

No. 09-2390
In the
**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

C. H.,

Plaintiff-Appellant

v.

MARTHA HEYWARD, et al.

Defendants-Appellees

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

June 1, 2010

Case Number 09-2390

C. H. v. Martha Heyward

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SUMMARY OF ARGUMENT

The crux of this case involves one major legal question: whether this Court should defer to the judgment of school administrators that a *Tinker* disruption was likely to arise if they allowed the plaintiff to wear confederate flag apparel in school. While this case lacks the horrific facts of many recent confederate flag cases where numerous physical disputes have arisen over the flag, it includes extensive and compelling evidence of racial tensions in the district. The existence of these racial tensions led school administrators to reasonably conclude that the presence of the confederate flag would likely result in substantial disruption to the educational environment in a number of respects. Amici urge federal courts to defer to the judgment of school administrators about the potentially disruptive nature of the confederate flag based on administrators' daily experience working with and educating students in the social and historical context of their communities.

I. In Confederate Flag Cases, School Administrators' Reasonable Perceptions Of Racial Tensions Should Be Enough To Forecast A *Tinker* Disruption.

When school administrators are considering regulating student speech at school, they must determine whether they have enough of the right kind of evidence to forecast a substantial disruption under *Tinker v. Des Moines*

*Independent Community School District.*¹ A review of school confederate flag case law reveals no bright line test indicating when school administrators have enough of the right kind of evidence to forecast that the confederate flag will cause a disruption. In most of the confederate flag cases where school districts have prevailed, racial tensions have culminated in relatively recent physical disputes between students.² In these cases, courts have not had to make a ruling on the significance of racial tensions, because physical disputes are unquestionably disruptive.³ On the other hand, in a few cases courts have upheld schools' prohibition of confederate flag apparel, relying only on evidence of racial tensions.⁴ In short, confederate flag case law does not indicate that evidence of

¹ 393 U.S. 503 (1969).

² See *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972); *B.W.A. v. Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740 (E.D. Mo. 2007); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000); *Barr v. LaFon*, 538 F.3d 554 (6th Cir. 2008); *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003); *Phillips v. Anderson County Sch. Dist.*, 987 F. Supp. 2d 488 (D.S.C. 1997); *A.M. v. Cash*, 585 F.3d 214 (5th Cir. 2009).

³ However, it is noteworthy that courts in a number of these cases have emphasized racial tensions in their decisions rather than physical disputes. See *West*, 206 F.3d at 1366-67 (“The history of racial tension in the district made administrators’ and parents’ concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable.”); *A.M.*, 585 F.3d at 222-23 (“Other circuits, applying *Tinker*, have held that administrators may prohibit the display of the Confederate flag in light of racial hostility and tensions at their

physical disputes is constitutionally required before schools may disallow confederate flag apparel.

Most of the evidence at the time the flag was disallowed in this case relates to racial tensions as perceived by school administrators. However, there is also evidence of a “classroom disruption” apparently involving the confederate flag which occurred during the school year in which the plaintiff was prohibited from wearing confederate flag apparel.⁵ Racial tensions at a school should be enough to forecast a disruption when confederate flag attire is worn. As case law indicates, the confederate flag has at least two meanings, but everyone knows that to some people, if not most people, it is a racially divisive symbol.⁶ The district court⁷ and

little importance, because school administrators “might reasonably think that other students would perceive the display

schools”¹⁰ At a workplace with racial tensions, we would not expect that an adult employee would threaten a coworker who wore a confederate flag belt buckle to work.¹¹ However, many young people are not emotionally or intellectually mature enough to handle hurt feelings caused by perceived personal attacks—particularly involving immutable qualities like race—in a constructive manner.¹²

Likewise, as the cases cited in footnote three illustrate—many of which are very

¹⁰ *Barr*, 538 F.3d at 567-68.

¹¹ Ideally, adult co-workers would instead complain and employers respond appropriately. See *Dixon v. Coburg Dairy*, 369 F.3d 811 (4th Cir. 2004) (employee complained about confederate flag stickers on a co-worker’s toolbox; employer offered to replace toolbox, co-worker refused, and employer fired co-worker for violating company’s anti-harassment policy; co-worker sued under state law protecting employee exercise of political rights guaranteed by the Constitution).

¹² Plenty of anecdotal evidence suggests this is the case. See, e.g., Anthony Cormier, *Full Recovery Expected for Student Shot in Chest*, SARASOTA HERALD TRIBUNE, Apr. 28, 2009 (high school student shot another student who was carrying a confederate flag in the street); Katherine Albers, *Lely High Suspends Three Over Flag Fracas*, NAPLES DAILY NEWS, Jan. 12, 2010 (high school student suspended after punching another student and trying to pull him out of a car that was displaying the confederate flag). What is most striking about both of these examples is how quickly disputes over the confederate flag resulted in significant violence. See also John O’Neill, *A New Generation Confronts Racism*, 50 EDUC. LEADERSHIP 60 (1993) (“Moreover, when conflicts with racial dimensions do arise, students ‘often don’t have the skills,’ to resolve them peacefully, says Sara Bullard, editor of the Southern Poverty Law Center’s *Teaching Tolerance*. ‘They are not taught the skills of cooperation and conflict resolution early enough or broadly enough’ to prevent conflicts from escalating. Even incidents that don’t begin as a racial conflict sometimes become one as the problem escalates, experts say. For example, it is not uncommon for a fight or argument between two students of different races or ethnic backgrounds to escalate into a series of insults, epithets, and physical fights between different groups of students, sometimes over several weeks or longer.”); see generally MELANIE KILLEN ET AL., *HOW CHILDREN AND ADOLESCENTS EVALUATE GENDER AND RACIAL EXCLUSION* (2002).

recent—unfortunately, racial conflict between students can be violent. As the Fifth¹³ and Tenth Circuits¹⁴ agree, administrators in racially tense schools do not have to wait for a “full-fledged brawl” to occur before disallowing confederate flag attire.¹⁵

This Court should not conclude that a *Tinker* disruption must involve likely violence or physical unrest, particularly where racial tensions exist. In confederate flag cases, courts have recognized that a substantial disruption can involve undermining the educational process. For example, in *Phillips v. Anderson County School District*, in upholding discipline of a student who refused to remove a confederate flag jacket, the court stated that “racial tension directly caused or escalated” by the confederate flag can lead to “interference with important purposes of the school—to foster the students’ ability to learn and to relate to one another.”¹⁶ Courts have cited numerous ways in which the education process can

¹³ *West*, 206 F.3d at 1366.

¹⁴ *A.M.*, 585 F.3d at 223-24.

¹⁵ Conversely, *Bragg v. Swanson*, 371 F. Supp. 2d 814 (W.D. W. Va. 2005), where the court enjoined the principal from enforcing a prohibition of the confederate flag for lack of evidence of a forecasted disruption, illustrates that in a school without racial tensions, wearing the confederate flag may not result in a disruption of any kind. In this case, a multiracial student testified that between 75 and 80 percent of students wore confederate flag apparel before the prohibition without a single complaint or comment at school. *Id.* at 820. This student described her school, which had a population of 1,004 students, 14 of whom were African-American, as a place where “people of both races mix freely . . . and are friendly with one another.” *Id.* at 816-17.

¹⁶ 987 F. Supp. at 493.

be undermined when the confederate flag is

incidents.²¹ Now introduce the confederate flag. To African-American students, the district's tolerance of the confederate flag in an already tense environment may send a message that the district is at best insensitive to racist behavior and at worst condones it, no matter how blatant it is. African-American students may have difficulty concentrating in class as they wonder whether continuing school, when they do not feel welcome, valued, or safe, is worthwhile. At this point, the African-American students may see no point in creating a physical disruption to protest the flag—or worse, they may be too afraid of violent retaliation to do so. Instead, the students may suffer psychological and physical harm silently, similar to the minority student in *White v. Nichols* who “complained of being intimidated and scared to the point of feeling ill because she was surrounded by Confederate flags and racial slurs.”²² Or students may feel compelled to leave the district as an

²¹ See studies cited in *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 532 F.3d 668 (7th Cir. 2008) describing evidence that students subject to derogatory comments about personal characteristics “may find it even harder than usual to concentrate on their studies and perform up to the school’s expectation.” See also James P. Comer, *Racism and the Education of Young Children*, 90 TEACHERS COLLEGE RECORD 352 (1989) (“Racism interferes with the normal development of those children subjected to it. It hampers their ability to function at their full potential as children and, later, as adults. This contributes to their greater involvement in social problems such as poor school learning, juvenile delinquency, teenage pregnancy, and substance abuse.”); Stephen Piggott, *New Study Finds Link Between Racism and Mental Health Problems*, IMAGINE 2050, May 14, 2009, <http://imagine2050.newcomm.org/2009/05/14/new-study-finds-link-between-racism-and-mental-health-problems/> (“The study found that 5th graders who were racially abused are highly likely to develop symptoms of depression.”).

²² 2006 WL 1594213, at *1.

African-American student did in *B.W.A. v. Farmington R-7 School District*²³ after being the target of racially motivated threats and violence. To say that no “substantial disruption” has occurred in this example because no student violence erupted amounts to an unnecessarily narrow reading of *Tinker*.

In First Amendment cases outside the confederate flag context, courts have recognized that the psychological effects of speech can be disruptive under *Tinker*.²⁴ Likewise, in *Morse v. Frederick*

harmful speech at school.”²⁶ Similarly in *Nuxoll v. Indian Prairie Sch. Dist. No. 204*,²⁷ in denying plaintiff’s preliminary injunction against a school rule forbidding derogatory comments referring to race, ethnicity, sexual orientation, etc., the court stated that a *Tinker*

suicide illustrate the legal responsibility (or at least the perceived legal responsibility) that school districts have for the psychological well-being of students.³⁵

None of the four U.S. Supreme Court cases involving student free speech contemplate racially divisive speech. Arguably, racially divisive speech is more justifiably regulated in schools than the speech in *Morse*—with racially divisive speech, the expression itself immediately inflicts the harm on the recipient; with speech promoting illegal drug use, the real harm derives from the likelihood of students acting on the advice of the speech (and probably no students smoked marijuana simply because they viewed Frederick’s banner). In short, the unique and troubling problem of racism suggests that a narrow interpretation of *Tinker*—or even applying *Tinker* at all³⁶—is not appropriate in this case.

³⁵ See, e.g., Mason Stockstill, *Motive in Boy’s Suicide Put into Question*, INLAND VALLEY DAILY BULLETIN, Oct. 19, 2006 (parents sue school district that allegedly punished their son for “exercising his First Amendment right” to walk out of school to protest federal immigration legislation claiming the punishment lead to his suicide).

³⁶ Recognizing the “uncivil aspects” of displaying the confederate flag, the Eleventh Circuit has applied *Bethel School District No. 403 v. Fraser* to cases involving the confederate flag in school districts when deciding qualified immunity. *Denno*, 281 F.3d at 1274; see also *Scott*, 324 F.3d at 1248 (applying *Fraser* to the confederate flag). Likewise, in *Denno* the Eleventh Circuit suggests that the Tenth Circuit might also have applied *Fraser* because while it relied on *Tinker* in *West*, it “did not disavow” the district court’s reliance on *Fraser*. *Id.* at 1273 n.4.

Tinker's often ignored "second prong," which allows school districts to prohibit speech that "colli[des] with the rights of other students to be secure and to be let alone,"³⁷ provides some flexibility from the often relied on "substantial disruption" test. In fact, *Tinker*'s "second prong" has been cited by courts in a number of confederate flag cases as a reason for disallowing the speech.³⁸ Moreover, in *DeFoe v. Spiva*, the court explicitly relied on *Tinker*'s second prong when ruling in favor of the school district stating: "A notable difference between the speech in *Tinker* and displays of the confederate flag here, is that the speech in *Tinker* communicated negative feelings toward the Vietnam war, while the speech in this case conveys a message of hatred toward some students because of their race."³⁹

Beyond the black—or perhaps gray—letter law of *Tinker*, schools should have more latitude in finding a disruption when the speech at issue is racially divisive in an already racially tense environment. First, Americans have a long and ugly history of racial conflicts that is unparalleled by any other issue and that continues today. The number of very recent confederate flag cases⁴⁰ that have facts worse than *Melton v. Young*,⁴¹ which was decided almost 40 years ago,

³⁷ 393 U.S. at 508.

³⁸ See, e.g., *Barr*, 538 F.3d at 568-69; *West*, 206 F.3d at 1366.

³⁹ 605 F. Supp. 2d at 820.

⁴⁰ See, e.g., *B.W.A.*, 508 F. Supp. 2d 740; *Barr*, 538 F.3d 554.

⁴¹ 465 F.2d 1332.

illustrates that racism and racial violence are still very prevalent in at least some of America's public schools. Second, school districts that fail to stop students from wearing confederate flag apparel risk being sued under Title VI of the Civil Rights Act of 1964,⁴² which prohibits race discrimination in schools, including racial harassment. Interestingly, in the two reported cases in which courts denied school districts summary judgment where the plaintiffs claimed the districts tolerated a racially hostile environment, the district

There is certainly a time and a place in public schools to discuss racial issues in an open manner—for example, in a classroom discussion lead by a qualified teacher. Allowing schools to regulate confederate flag attire in a racially tense environment in no way prevents such discussions from taking place in America's public schools. In a similar vein, forcing schools to tolerate the confederate flag in a racially divisive environment in the name of the First Amendment will in no way encourage much needed frank and intelligent discussions about the subject of race.

plaintiff would have this Court rely on evidence of racial tensions only from incidents involving the confederate flag, the varying facts of these cases illustrate that students express racial animosity in a variety of ways. In light of the wide range of racist behavior possible, it would be unreasonable for a court to ignore clear expressions of racial tensions merely because they fail to involve the confederate flag. Likewise, the U.S. Department of Education's Office for Civil Rights' guide for school officials, titled *Protecting Students from Harassment and Hate Crime*, contains a checklist relevant to determining whether a "hate motive" may be involved in an incident or attack.⁴⁶ Among the factors to consider are historical animosities between groups, the perceptions of the community, and whether objects representing bias, including the confederate flag, were used.⁴⁷ In summary, school districts should be allowe

Not all evidence of racial tensions will include racial strife. In this case, the middle and high school principals, the school board chairwoman, and the former high school student body president all agreed there were racial problems at the district and in the community.⁴⁸ Their perceptions seemed to be based on more than just blatant acts of racism. Researchers indicate that evidence of racism and racial tension can often be more subtle now than in the past.⁴⁹ Social psychologists have concluded based on research that even as overt expressions of prejudice have declined over the years, racial prejudices have still remained present in more subtle forms.⁵⁰ Because subtle racism is even more likely today than overt racism and because administrators, students, and community members are just as aware of and affected by signs of subtle racism as explicit acts of race-based prejudice within the schools, school districts should be able to take into account this type of evidence of racial tensions to forecast a disruption.

⁴⁸ *Hardwick*, 674 F. Supp. 2d at 735.

⁴⁹ See, e.g., Bertram Gawronski et al., *Understanding the Relations Between Different Forms of Racial Prejudice: A Cognitive Consistency Perspective*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 648 (2008).

⁵⁰ One theory for describing this phenomenon is aversive racism where “people hold strong egalitarianism-related, nonprejudicial goals . . . but nevertheless experience negative feelings toward these groups even though these feelings are not reflected in negative judgments.” *Id.* Conscious of self-image, aversive racists may avoid a discriminatory response that could be attributed to race-based motives while still be so2216 0tsf 9 i7(ere “p)Uf54e.race-bas 513a0/ aw3001te7tramR0 Tw(ejudicial goa

Finally, evidence from local history – even when not that current – can be a powerful indicator of racial tensions within both the school and the community generally.⁵³ Even where the current school climate appears less racially-charged when compared to the past, historical evidence may signal that more subtle racial tensions persist into the present. In fact, a number of courts have relied on evidence of “older” racially charged incidents to conclude that racial tensions still exist at a school.⁵⁴ For example, in *A.M. v. Cash*, the plaintiff claimed that she had “never heard of” an incident which occurred four year earlier, where a student at her high school shoved a confederate flag in the face of another high school’s girls⁴³ volleyball team composed of all black students.⁵⁵ Nevertheless, the Fifth Circuit relied on this incident when concluding that the high school was still plagued with racial tensions.⁵⁶ In some cases it could be that the proactive efforts of school administrators to address the past racial tensions have contributed to a decline in overtly prejudicial behavior. In *West v. Derby Unified School District*, for example, the court noted in the facts that the “Racial Harassment and Intimidation”

⁵³ See U.S. DEPARTMENT OF JUSTICE, DISTANT EARLY WARNING SIGNS (DEWS) SYSTEM: INDICATORS USED TO ASSESS THE POTENTIAL FOR RACIAL TENSION IN A COMMUNITY, *available at* <http://www.justice.gov/crs/pubs/dewslast.pdf> (listing

policy at issue in the case had led to just such a decline in incidents of racial harassment and discord in the school between 1995 and 1998.⁵⁷ Yet, the court found that the history of racial tensions in the district made the administrators' concerns about future disruptions due to the confederate flag reasonable in 1998.⁵⁸ Given that subtle racism may persist long after the last time a fight happened at

are “within the range where reasonable minds will differ.”⁶¹ Likewise, as a South Carolina district court stated in *Phillips*, school administrators can—and should—take steps to prevent reasonably anticipated disruptions: “School authorities . . . are not required to wait until disorder or invasion occurs. . . . Indeed, it has been held that the school authorities ‘have a duty to prevent the occurrence of disturbances.’”⁶²

School administrators—and in particular, principals—generally will be tasked with deciding whether to prohibit students from wearing confederate flag apparel based on their reasonable forecast of a disruption occurring in the school. For the reasons discussed below, administrators are uniquely qualified to identify racial tensions and to ascertain that wearing confederate flag attire in a racially tense environment will cause a specific fear, as opposed to simply an “undifferentiated fear or apprehension of disturbance.”⁶³ Therefore, their judgment should not be second-guessed by the federal courts. As the Seventh Circuit stated in *Nuxoll*, “A judicial policy of hands off (within reason) school regulation of student speech has much to recommend it. . . . [J]udges are incompetent to tell

⁶¹ *A.M. v. Cash*, 585 F.3d at 222 (quoting *Shanley v. Northeastern Indep. Sch. Dist.*, 462 F.2d 960, 970 (5th Cir. 1972)).

⁶² 987 F. Supp. at 492 (citations omitted).

⁶³ *Tinker*, 393 U.S. at 508.

school authorities how to run schools in a way that will preserve an atmosphere conducive to learning”⁶⁴

First, courts should defer to the judgment of school administrators about whether racial tensions exist and may cause a disruption, because school administrators are in the trenches at the school every day. As the Eleventh Circuit noted in *Scott v. School Board of Alachua County*, even though students do not

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School principals have unique knowledge of the school environment and student reactions to racial tensions and other difficult situations, because they are involved in every major issue that arises in their school. Likewise, principals are highly involved in the discipline process and, consequently, are familiar with the problems underlying discipline—like racial tensions—in their schools. Long term administrators in particular, such as the principal in this case, know the history of racial tensions at their school and how students have typically responded to and have been affected by them. For example, in *DeFoe v. Spiva*, the district court cited the principal’s testimony that when he started as assistant principal of the school eight years before the facts giving rise to the case, he did not think disallowing the confederate flag was necessary, but he changed his position on the policy after witnessing racial tensions and their effects in the school over a period of several years.⁶⁷

Second, courts should defer to the perceptions of school administrators about racial tensions, because many school principals and other administrators receive training on how to identify and deal with racial issues and diversity in the school environment as part of their education.⁶⁸ This training⁶⁹ also makes administrators

⁶⁷ 650 F. Supp. 2d at 816.

⁶⁸ Diversity requirements are becoming more common in institutions of higher learning around the country. In 2000, a national study of colleges and universities found that 63 percent either had a diversity requirement for graduation in place or they were developing one. Debra Humphreys, National Survey Finds Diversity

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Dated: June 1, 2010

/S/ Francisco M. Negrón, Jr.

Amici Curiae

