whose imagery was less "prominent," to be "less likely [to get them] singled out, targeted for any possible recrimination," and

"significant[ly] differen[t] in [terms of] what [he] saw as being potential for targeting."[3]

The officials offered the remaining students the choice either to turn their shirts inside out or to go home for the day with excused absences that would not count against their attendance records. Students D.M. and D.G. chose to go home. Neither was disciplined.

In the aftermath of the students' departure from school, they received numerous threats from other students. D.G. was threatened by text message on May 6, and the same afternoon, received a threatening phone call from a caller saying he was outside of D.G.'s home. D.M. and M.D. were likewise threatened with violence, and a student at Live Oak overheard a group of classmates saying that some gang members would come down from San Jose to "take care of" the students. Because of these threats, the students did not go to school on May 7.

The students and their parents, acting as guardians, brought suit under 42 U.S.C. § 1983 and the California Constitution against Morgan Hill Unified School District ("the District"); and Boden and Rodriguez, in their official and individual capacities, alleging violations of their federal and California constitutional rights to freedom of expression and their federal constitutional rights to equal protection and due process.

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[3] The students permitted to return to class were wearing "Tap Out" (or "TapouT") shirts, which bear the logo of a popular martial arts company, sometimes (as here) with flag iconography.

On cross-motions for summary judgment, the district court granted Rodriguez's motion on all claims and denied the students' motion on all claims, holding that school officials did not violate the students' federal or state constitutional rights. The district court did not address claims against Boden, because he was granted an automatic stay in bankruptcy. The district court dismissed all claims against the District on grounds of sovereign immunity, a ruling not challenged on appeal. The question on appeal is thus whether Rodriguez, in his official or individual capacity, violated the students' constitutional rights.

ANALYSIS

I. FIRST AMENDMENT CLAIMS

We analyze the students' claims[4] under the well-recognized framework of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).[5] Under *Tinker*, students may "express [their] opinions, even on controversial subjects . . . if [they] do[] so without materially and substantially

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[4] Because California follows federal law for free expression claims arising in the school setting, the students' federal and state claims stand or fall together. *Cal. Teachers Ass'n v. Governing Bd. of San Diego Unified Sch. Dist.*, 45 Cal. App. 4th 1383, 1391–92 (1996).

[5] As we noted in *Wynar*, 728 F.3d at 1067, student speech that is "vulgar, lewd, obscene [or] plainly offensive" is governed by *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986); speech that is "school-sponsored" is governed by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and speech that "falls into neither of these categories" is governed by *Tinker*. *See Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (listing standards).

interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513 (final alteration in original) (internal quotation marks omitted). To "justify prohibition of a particular expression of opinion," school officials "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

That said, "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. Under *Tinker*, schools may prohibit speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities," or that constitutes an "actual or nascent [interference] with the schools' work or . . . collision with the rights of other students to be secure and to be let alone." *Id.* at 508, 514; *see also Wynar*, 728 F.3d at 1067 (quoting *Tinker*, 393 U.S. at 508, 514.). As we have explained, "the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances." *Karp v. Becken*, 477 F.2d 171, 175 (9th Cir. 1973) (footnote omitted). Indeed, in the school context, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." *Id.* As the Seventh Circuit explained, "[s]chool authorities are entitled to exercise discretion

in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission." *Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874, 877–78 (7th Cir. 2011).

Although *Tinker* guides our analysis, the facts of this case distinguish it sharply from *Tinker*, in which students' "pure speech" was held to be constitutionally protected. 393 U.S. at 508. In contrast to *Tinker*, in which there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," *id.*, there was evidence of nascent and escalating violence at Live Oak. On the morning of May 5, 2010, each of the three students was confronted about their clothing by other students, one of whom approached student M.D. and asked, "Why are you wearing that? Do you not like Mexicans[?]" Before the brunch break, Rodriguez learned of the threat of a physical altercation. During the break, Rodriguez was warned about impending violence by a second student. The warnings of violence came, as the district court noted, "in [the] context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag." Threats issued in the aftermath of the incident were so real that the parents of the students involved in this suit kept them home from school two days later.

The minimal restrictions on the students were not conceived of as an "urgent wish to avoid the controversy," as in *Tinker*, *id.* at 510, or as a trumped-up excuse to tamp down student expression. The controversy and tension remained, but the school's

actions presciently avoided an altercation. Unlike in *Tinker*, where "[e]ven an official memorandum prepared after the [students'] suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption," *id.* at 509, school officials here explicitly referenced anticipated disruption, violence, and concerns about student safety in conversations with students at the time of the events, in conversations the same day with the students and their parents, and in a memorandum and press release circulated the next day.

In keeping with our precedent, school officials' actions were tailored to avert violence and focused on student safety, in at least two ways. For one, officials restricted the wearing of certain clothing, but did not punish the students. School officials have greater constitutional latitude to suppress student speech than to punish it. In *Karp*, we held that school officials could "curtail the exercise of First Amendment rights when they c[ould] reasonably forecast material interference or substantial disruption," but could not discipline the student without "show[ing] justification for their action." 477 F.2d at 176; *cf. Wynar*, 728 F.3d at 1072 (upholding expulsion, despite its "more punitive character," as a justified response to threats); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001).

For another, officials did not enforce a blanket ban on American flag apparel, but instead allowed two students to return to class when it became clear that their shirts were unlikely to make them targets of violence. The school distinguished among the students based on the perceived threat level, and did not

embargo all flag-related clothing. *See* Background, *supra*.

Finally, whereas the conduct in *Tinker* expressly did "not concern aggressive, disruptive action or even group demonstrations," 393 U.S. at 508, school officials at Live Oak reasonably could have understood the students' actions as falling into any of those three categories, particularly in the context of the 2009 altercation. The events of 2010 took place in the shadow of similar disruptions a year earlier, and pitted racial or ethnic groups against each other. Moreover, students warned officials that there might be physical fighting at the break.[6]

We recognize that, in certain contexts, limiting speech because of reactions to the speech may give rise to concerns about a "heckler's veto."[7] But the language of *Tinker* and the school setting guides us here. Where speech "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others," school officials may limit the speech. *Tinker*, 393 U.S. at 513. To require school

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[6] Our recent case of *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014), is not instructive here, since that case, unlike this one, involved compelled speech in the form of a mandatory uniform policy and did not involve the intersection of the First Amendment and violence or a threat of violence in the school setting. *Id. at* 1204.

[7] The term "heckler's veto" is used to describe situations in which the government stifles speech because it is "offensive to some of [its] hearers, or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (internal citations and quotation marks omitted).

officials to precisely identify the source of a violent threat before taking readily-available steps to quell the threat would burden officials' ability to protect the students in their charge—a particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet—and run counter to the longstanding directive that there is a distinction between "threats or acts of violence on school premises" and speech that engenders no "substantial disruption of or material interference with school activities." *Id.* at 508, 514; *see also id.* at 509, 513.

In the school context, the crucial distinction is the nature of the speech, not the source of it. The cases do not distinguish between "substantial disruption" caused by the speaker and "substantial disruption" caused by the reactions of onlookers or a combination of circumstances. *See, e.g.*, *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 38, 38 n. 11 (10th Cir. 2013) (observing that "Plaintiffs note that most disruptions occurred only because of wrongful behavior of third parties and that no Plaintiffs participated in these activities . . . . This argument might be effective outside the school context, but it ignores the 'special characteristics of the school environment,'" and that the court "ha[d] not found[] case law holding that school officials' ability to limit disruptive expression depends on the blameworthiness of the speaker. To the contrary, the *Tinker* rule is guided by a school's need to protect its learning environment and its students, and courts generally inquire only whether the potential for substantial disruption is genuine." (quoting *Tinker*, 393 U.S. at 506)); *Zamecnik*, 636 F.3d at 879–80 (looking to the reactions of onlookers to determine whether the

speech could be regulated); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1272 (11th Cir. 2004) (looking to the reactions of onlookers to determine whether a student's expression "cause[d] (or [was] likely to cause) a material and substantial disruption") (alterations and internal quotation marks omitted).

Perhaps no cases illustrate this principle more clearly than those involving displays of the Confederate flag in the school context. We respect the American flag, and know that its meaning and its history differ greatly from that of the Confederate flag. Nevertheless, the legal principle that emerges from the Confederate flag cases is that what matters is substantial disruption or a reasonable forecast of substantial disruption, taking into account either the behavior of a speaker—*e.g.*, causing substantial disruption alongside the silent or passive wearing of an emblem—or the reactions of onlookers. Not surprisingly, these cases also arose from efforts to stem racial tension that was disruptive. Like *Dariano*, the reasoning in these cases is founded on *Tinker*. *See, e.g.*, *Hardwick*, 711 F.3d at 437 (Fourth Circuit case upholding school officials' ban on shirts with labels like "Southern Chicks," "Dixie Angels," and "Daddy's Little Redneck," and the Confederate flag icon, even though the bearer contended that hers was a "silent, peaceable display" that "even drew positive remarks from some students" and "never caused a disruption" because "school officials could reasonably forecast a disruption because of her shirts" (internal quotation marks omitted)); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 223 (5th Cir. 2009) (noting that "[o]ther circuits, applying *Tinker*, have held that administrators may prohibit the display of the Confederate flag in light of racial hostility and

tension at their schools"); *Barr v. Lafon*, 538 F.3d 554, 567–68 (6th Cir. 2008) (noting the "disruptive potential of the flag in a school where racial tension is high," and that "[o]ur holding that the school in the circumstances of this case reasonably forecast the disruptive effect of the Confederate flag accords with precedent in our circuit as well as our sister circuits").[8]

Our role is not to second-guess the decision to have a Cinco de Mayo celebration or the precautions put in place to avoid violence where the school reasonably forecast substantial disruption or violence. "We review . . . with deference[] schools' decisions in connection with the safety of their students even when freedom of expression is involved," keeping in mind that "deference does not mean abdication." *LaVine*, 257 F.3d at 988, 992. As in *Wynar*, the question here is not whether the threat of violence was real, but only whether it was "reasonable for [the school] to proceed as though [it were]." 728 F.3d at 1071; *Karp*, 477 F.2d at 175 (noting that "*Tinker* does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption"). Here, both the specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real. We hold that

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[8] Other circuits that have considered the question have adopted the same logic. *See, e.g.*, *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739–40 (8th Cir. 2009); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365–66 (10th Cir. 2000); *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1248 (11th Cir. 2003) (per curiam).

school officials, namely Rodriguez, did not act unconstitutionally, under either the First Amendment or Article I, § 2(a) of the California Constitution, in asking students to turn their shirts inside out, remove them, or leave school for the day with an excused absence in order to prevent substantial disruption or violence at school.

II. EQUAL PROTECTION CLAIM

The students' equal protection claim is a variation of their First Amendment challenge. *Cf.* U.S. CONST. amend. XIV, § 1 (stating that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"). They allege that they were treated differently than students wearing the colors of the Mexican flag, and that their speech was suppressed because their viewpoint was disfavored. We note that the students had no response when asked why they chose to wear flag clothing on the day in question. The school responds that it had a viewpoint-neutral reason—student safety—for suppressing the speech in question, and that they treated "all students for whose safety they feared in the same manner."

Government action that suppresses protected speech in a discriminatory manner may violate both the First Amendment and the Equal Protection Clause. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992) (noting that the Supreme Court "has occasionally fused the First Amendment into the Equal Protection Clause in this fashion, but . . . with the acknowledgment . . . that the First Amendment underlies its analysis"). Where plaintiffs allege violations of the Equal Protection Clause relating to expressive conduct, we employ "essentially the same" analysis as we would in

a case alleging only content or viewpoint discrimination under the First Amendment. *Barr v. Lafon*, 538 F.3d 554, 575 (6th Cir. 2008).

In the school context, we look again to *Tinker*. 393 U.S. at 510; *see also Barr*, 538 F.3d at 576–77; *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (stating that *Tinker* "applies to school regulations directed at specific student viewpoints"). According to *Tinker*, schools are not forced to "prohibit the wearing of all symbols of political or controversial significance" in order to justify a prohibition against the wearing of a certain symbol, if such a prohibition is "necessary to avoid material and substantial interference with schoolwork or discipline." 393 U.S. at 510–11. Schools may, under *Tinker*, ban certain images, for example images of the Confederate flag on clothing, even though such bans might constitute viewpoint discrimination. *See, e.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1184–85 (9th Cir. 2006) (noting that "[w]hile the Confederate flag may express a particular viewpoint, '[i]t is not only constitutionally allowable for school officials' to limit the expression of racially explosive views, 'it is their duty to do so'" (alteration in original) (quoting *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam)), *judgment vacated on other grounds sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007); *Scott*, 324 F.3d at 1248 (upholding district court order barring Confederate symbols based on "the potential disruption that the displaying of Confederate symbols would likely create"); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366–67 (10th Cir. 2000) (upholding ban on Confederate symbols based on a "series of racial incidents or confrontations,"

including "hostile confrontations between a group of white and black students").

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.

Because the record demonstrates that the students' shirts "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," *Tinker*, 393 U.S. at 514, the authorities' actions were permissible under *Tinker*. We reject the students' equal protection claim.

III. DUE PROCESS AND INJUNCTIVE RELIEF CLAIMS

The students further challenge the District's dress code, which prohibits clothing that "indicate[s] gang affiliation, create[s] a safety hazard, or disrupt[s] school activities." They seek to permanently enjoin the use of the dress code, claiming that it fails to provide objective standards by which to referee student attire, in violation of the Due Process Clause.[9] We reject the students' due process claims.

The Supreme Court has "recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary

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[9] Although the District is not a party to this appeal, we consider the students' dress code claims because they brought suit against Rodriguez in his official capacity.

procedures," and has thus specified that, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code . . . . " *Bethel Sch. Dist.*, 478 U.S. at 686 (holding that a school had not violated a student's due process rights by disciplining him for lewd speech under a policy prohibiting "obscene" speech).

The District's dress code is in line with others that the federal courts have held to be permissible. *See, e.g.*, *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 441, 444 (4th Cir. 2013) (upholding code prohibiting "disrupt[ive]" or "offensive" clothing, including clothing that "distract[s]" or "interfere[s]"), *cert. denied*, 134 S. Ct. 201 (2013); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 224 (5th Cir. 2009) (upholding code prohibiting clothing with "inappropriate symbolism").

Significantly, the dress code challenged here incorporates the standards sanctioned in *Tinker*: safety and disruption. *See B.W.A. v. Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740, 750–51 (E.D. Mo. 2007) (holding that a dress code that contains language that "tracks *Tinker*" poses "no real danger" of compromising the First Amendment rights of students), *aff'd* 554 F.3d 734 (8th Cir. 2009); *see also Hardwick*, 711 F.3d at 441. It would be unreasonable to require a dress code to anticipate every scenario that might pose a safety risk to students or that might substantially disrupt school activities. Dress codes are not, nor should they be, a school version of the Code of Federal Regulations. It would be equally unreasonable to hold that school

officials could not, at a minimum, rely upon the language *Tinker* gives them.

We affirm the district court's holding that the policy is not unconstitutionally vague and does not violate the students' right to due process.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NO. C 10-02745 JW

[Filed November 8, 2011]

Dianna Dariano, et al.,	)
	)
Plaintiffs,	)
v.	)
	)
Morgan Hill Unified Sch. Dist., et al.,	)
	)
Defendants.	)
	)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs[1] bring this action against Morgan Hill Unified School District ("Morgan Hill") and certain

[1] Dianna Dariano and John Dariano on behalf of their minor child M.D., Julie Ann Fagerstrom and Kurt Fagerstrom on behalf of their minor child D.M., and Kendall Jones and Joy Jones on behalf of their minor child D.G.

individuals[2] (collectively, "Defendants"), alleging violations of their First and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983, and violations of their right to Freedom of Expression under the California Constitution, Art I., § 2. Plaintiffs allege that Defendants violated their federal and state constitutional rights to freedom of expression, due process, and equal protection by disallowing them from wearing American flag shirts in a public high school on Cinco de Mayo Day.

Presently before the Court are: (1) Defendants' Motion for Summary Judgment as to all claims;[3] and (2) Plaintiffs' Motion for Summary Judgment as to all claims.[4] The Court conducted a hearing on October 3,

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[2] Individual Defendants are Nick Boden ("Boden") in his official and individual capacity as Principal of Live Oak High School, and Miguel Rodriguez ("Rodriguez") in his official and individual capacity as Assistant Principal of Live Oak High School.

Defendants Rodriguez and Boden have both left the Morgan Hill Unified School District since this action was filed. (See Docket Item No. 12–2.) Pursuant to Fed. R. Civ. P. 25(d), their successors in office are automatically named as defendants in the suit in their official capacity. In addition, on September 19, 2011, the Court received notice that Defendant Boden has filed for bankruptcy. (See Docket Item No. 64.) Accordingly, all proceedings against Defendant Boden are stayed as a matter of law. See 11 U.S.C. § 362(a).

[3] (Defendants' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, hereafter, "Defendants' Motion," Docket Item No. 53.)

[4] (Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, hereafter, "Plaintiffs' Motion," Docket Item No. 52.)

2011. Based on the papers submitted to date and oral argument, the Court GRANTS Defendants' Motion and DENIES Plaintiffs' Motion for Summary Judgment.

II. BACKGROUND

A detailed description of the allegations in this case can be found in the Court's February 17, 2011 Order.[5] The Court reviews the undisputed facts and procedural history relevant to resolving these Motions.

A. Undisputed Facts

Plaintiffs are three students who attended Live Oak High School at the time the events at issue occurred.[6] Live Oak High School ("Live Oak") is a high school within the Morgan Hill Unified School District, a public school district in the state of California.[7] On May 5, 2010, Plaintiffs and two other students wore clothing including images of the American flag to school at Live Oak. (Answer ¶ 14.) Defendant Rodriguez was an assistant principal at Live Oak on that date. (Id. ¶ 13.) During "brunch break," which occurs between 10:00 a.m. and 10:15 a.m. every day, Defendant Rodriguez asked Plaintiffs to either remove their shirts or turn them inside out. (Complaint ¶¶ 18-20; Answer ¶ 20.) When Plaintiffs refused to comply with this request, Defendant Rodriguez asked Plaintiffs to come to his

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[5] (Order Granting in part and Denying in part Defendants' Motion to Dismiss, hereafter, "February 17 Order," Docket Item No. 36.)

[6] (Defendants' Answer to Plaintiffs' Complaint ¶¶ 8-10, hereafter, "Answer," Docket Item No. 37.)

[7] (Complaint ¶ 11.)

office. (Answer ¶ 20.) Plaintiffs complied with this request. (Id. ¶ 23.)

Shortly thereafter Dianna Dariano, the mother of Plaintiff M.D., arrived at the school office. (Answer ¶ 26.) Immediately thereafter, Defendant Boden met with Plaintiffs and the two other students in a conference room in the school's office. (Id. ¶ 28.) The students remained in the office for approximately ninety minutes. (Id. ¶ 29.) Over the course of the meeting, Defendant Boden let two of the five students, including Plaintiff M.D., return to class without changing their shirts. (Complaint ¶¶ 29-30; Answer ¶ 29.) These two students were wearing "Tap Out" shirts. (Id.) Defendant Boden told Plaintiffs D.M. and D.G. that they had to either turn their shirts inside out or go home for the day. (Answer ¶ 30.) He told them that if they chose to go home for the day, they would receive excused absences and it would not count against their attendance record. (Id.) Both Plaintiffs left school at that time. (Complaint ¶ 30.) Although Plaintiff M.D. had been allowed to return to class, Dianna Dariano removed her son from school for the rest of that day. (Answer ¶ 31.)

B. Procedural History

Plaintiffs filed their Complaint on June 23, 2010.[8] Defendants moved to dismiss for lack of subject matter jurisdiction on the grounds that: (1) the case was moot because the individual Defendants were no longer employed by the District; (2) Plaintiffs' claims for nominal damages were barred by sovereign immunity;

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[8] (See Docket Item No. 1.)

(3) Plaintiff M.D. suffered no injury in fact because he was allowed to return to class without changing his clothes; and (4) none of the named parents had standing to sue on their own behalf as they had not suffered injury.[9] The Court granted Defendants' Motion with respect to the parents, holding that the parents lacked standing to bring the suit. (See February 17 Order at 14-15.) The Court denied Defendants' Motion in all other respects. (Id.) Defendants then filed their Answer to Plaintiffs' Complaint, asserting sovereign immunity as to all claims against Defendant Morgan Hill and qualified immunity for Defendants Boden and Rodriguez. (Answer at 8-9.)

Presently before the Court are the parties' Cross-Motions for Summary Judgment.

III. STANDARDS

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex v. Catrett, 477 U.S. 317, 323-24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact." Id. at 323.

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[9] (See Notice of Defendants' Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction, Docket Item No. 12.)

The non-moving party must then identify specific facts "that might affect the outcome of the suit under the governing law," thus establishing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). The court draws all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1992). The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987). In such a case, summary judgment is inappropriate. Anderson, 477 U.S. at 248. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

Although the district court has discretion to consider materials in the court file not referenced in the opposing papers, it need not do so. See Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1028-29 (9th Cir. 2001). "The district court need not examine the entire file for evidence establishing a genuine issue of fact." Id. at 1031. However, when the parties file cross-motions for summary judgment, the district court must consider all of the evidence submitted in support

of both motions to evaluate whether a genuine issue of material fact exists precluding summary judgment for either party. Fair Housing Council of Riverside Cnty, Inc. v. Riverside Two, 249 F.3d 1132, 1135 (9th Cir. 2001).

IV. DISCUSSION

Defendants move for summary judgment on the grounds that: (1) All claims against Defendant Morgan Hill are barred by the Eleventh Amendment; (2) Plaintiffs' cause of action for free speech violations fails because school administrators reasonably forecast that Plaintiffs' clothing would cause a substantial disruption at school; (3) Plaintiffs' equal protection claim fails because Plaintiffs have not offered any evidence that they were discriminated against; and (4) Plaintiffs' cause of action for violation of due process fails because as a matter of law Defendant Morgan Hill's dress code policy provides adequate notice to students of what attire is prohibited. (Defendants' Motion at 1-2.) Defendants further contend that none of the actions of Defendant Rodriguez violated law which was clearly established at the time, entitling Defendant Rodriguez to qualified immunity. (Id.)

Plaintiffs counter that they must prevail on all claims as a matter of law because: (1) Plaintiffs' attire did not cause any disruption of school activities, rendering its suppression a violation of the First Amendment;[10] (2) Plaintiffs were denied the equal protection of the law because undisputed evidence demonstrates that they were treated differently than

[10] (See Plaintiffs' Motion at 11.)

students wearing Mexican flags and flag colors;[11] and (3) the undisputed evidence shows that Defendant Morgan Hill provides no guidelines for administrators in determining when clothing is disruptive, rendering Defendant Morgan Hill's dress code policy unconstitutionally vague in violation of their right to due process. (Id. at 19.) Plaintiffs also contend that their claims against Morgan Hill and Defendant Rodriguez are not barred by sovereign immunity because monetary damages are sought only against the school administrators in their individual capacities, and not against the state itself.[12]

A. Eleventh Amendment Immunity

At issue is whether Plaintiffs' claims against Defendant Morgan Hill are barred by Eleventh Amendment sovereign immunity.

The Eleventh Amendment bars private citizens from bringing suit against a state in federal court. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). States are immune from suit in federal court regardless of the nature of either the relief sought or the cause of action. Id. at 100-02. In addition, sovereign immunity bars suit when either the state itself or an agency of the state is named as the defendant. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429 (1997). The Ninth Circuit has consistently held that in California, because of the manner in which funds are dispersed to school districts

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[11] (See Plaintiffs' Motion at 15.)

[12] (Plaintiffs' Reply in Support of Motion for Summary Judgment at 11-12, hereafter, "Plaintiffs' Reply," Docket Item No. 63.)

by the state, school districts are agencies of the state for sovereign immunity purposes. See Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 251 (9th Cir. 1992). Thus, school districts in California are immune to suit even for relief that is solely prospective. See Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1035-36 (9th Cir. 1999).

Here, the parties do not dispute that Defendant Morgan Hill is a public school district operating within the state of California.[13] As such, under Belanger, the district is an agent of the state, which means that the Court lacks jurisdiction to hear Plaintiffs' claims against it.

Plaintiffs contend that their claims against Morgan Hill are not barred by sovereign immunity because they seek only prospective relief, and Ex Parte Young[14] created "an exception to Eleventh Amendment immunity" for prospective relief.[15] While Ex Parte Young does allow suits to proceed against state *officials* in their official capacity for purely prospective relief, it does not allow federal courts to entertain suits against the state itself, regardless of the form of relief sought. See Rounds, 166 F.3d at 1035-36 (discussing Ex Parte Young). Here, Plaintiffs have named a state entity, Morgan Hill Unified School District, as a Defendant. However, because Ex Parte Young only enables suit

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[13] (See Complaint ¶ 11.)

[14] 209 U.S. 123 (1908).

[15] (See Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 22-23, hereafter, "Plaintiffs' Opp'n," Docket Item No. 59.)

against state officials, it does not permit Plaintiffs to sue Morgan Hill.

Accordingly, the Court DISMISSES all claims against Defendant Morgan Hill.[16]

B. First Amendment Claim

At issue is whether the school officials violated Plaintiffs' First Amendment rights.

Courts have long struggled to balance the First Amendment rights of students with the need of school administrators to maintain a safe and educational environment in our nation's schools. See Morse v. Frederick, 551 U.S. 393, 403-08 (2007) (reviewing cases); LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987-90 (9th Cir. 2001). Though Tinker v. Des Moines made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[17] the Supreme Court has also consistently recognized that these rights are not co-extensive with those of adults or even of children outside of a public school setting.[18]

Student speech which is not obscene, and which does not bear the imprimatur of the school, is governed

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[16] Dismissal for lack of subject matter jurisdiction is not a ruling on the merits of a plaintiff's claim and is therefore a dismissal without prejudice. Haywood v. Drown, 129 S. Ct. 2108, 2134 (2009).

[17] 393 U.S. 503, 506 (1969).

[18] See, e.g., Morse, 551 U.S. at 396-97.

by the standard set forth in Tinker.[19] This standard allows officials to suppress speech only on the basis of "facts which might have reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." Tinker, 393 U.S. at 514. The Ninth Circuit has noted that while simple in theory, this standard is difficult to apply across the myriad possible disruptive situations faced by school administrators. See Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973). For that reason, in determining whether the Tinker standard has been satisfied, courts must look to "the totality of the relevant facts" present in every case. LaVine, 257 F.3d at 989. Karp, however, provides useful guidance as to what constitutes an adequate factual basis for believing a disruption will occur.

First, in Karp, the Ninth Circuit clarified that Tinker does not require that school officials wait until disruption occurs before they act. 477 F.2d at 175. To the contrary, school officials generally have a duty to prevent such occurrences when possible. Id. Second, Tinker "does not demand a certainty that disruption will occur, but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption." Id. Third, in evaluating the adequacy of an official's justification for suppression, "the level of disturbance required to justify official intervention is relatively lower in a public school than it might be on a street corner." Id. Finally, school officials may be justified in suppressing speech on campus in order to prevent a disturbance even if punishing a student for

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[19] See Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992).

that same speech would not pass constitutional muster. See id. at 176-77; see also LaVine, 257 F.3d at 992 (upholding emergency expulsion of student based on concerns for student safety but enjoining school from placing "negative documentation" in student's permanent file).

The Ninth Circuit has not directly confronted the question of when a perceived threat of violence by other students against a student speaker may justify the suppression of that student's speech. Those circuits to confront the question, however, have demonstrated broad deference to the decisions of school administrators with regards to student safety. The Sixth, Tenth and Eleventh Circuits have all upheld bans on the Confederate flag in schools with a history of racial tensions leading to disturbances.[20] Similarly, the Second Circuit, in considering the propriety of suspending a student after his comments led to multiple threats of violence against him, explained that "while Tinker was not entirely clear as to what constitutes 'substantial interference,' violence or the threat of violence would undoubtedly qualify." DeFabio v. East Hampton Union Free Sch. Dist., 623 F.3d 71, 79 (2d Cir. 2010) (citation omitted). Recognizing the critical importance of maintaining a safe environment, courts consistently review "with deference . . . schools'

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[20] See Barr v. Lafon, 538 F.3d 554, 565-70 (6th Cir. 2008) (applying Tinker standard and upholding prohibition on wearing Confederate flag); Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1249 (11th Cir. 2003) (holding that ban on Confederate flag satisfied Tinker standard), cert. denied, 540 U.S. 824; West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1365-67 (10th Cir. 2000) (upholding ban on Confederate flags under Tinker).

decisions in connection with the safety of their students even when freedom of expression is involved." LaVine, 257 F.3d at 992.

In this case, the following undisputed evidence is before the Court:

(1) In the six years that Defendant Boden was principal at Live Oak, he personally observed at least thirty fights on campus.[21] Some of these fights involved gangs, and others were between Caucasian and Hispanic students. (Id.) A police officer is present on campus every day to ensure safety on school grounds.[22]

(2) On Cinco de Mayo in 2009, a verbal exchange and altercation arose between a group of predominantly white and a group of Mexican students.[23] This altercation involved an exchange of profanities and threats were made. (Id.) A makeshift American flag was put on one of the trees on campus. (Id.) A

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[21] (Declaration of Nicholas Boden in Support of Defendants' Motion for Summary Judgment ¶ 5, hereafter, "Boden Decl.," Docket Item No. 54.)

[22] (Declaration of Alyson Cabrera in Support of Defendants' Motion for Summary Judgment, hereafter, "Cabrera Decl.," Ex. G, Deposition of Dominic Maciel at 57:11-57:17, hereafter, "Maciel Depo.," Docket Item No. 55-3; Cabrera Decl., Ex. F, Deposition of Daniel Galli at 36:18-36:24, hereafter, "Galli Depo.," Docket Item No 55-3.)

[23] (Cabrera Decl., Ex. B, Deposition of Miguel Rodriguez at 65:17-86:6, hereafter, "Rodriguez Depo.," Docket Item No. 55-1.)

group of Caucasian students began clapping and chanting "USA" as this flag went up. (Id.) This was in response to a group of Mexican students walking around with the Mexican flag. One Mexican student shouted "fuck them white boys, fuck them white boys." (Id.) Vice- Principal Rodriguez directed the minor to stop using such profanity. (Id.) The minor responded by saying "But Rodriguez, they are racist. They are being racist. Fuck them white boys. Let's fuck them up." (Id.) Vice-Principal Rodriguez removed the minor from the area. (Id.)

(3) When Plaintiff M.D. wore an American flag shirt to school on Cinco de Mayo 2009, he was approached by a male student who shoved a Mexican flag at him and said something in Spanish expressing anger at Plaintiffs' clothing.[24]

(4) Many of the students involved in the May 2009 altercation were still students at Live Oak in May of 2010. (Rodriguez Depo. at 92:8-92:12.)

(5) On the morning of Cinco de Mayo 2010, a female student approached Plaintiff M.D., motioned to his shirt, and said "why are you wearing that, do you not like Mexicans?" (Dariano Depo. at 68:25-69:7.) Plaintiffs D.G. and D.M. were also confronted about their

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[24] (Cabrera Decl., Ex. E, Deposition of Matthew Dariano at 83:15-83:20, hereafter, "Dariano Depo.," Docket Item No. 55-2.)

clothing by female students before brunch break.[25]

(6) As Defendant Rodriguez was leaving his office before brunch break on May 5, 2010, a Caucasian student approached him and said, "You may want to go out to the quad area. There might be some–there might be some issues." (Rodriguez Depo. at 46:20-46:25.)

(7) During brunch break on May 5, 2010, another student called Vice-Principal Rodriguez over to a group of Mexican students and said that she was concerned about a group of students wearing the American flag and said that "there might be problems."[26] Vice-Principal Rodriguez took her statement to mean that there might be some sort of physical altercation. (Id. at 60:13-60:15.) A group of Mexican students also asked Defendant Rodriguez "why do they get to wear their flag when we don't get to wear our flag?" (Id. at 57:1-57:3.)

(8) Defendant Rodriguez was directed by Defendant Boden to have the students either turn their shirts inside out or take them off. (Rodriguez Depo. at 76:23-77:5.) Plaintiffs refused to do so. (Id. at 79:1-79:4.)

(9) While meeting with Plaintiffs about their attire, Defendant Rodriguez explained that

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[25] (Maciel Depo. at 127:18-128:5; Galli Depo. at 101:22-102:7.)

[26] (Rodriguez Depo. at 60:4-60:8.)

he was concerned for their safety. (Rodriguez Depo. at 108:5-108:14.) Plaintiffs did not dispute that their attire put them at risk of violence. (Id.) Plaintiff D.M. stated that he was "willing to take on that responsibility" in order to continue wearing his shirt. (Id.)

(10) Following Plaintiffs' departure from school they received numerous threats from other students. Plaintiff D.G. received a threat of violence via text message on May 6th.[27] He received another threatening call from a male saying he was outside of D.G.'s home that same night. (Id.) Plaintiffs D.M. and M.D. also were threatened with violence. (Id. at 90:15-91:3.) A student at Live Oak overheard a group of male students saying that some gang members would come down from San Jose to "take care of" Plaintiffs. (Id. at 84:2-84:5.) Based on these threats, Plaintiffs did not go to school on May 7. (Id. at 85:1.)

Although Plaintiffs do not dispute that any of these incidents occurred, Plaintiffs contend that as a matter of law, the events prior to the school officials' intervention do not constitute a sufficient basis to forecast a substantial disruption with school activities. In support of this contention, Plaintiffs emphasize the facts, also undisputed, that no classes were delayed or

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[27] (Cabrera Decl., Ex. I, Deposition of Joy Jones at 82:11-85:1, hereafter, "Jones Depo.," Docket Item No. 55-3.)

interrupted by Plaintiffs' attire,[28] no incidents of violence occurred on campus that day,[29] and prior to asking Plaintiffs to change Defendant Rodriguez had heard no reports of actual disturbances being caused in relation to Plaintiffs' apparel.[30]

Upon review, the Court finds that based on these undisputed facts, the school officials reasonably forecast that Plaintiffs' clothing could cause a substantial disruption with school activities, and therefore did not violate the standard set forth in Tinker by requiring that Plaintiffs change. In contrast to Tinker, in which the Supreme Court specifically noted that no threats of violence were made,[31] here Defendant Rodriguez was warned by two different students that they were concerned that Plaintiffs' clothing would lead to violence. These warnings were made in a context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag. While Plaintiffs are correct that no actual violence had erupted prior to the school officials' intervention, Tinker unequivocally

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[28] (Declaration of William J. Becker Jr., in Support of Plaintiffs' Motion for Summary Judgment, hereafter, "Becker Decl.," Ex. 1, Deposition of Miguel Rodriguez at 44:5-44:19, hereafter, "Rodriguez Depo. 2," Docket Item No. 52-1.)

[29] (Becker Decl., Ex. 4, Deposition of Nicholas Boden at 59:19-59:21, hereafter, "Boden Depo.," Docket Item No. 52-1.)

[30] (Rodriguez Depo. 2 at 44:15-44:19.)

[31] 393 U.S. at 508.

did not establish an "actual disruption" standard.[32] To require the school officials to ignore warnings of violence until they reached fruition would, as the Sixth Circuit noted, place school officials "between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation."[33] Although no school official can predict with certainty which threats are empty and which will lead to true violence, the Court finds that these school officials were not unreasonable in forecasting that Plaintiffs' clothing exposed them to significant danger. Because the school officials were responsible for the safety of Plaintiffs on a day-to-day basis, the Court finds that they did not violate the First Amendment by asking Plaintiffs to turn their shirts inside out to avoid physical harm.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' First Cause of Action against Defendant Rodriguez.

C. Equal Protection Claim

At issue is whether Plaintiffs' right to equal protection was violated by the requirement that they change clothing. Plaintiffs contend that they are entitled to summary judgment because the undisputed evidence shows that they were treated differently than students wearing the colors of the Mexican flag, and that this distinction was based on the unpopularity of their viewpoint. (Plaintiffs' Motion at 18.) Defendants

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[32] See Karp, 477 F.2d at 175.

[33] Barr, 538 F.3d at 565 (citation omitted).

respond that Plaintiffs have offered no evidence demonstrating that students wearing the colors of the Mexican flag were likely to be targeted for violence, and that officials treated all students for whose safety they feared in the same manner. (Defendants' Motion at 20.)

When the government infringes upon protected speech in a discriminatory manner, such conduct may constitute a violation of the Equal Protection Clause as well as the First Amendment. See Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972). "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny it those wishing to express less favored or more controversial views." Id.

Here, for the reasons discussed above, Defendants have provided a non-discriminatory basis for asking Plaintiffs to remove their American flag attire. Defendants have put forth significant evidence demonstrating that Plaintiffs were asked to change clothes in order to protect their own safety. Plaintiffs have not offered any evidence demonstrating that students wearing the colors of the Mexican flag were targeted for violence. To the contrary, the undisputed evidence shows that Plaintiffs were the only students on campus whose safety was threatened that day, at least to the knowledge of Defendants.[34] In addition, Defendant Rodriguez has testified that he did not see any students wearing the Mexican flag on their clothing during the day. (Rodriguez Depo. 2 at 117:17-

[34] (Boden Depo. at 59:19-59:21.)

117:22.) He also testified that he did not see any students with Mexican flags displayed on their person until he saw photos in the newspaper in the days following Cinco de Mayo. (Id. at 117:2-117:11.) Plaintiffs offer no evidence to contradict Defendant Rodriguez's testimony in this regard.

In sum, the school officials have offered substantial evidence that all students whose safety was in jeopardy were treated equally. Plaintiffs offer no evidence to the contrary. Absent any evidence that the school officials treated students differently based on the content of the message they displayed, as opposed to concerns for their safety, the Court finds that the school officials are entitled to judgment as a matter of law.[35]

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' Third Cause of Action against Defendant Rodriguez.

D. Due Process Claim

In addition to seeking relief from Defendant Rodriguez in his individual capacity, Plaintiffs seek to permanently enjoin the use of the school district's dress

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[35] Plaintiffs contend that statements made by school officials, during their meeting with Plaintiffs, demonstrate that those officials only required Plaintiffs to change their clothes in order to avoid offending other students at the school. However, upon review, the Court finds that Plaintiffs mischaracterize the statements at issue. The Court finds that those statements, when read in context, indicate that Defendants were apprehensive about causing "offense" to other students in relation to Defendants' concerns about Plaintiffs' safety. (See, e.g., Rodriguez Depo. 2 at 89:23-91:12; Boden Depo. at 49:20-51:7.)

code policy,[36] which Plaintiffs contend is unconstitutionally vague and thus violates the Due Process Clause.[37] Although all claims against Defendant Morgan Hill have been dismissed, the constitutionality of its dress code policy is nonetheless properly before the Court because Defendant Rodriguez has been named in his official, as well as individual capacity. As stated earlier, because Defendant Rodriguez's successor will be in a position to enforce the allegedly unconstitutional policy, suit against him for prospective relief is proper.[38] Defendants do not dispute that the policy is their operative dress code and that Defendant Morgan Hill does not have any additional guidelines on which administrators are supposed to rely in administering the code.[39] Defendants contend, however, that the policy provides adequate guidance to school officials under the

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[36] (See Becker Decl., Ex. 8, Excerpts from Student Rights and Responsibilities Handbook, Docket Item No. 52-1.)

[37] Specifically, Plaintiffs contend that the dress code is unconstitutionally vague because of its prohibition on clothing which "disrupts school activities," arguing that this rule "provides no objective standards," thereby "granting government officials unbridled discretion to silence messages and viewpoints." (Plaintiffs' Motion at 19-20.)

[38] See Long v. Van de Kamp, 961 F.2d 151, 152 (9th Cir. 1992) (explaining that prospective relief may be sought against a state official if that official has a sufficient connection to the challenged statute or provision).

[39] (Becker Decl., Ex. 5, Deposition of Wesley Smith at 19:21-25:13, Docket Item No. 52-1.)

diminished standards applicable to school disciplinary codes. (Defendants' Motion at 18.)

The Supreme Court has made clear that while students may challenge a school disciplinary policy for vagueness, the standards that apply to school disciplinary codes are vastly different than those governing criminal statutes. This is because of "the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process," which means that "the school disciplinary rules need not be as detailed as a criminal code." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986). Thus, "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures." Id. (citation omitted). Because of this need for flexibility, the Fraser Court found that the due process claim of a student who had been suspended on the basis of a policy forbidding "obscene" speech, when his speech was not legally obscene but merely overly lewd for a school setting, was "wholly without merit." Id.

Here, the Court finds that the policy at issue does not violate the Due Process clause for lack of clarity. To the contrary, the disciplinary standard is no more vague than that at issue in Fraser, or than dress codes across the country that have been upheld against vagueness challenges.[40] Plaintiffs do not cite to a single

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[40] See, e.g., A.M. ex rel. McAllum v. Cash, 585 F.3d 214, 224 (5th Cir. 2009) (upholding against due process challenge school dress code's prohibition on clothing with "inappropriate symbolism"); Jackson v. Dorrier, 424 F.2d 213, 214, 215 (6th Cir. 1970)

instance, in this circuit or any other, of a school dress code's ban on disruptive conduct or apparel being held overly vague, and the Court is aware of none. Thus, the Court finds that Plaintiffs' argument is precluded by Fraser and that the District's policy does not violate Plaintiffs' right to due process.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' Second Cause of Action.

E. State Constitutional Claim

At issue is whether Plaintiffs' rights to freedom of speech and expression under Article 1, § 2(a) of the California State Constitution were violated by the requirement that they change clothes.

Article 1, § 2(a) of the California Constitution is more protective of speech than the First Amendment in some contexts.[41] In the context of schools, however, California courts have generally treated the rights of students and teachers under Article 1, § 2(a) as being co-extensive with those provided by the First Amendment.[42]

Here, Plaintiffs concede that their Article 1, § 2(a) claim is dependant upon the Court finding a violation

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(upholding dress code's prohibition on attire that is a "disturbing influence").

[41] See Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d. 899, 908 (1979).

[42] See, e.g., Cal. Teachers Ass'n v. Governing Bd. of San Diego United Sch. Dist., 45 Cal. App. 4th 1383, 1391-92 (Cal. Ct. App. 1996).

of the Tinker standard. (Plaintiffs' Opp'n at 18.) Having found that the school officials' conduct satisfied the Tinker standard and did not violate the First Amendment, the Court similarly finds that their conduct did not violate Article 1, § 2(a) of the California Constitution.

Accordingly, the Court GRANTS Defendants' Motion as to Plaintiffs' Fourth Cause of Action.

V. CONCLUSION

The Court DENIES Plaintiffs' Motion for Summary Judgment and GRANTS Defendants' Motion for Summary Judgment as follows:

(1) The Court DISMISSES all claims against Defendant Morgan Hill for lack of subject matter jurisdiction based on sovereign immunity.

(2) The Court GRANTS Defendant Rodriguez's Motion for Summary Judgment on all claims.

(3) In light of the automatic stay as to Defendant Boden, pursuant to Rule 54(b), the Court finds that there is no just reason to delay entry of Judgment as to Defendant Rodriquez. See Fed. R. Civ. P. 54(b). Judgment shall be entered accordingly.

In light of this Order, Plaintiffs' Motion for a Non-Jury Trial is DENIED as moot. (See Docket Item No. 49.)

Dated: November 8, 2011

/s/James Ware
JAMES WARE
United States District Chief Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Alyson Cabrera acabrera@gordonrees.com
Mark S. Posard mposard@gordonrees.com
Robert J. Muise rmuise@thomasmore.org
William Joseph Becker bbeckerlaw@gmail.com

Dated: November 8, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NO. C 10-02745 JW

[Filed November 8, 2011]

Dianna Dariano, et al.,	)
	)
Plaintiffs,	)
v.	)
	)
Morgan Hill Unified Sch. Dist., et al.,	)
	)
Defendants.	)
	)

JUDGMENT

Pursuant to the Court's November 8, 2011 Order Granting Defendants' Motion for Summary Judgment, judgment is entered in favor of Defendant Miguel Rodriguez[1] against Plaintiffs Dianna Dariano and John Dariano on behalf of their minor child M.D., Julie Ann Fagerstrom and Kurt Fagerstrom on behalf of their minor child D.M., and Kedall Jones and Joy Jones on behalf of their minor child D.G.

[1] In light of the automatic stay as to Defendant Boden, pursuant to Rule 54(b), the Court finds that there is no just reason to delay entry of Judgment as to Defendant Rodriquez. See Fed. R. Civ. P. 54(b).

Each party shall pay their own fees and costs. The Clerk shall close this file.[2]

Dated: November 8, 2011

/s/James Ware
JAMES WARE
United States District Chief Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Alyson Cabrera acabrera@gordonrees.com
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Dated: November 8, 2011

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Susan Imbriani
Courtroom Deputy

[2] Any party may move the Court to reopen this case against Defendant Boden at the completion of his bankruptcy proceedings.