No. 07-3099

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

B.W.A., *et al.*,

Plaintiffs-Appellants

v.

FARMINGTON R-7 SCHOOL DISTRICT, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE UNITED STATES

This case concerns the authority of public schools to prohibit student speech that may constitute racial harassment. The United States is authorized to file and intervene in cases presenting issues arising under the Equal Protection Clause of the Fourteenth Amendment in the context of public schools, see 42 U.S.C. 2000c-6, 42 U.S.C. 2000h-2. In addition, the United States can sue to enforce Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits discrimination on the basis

of race by recipients of federal funds, including school authorities. Accordingly, the United States has a substantial interest in supporting school districts' legitimate efforts to prevent harassment of students based on race (or other factors, such as sex or disability) in public schools, and in the orderly development of the law regarding the control by school districts of student speech that may amount to racial harassment.

STATEMENT OF THE ISSUE

Whether the district court properly held that a school district did not violate the First Amendment by prohibiting students from wearing clothing displaying the Confederate flag where the school and the community in which it was located had recently experienced numerous incidents of racial violence and racial tension, and school officials had reason to believe that display of the flag would cause material and substantial disruption to the school's educational function.

STATEMENT OF THE CASE

1. Facts

A. Plaintiffs B.W.A., R.S., and S.B. were students at Farmington High School. See *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740 (E.D. Mo. 2007). Farmington High School is part of the Farmington R-7 School District

(District) in Farmington, Missouri. *Id.* at 743. Only fifteen to twenty of Farmington High School's 1,100 students are African-American. *Id*. at 744 n.5.

B. In 1995, the District adopted a student dress code that prohibited "[d]ress that materially disrupts the educational environment." *B.W.A.*, 508 F. Supp. 2d at 743. This code was published in the Farmington High School Student and Parent Information Guide and was given to every student at the beginning of the 2006-2007 school year. *Ibid*. In January 2006, the District's superintendent, W.L. Sanders, "told District administrators that the Confederate flag was a symbol prohibited by the dress code." *Ibid.* According to the superintendent, his decision was based on several race-related incidents that occurred in the District in 2005. *Ibid*.

Specifically, in May 2005, a white elementary school student urinated on a black fourth grader while allegedly saying, "[T]hat is what black people deserve." *B.W.A.*, 508 F. Supp. 2d at 743; see also Doc. 31-17 at 2, p. 9 (Deposition of W.L. Sanders)[1]; Doc. 31-4 at 2 (Affidavit of Lashonda Reid). The District's investigation confirmed that the white student urinated on the African-American student but could not conclusively determine whether the white student made the

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[1] "Doc. __ at __" refers to documents listed in the district court's docket sheet and the page numbers within those documents. *B.W.A.* v. *Farmington R-7 Sch. Dist.*, No. 06-cv-1691 (E.D. Mo.).

racial remark. *B.W.A.*, 508 F. Supp. 2d at 743-744. The parents of the African-American student removed their child from the District, stating that the school was not a "good educational environment" for him. *Id*. at 744.

On September 9, 2005, there was a confrontation at Farmington High School between a white student and an African-American student, Laricco Welch, after which a group of white students went to Welch's home. *B.W.A.*, 508 F. Supp. 2d at 744; see also Doc. 33-9 at 4, p. 14 (Deposition of W.L. Sanders). One of the white students had a swastika tattoo; another white student was carrying an aluminum baseball bat. *B.W.A.*, 508 F. Supp. 2d at 744. At Welch's house, the white students made racially derogatory remarks, including telling Welch that "anything that is not white is beneath them." *Ibid*. Welch's mother stated that when she tried to "keep a physical altercation from breaking out," one of the white students hit her in the eye, causing a fight between her son and the white students. *Ibid.*; Doc. 31-5 at p. 2 (Affidavit of Edith Welch). Thereafter, several white students and other individuals drove around the Welch residence, yelling racial remarks and threatening to burn the house down. *B.W.A.*, 508 F. Supp. 2d at 744. Ultimately, police were called to the scene. Doc. 33-9 at 5, p. 14 (Deposition of W.L. Sanders).

Three days later, a group of white students "surrounded and confronted" Laricco Welch at school. *B.W.A.*, 508 F. Supp. 2d at 744; Doc. 31-5 at p. 2 (Deposition of Edith Welch). School officials tried to keep Welch separated from other students at the school who might harm him. Doc. 33-9 at 4, p. 15 (Deposition of W.L. Sanders). As a result of these confrontations, and concern that their son might not be safe at Farmington, Welch's family withdrew him from school and moved out of the District. *B.W.A.*, 508 F. Supp. 2d at 744; see also Doc. 33-9 at 4, p. 15 (Deposition of W.L. Sanders); Doc. 31-5 at p. 3 (Affidavit of Edith Welch).

In December 2005, a fight broke out between members of the Farmington High School and Festus Senior High School basketball teams after two white Farmington players directed "racial slurs" towards two African-American players from Festus. *B.W.A.*, 508 F. Supp. 2d at 744; see also Doc. 31-17 at 3, pp. 19-20 (Deposition of W.L. Sanders). Superintendent Sanders stated that Festus High School has a "greater African American population than * * * Farmington." Doc. 31-17 at 6, p. 30 (Deposition of W.L. Sanders). Superintendent Sanders also stated that a Confederate flag hung in the hallway near the locker rooms during the game. *Id.* at 4, p. 21. Sanders stated that throughout the game there was physical contact between a black player from Festus and a white player from Farmington

and that officials had to separate the players. *Id.* at 3, pp. 19-20. Festus players alleged that the white Farmington players had used racial slurs and that these problems led to a confrontation in the crowd between some white Farmington residents and black Festus residents. *Id*. at 3, p. 20. Basketball tournament officials decided to forgo having the teams shake hands after the game and separated the teams for the awarding of trophies. *Ibid*.

Because the District's investigation into the causes of the incident ultimately was "inconclusive," Farmington did not discipline any of its players. *B.W.A.*, 508 F. Supp. 2d at 744. Supporters of the Festus students and the local Festus newspaper condemned Farmington's response, and the Festus students filed a report with the Missouri State High School Activities Association and the United States Department of Education's Office of Civil Rights (OCR). *Ibid*. As part of their agreement with OCR, Festus School District officials wrote a letter to the Farmington School District requesting that Farmington take steps to prevent any further racial incidents. *Ibid.* Consequently, the Farmington and Festus high school basketball teams no longer play each other unless required by their athletic conference, and extra security is provided at these games. *Ibid*.

Two other racial incidents occurred at Farmington High School prior to the superintendent's January 2006 ban on the Confederate flag. On December 5,

2005, school officials found that a white student was drawing swastikas and writing racially derogatory "white power" song lyrics in his notebook. *B.W.A.*, 508 F. Supp. 2d at 744-745 & n.6. On December 15, 2005, a white student told another student "never to loan my stuff to a black man" when the other student allowed a black student to borrow his portable video game system. *Id.* at 745 & n.7.

Following those incidents, Superintendent Sanders, relying on his authority to prevent "disrupti[on]" to the education of the high school students, Doc. 31-17 at 7 p. 47 (Deposition of W.L. Sanders), decided to ban students from wearing clothing that depicted the Confederate flag. *Id*. at 7-8, pp. 45-47, 51-52. Superintendent Sanders relied on his understanding of the history of the Confederate flag, the context in which it was displayed, the message others might take from it, the role of the flag in the basketball game incident, and attendant racial tensions at the school. *Id*. at 8, pp. 51-52.

Additional racial incidents occurred at Farmington High School after the January 2006 flag ban: (1) on February 9, 2006, and March 10, 2006, school officials disciplined students for making racial slurs; (2) on March 23, 2006, school officials disciplined a white student for shouting "white power" three times during class; (3) on March 29, 2006, a white student drew a swastika on the

chalkboard and told his teacher that the "niggers [are] here" upon the arrival of a visiting track team; and (4) on April 26, 2006, a student stated that he "work[s] like a nigger and nobody cares." *B.W.A.*, 508 F. Supp. 2d at 745.

C. On September 27, 2006, B.W.A. arrived at school wearing a hat depicting the Confederate flag. *B.W.A.*, 508 F. Supp. 2d at 745. A teacher and the dean of students at Farmington High School told B.W.A. that he could not wear his hat. *Ibid*. Susan Barber, assistant principal at Farmington High School, also met with B.W.A. early in the morning and told him that he would have to remove the hat because "some people view the Confederate flag as a symbol of racism." *Ibid*.; see also Doc. 33-5 at 2, pp. 10-13 (Deposition of B.W.A.); Doc. 31-14 at 2-3, pp. 12-13 (Deposition of Susan Barber). B.W.A. kept his hat in his backpack for the rest of the day. *B.W.A.*, 508 F. Supp. 2d at 745.

B.W.A. came to school the next day wearing a t-shirt and belt buckle bearing an image of the Confederate flag. *B.W.A.*, 508 F. Supp. 2d at 745. Farmington coach Mark Krause took B.W.A. to the principal's office that morning. Doc. 31-3 at p. 8 ¶ 52 (Defendant's Statement of Uncontroverted Facts). Assistant Principal Barber spoke to B.W.A. again, asking him to remove his belt buckle and turn his shirt inside out. *B.W.A.*, 508 F. Supp. 2d at 745. When

B.W.A. refused, the assistant principal sent him home for the day, and his mother subsequently "withdrew him from school." *Ibid*.

After B.W.A. left Farmington, racial tensions increased. Protesters, carrying the Confederate flag, gathered outside the school; bathroom walls were vandalized with racial slurs; a student was disciplined on November 29, 2006, after telling an African-American student that he was a "monkey crawling across the seats of the bus"; and in January 2007, another African-American student left Farmington because he was "uncomfortable due to the racial tension." *B.W.A.*, 508 F. Supp. 2d at 745; see also Doc. 31-17 at 6, pp. 30-31 (Deposition of W.L. Sanders).

On January 10, 2007, R.S. wore a shirt to school that B.W.A. had given him approximately two days earlier that bore the phrase "The South was right[,] Our school is wrong," and the image of the Confederate flag. *B.W.A.*, 508 F. Supp. 2d at 745; see also Doc. 31-13 at 3, p. 8 (Deposition of R.S.). When R.S. refused to change or turn his shirt inside out, he was suspended for the rest of the day. Doc. 31-13 at 4, p. 11 (Deposition of R.S.); see also *B.W.A.*, 508 F. Supp. 2d at 745. The next day, R.S. wore a shirt to school that said, "Our school supports freedom of speech for all (except Southerners)." *Ibid.* Upon being told to turn his shirt

inside out or leave school, he left and returned with a shirt from "Dixie Outfitters," which did not depict the Confederate flag. *B.W.A.*, 508 F. Supp. 2d at 745-746.

On January 12, 2007, S.B. wore to school a shirt containing the Confederate flag and a slogan supporting B.W.A. *B.W.A.*, 508 F. Supp. 2d at 746. During the morning, the dean of students at Farmington High School asked S.B. to turn her shirt inside out, and when S.B. refused she was suspended for the rest of the day. *Ibid*.; see also Doc. 31-16 at 2, p. 8 (Deposition of S.B.).

D. On November 21, 2006, B.W.A. filed this lawsuit, alleging that the Farmington R-7 School District, the District's superintendent, the District's assistant superintendent, and the high school's dean of students, assistant principal, and a teacher violated his First Amendment rights and Missouri law when they refused to allow him to wear the Confederate flag at school. *B.W.A.*, 508 F. Supp. 2d at 746. R.S. and S.B. were later added as plaintiffs. *Ibid*. Plaintiffs sought declaratory and injunctive relief that would allow them to wear clothing depicting the Confederate flag to school. *Ibid*.

2. District Court Decision

On August 10, 2007, the district court granted the District's motion for summary judgment. In reaching this conclusion, the court recounted the racially charged incidents that had occurred, as described above. The court stated that it

was well-settled law that public school students' First Amendment rights at school "are not automatically coextensive with the rights of adults in other settings" and that it must analyze plaintiffs' claims "in light of the special characteristics of the school environment." *B.W.A.*, 508 F. Supp. 2d at 747.

The district court concluded that this case was governed by *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969), which held that students are entitled to freedom of expression unless a prohibition on speech is necessary to avoid substantial disorder, an invasion of the rights of other students, or material interference with schoolwork. Applying *Tinker*, the court held that prohibiting plaintiffs from wearing clothing depicting the Confederate flag was permissible because the school officials had reason to believe that displaying the flag would cause a material and substantial disruption at the school. *B.W.A.*, 508 F. Supp. 2d at 747-749.

The district court rejected plaintiffs' contentions that (1) *Tinker* required school officials to prove conclusively that the prior incidents they cited to justify the ban were indeed racially motivated; (2) those incidents did not support the District's restriction of speech because they did not involve the display of the Confederate flag or occur on school grounds; and (3) no disruption actually occurred when the students wore the Confederate flag to school. *B.W.A.*, 508 F.

Supp. 2d at 750. The court noted that *Tinker* requires only that school officials have "reason to anticipate" a material and substantial disruption in order to act, and need not wait to act until an actual disruption occurs. *Ibid*. Moreover, the district court found that numerous courts of appeals have rejected arguments similar to those advanced by plaintiffs in cases considering whether students have a First Amendment right to display the Confederate flag at a school with a history of racial violence. *Id*. at 748 (citing *West* v. *Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir.), cert. denied, 531 U.S. 825 (2000); *Scott* v. *School Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir.) (per curiam), cert. denied, 540 U.S. 824 (2003); *Melton* v. *Young*, 465 F.2d 1332 (6th Cir. 1972), cert. denied, 411 U.S. 951 (1973); and *D.B. ex rel. Brogdon* v. *Lafon*, 217 F. App'x 518 (6th Cir. 2007)). The district court also cited several decisions in which courts held that the Confederate flag can be a divisive symbol that increases racial tensions. *B.W.A.*, 508 F. Supp. 2d at 748-749.

STANDARD OF REVIEW

When considering the district court's grant of summary judgment, this Court reviews findings of fact for clear error and conclusions of law *de novo*. *Morris* v. *City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008). Summary judgment is

justified if there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

SUMMARY OF ARGUMENT

In this case, District officials were faced with racial incidents, threats, and even violence occurring both in and around the school and a serious possibility of more such violence in the school. Rather than sit by, the officials tried to break that cycle by removing a historically racially charged symbol, the Confederate flag, from the school. The school officials' actions are not only constitutional under existing precedent, but are in keeping with their duty to protect students at school and to eliminate racially charged disruptions to the school system's educational mission. In *Tinker* v. *Des Moines Independent Community School District*, the Supreme Court held that public school officials may restrict student speech if they have reason to believe that such speech would cause material and substantial disruption to school activities or impinge on the rights of other students. 393 U.S. 503, 509 (1969). The district court correctly applied that standard to grant summary judgment for the District.

The uncontroverted record shows that Farmington High School had a recent history of racial tension that led two of its fifteen to twenty African-American students to leave the school. One incident, an altercation at school between a

white student and an African-American student that moved off campus to the African-American student's house, required a police response. The school superintendent, aware of these racially charged incidents, at least one of which involved display of the Confederate flag, concluded that the racial tension was disrupting the school's operations. On this record, it was reasonable for school officials to conclude that allowing students to wear clothing displaying the Confederate flag at school could well cause further material and substantial disruption, and the ban on the Confederate flag did not run afoul of the First Amendment.

Plaintiffs' arguments to the contrary are meritless. First, their contention that the ban on the Confederate flag was impermissible viewpoint discrimination is clearly incorrect. The ban was based on the very reasonable fear of violence in school, not on the underlying political views of the students who wore the Confederate flag. Second, there is no merit to plaintiffs' contention that Farmington school officials lacked a sufficient basis for their fear that display of the Confederate flag could incite racial incidents at school. The record contains a number of racially charged incidents that predated the ban on the Confederate flag. Finally, plaintiffs' claim that school officials could not ban the flag unless its display actually resulted in violence is meritless. In each of the four incidents in

which plaintiffs wore the flag after the ban was established, plaintiffs were taken to the principal's office either immediately upon their arrival at school or early in the school day, and so there was little opportunity for other students to see the flag. Moreover, a challenged action, such as the flag ban in this case, does not become unconstitutional merely because it achieved its ends, and school officials need not wait for racial violence occur before stepping forward to eliminate such a serious threat to the educational environment.

ARGUMENT

THE SCHOOL OFFICIALS' ACTIONS DID NOT VIOLATE THE FIRST AMENDMENT

Whether the First Amendment prevents school officials from banning the display of the Confederate flag on clothing at school is a question of first impression in this Circuit. The other courts of appeals that have faced this question have held, relying on *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), that school officials may prohibit the display of the Confederate flag in a school with a recent history of racial violence that could be exacerbated by such a symbol of racial divisiveness. The district court in this case properly applied the *Tinker* test.

A. Tinker's Balancing Test Applies To Plaintiffs' Claims

While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, "the constitutional rights of students in public school are not automatically co-extensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986); accord *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988). The First Amendment, like other constitutional rights, must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506; see also *Hazelwood*, 484 U.S. at 266.[2] "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' * * * even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266 (citation omitted).

Tinker is the seminal case regarding the rights of public school students to free expression. That case considered whether students could wear black armbands to school to protest the United States' involvement in Vietnam. 393

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[2] Many constitutional rights apply differently in the school setting. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822 (2002) (same); *Veronia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 651 (1995) (same); *Goss* v. *Lopez*, 419 U.S. 565, 584 (1975) (disciplinary suspension ordinarily requires only "rudimentary procedures").

U.S. at 504. Although administrators had banned the armbands two days before, several students nevertheless wore them to school and were sent home. *Ibid*. The Supreme Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but that those rights must be "applied in light of the special characteristics of the school environment." *Id.* at 506. Courts must, therefore, strike a balance between students' free speech rights and the need to maintain a safe, secure, and effective learning environment. *Id.* at 507 (balancing the need for "scrupulous protection of Constitutional freedoms of the individual" against the need of schools to perform their proper educational function); see also *Hazelwood*, 484 U.S. at 266 ("[T]he First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings.") (internal quotation marks omitted).

Applying this balancing test, the *Tinker* Court held that the students were entitled to wear the armbands unless "school authorities had 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." *Tinker*, 393 U.S. at 509. The Court's conclusion that the armband ban violated the First Amendment was based on two important facts: (1) that the administrators passed the policy and

disciplined the students based on an "undifferentiated fear or apprehension of disturbance," *id.* at 508, and (2) that the decision to ban the armbands was predicated "upon an urgent wish to avoid the controversy which might [have resulted] from the expression," *id*. at 510. The Court emphasized that school officials must justify their suppression of a particular form of speech by a showing of "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509-510.[3] The District met this standard here. *See infra* at pp. 19-29.

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[3] Plaintiffs' discussion (Appellants' Br. 14-15) of *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966), and *Blackwell* v. *Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), two pre-*Tinker* cases, supports our position in this case. Both *Burnside* and *Blackwell* show that the constitutionality of the flag ban in this case turns on the presence of potential disruption of the school's educational mission. In *Burnside*, the court of appeals struck down a school district's ban on "freedom buttons" where there was *no* evidence of disruption in the schools. 363 F.2d at 746-749. In *Blackwell*, the same panel on the same day declined to enjoin a ban on "freedom buttons" where there *was* evidence of school disruption. 363 F.2d at 750-754. The *Tinker* Court cited to both cases to further illustrate its holding. *Tinker*, 393 U.S. at 505 n.1 & 511-513. In this case, the superintendent pointed to incidents of racial violence and harassment in the District to support his decision to ban the Confederate flag on student clothing.

B. Racial Tensions At Farmington High School Supported The School Officials' Conclusion That Display Of The Confederate Flag On Student Clothing Would Materially And Substantially Interfere With School Operations

1. Farmington's ban on display of the Confederate flag on student clothing stemmed from unrefuted evidence of recent racial tensions and violence involving Farmington High School students, which reasonably led the superintendent to believe that display of the Confederate flag on student clothing could materially and substantially disrupt school operations. See pp. 3-7, *supra*. Specifically, in upholding the ban, the district court relied on eleven serious verbal or physical confrontations between white and African-American students, or use of racial slurs or hate speech, between May 2005 and April 2006. See *supra* at pp. 3-7; see also *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 508 F. Supp. 2d 740, 743-745 (E.D. Mo. 2007). Ten of these incidents involved Farmington High School students. 508 F. Supp. 2d at 743-745. As a result of that ongoing racial tension, two of the fifteen to twenty African-American students at Farmington High School left. *Ibid*. One African-American elementary school student also transferred out of the District because of the racial conflict. See pp. 3-4, *supra*.

Plaintiffs do not dispute that these events occurred; instead, they argue (Appellants' Br. 26-28) that incidents that occurred off-campus cannot justify the

ban. Specifically, they assert that the District may not rely on (1) the September 2005 incident where a group of white students armed with a baseball bat went to an African-American student's house and shouted that "anything that is not white is beneath them" and the two fights that followed, or (2) the December 2005 fight between the Farmington and Festus basketball players after Farmington players directed racial slurs at members of the opposing team and hung a Confederate flag outside their locker room. Plaintiffs also argue (Appellants' Br. 32) that the District's investigations into these incidents were "inconclusive" about their causes and that therefore, those events cannot support the flag ban.

These arguments are meritless. *Tinker* does not require school officials to make a formal investigative finding before acting to avoid further disruption to school activities. Rather, *Tinker* requires only that school officials have "reason to anticipate" that the display of the Confederate flag could result in material and substantial disruption. 393 U.S. at 509. In light of the many incidents where white students directed threats and racial slurs at African-Americans, it was reasonable for Farmington officials to conclude that the display of the Confederate flag in such a school environment could result in such material and substantial disruption. In a similar case, *West* v. *Derby Unified School District No. 260*, 206 F.3d 1358, 1362 (10th Cir.), cert. denied, 531 U.S. 825 (2000), the Tenth Circuit

concluded that a history of racial incidents, such as verbal confrontations between white students wearing Confederate flag shirts and African-American students wearing Malcolm X shirts and reports of racial incidents on school buses and football games, was a sufficient and reasonable basis for the school to prohibit students from wearing the Confederate flag.[4]

With respect to the plaintiffs' assertion (Appellants' Br. 27) that the court may take into account only events that occurred on campus, all but two of the racial incidents that the court considered took place on the Farmington High School campus. *B.W.A.*, 508 F. Supp. 2d at 743-745. In any event, the on-campus/off-campus distinction is a false dichotomy. For example, the September 9, 2005, confrontation involving white students at Laricco Welch's house began at school and continued three days later when a group of white students surrounded and confronted Welch, again at school. *B.W.A.*, 508 F. Supp. 2d at 744. Nor is there any authority for the students' contention that a school district must ignore

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[4] In *West*, school officials suspended a white student for drawing a Confederate flag on a piece of paper in class, in violation of the school district's "Racial Harassment and Intimidation" policy. 206 F.3d at 1363. Although the "Racial Harassment and Intimidation" policy prohibited students from wearing or having in their possession any written material that is racially divisive, such as any item that denotes "Black power" and "Confederate flags," it is unclear whether the school district also barred students from wearing Malcolm X shirts at school. *Id.* at 1361.

events in the community when deciding what is likely to cause serious problems at school. See *West*, 206 F.3d at 1362 (considering incident in which members of the Aryan Nation and Ku Klux Klan distributed materials encouraging racism to students off-campus).

2. The ample evidence of racial tension and violence at Farmington High School is analogous to other cases where courts have held, applying *Tinker*, that disciplining students for displaying the Confederate flag did not violate the First Amendment. The Sixth and Tenth Circuits have held that school officials need not wait until a material and substantial disruption to school discipline occurs to bar student expression. See *West*, 206 F.3d at 1366 ("The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one."); *Melton* v. *Young*, 465 F.2d 1332, 1335 (6th Cir. 1972), cert. denied, 411 U.S. 951 (1973) ("[T]hose charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished.") (citation omitted). See also *Lowery* v. *Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) ("Forecasting disruption is unmistakably difficult to do; thus, *Tinker* does not require certainty that disruption will occur.") (internal quotation marks and citation omitted). Like the schools in *West* and *Melton*, Farmington

High School suffered a number of racial incidents, including at least one involving the Confederate flag, before school officials banned the flag, and as in those cases, the charged racial atmosphere at Farmington provided officials with a reason to expect that the display of the Confederate flag would fuel continued racial tension. See *West*, 206 F.3d at 1366; *Melton*, 465 F.2d at 1335. Under these circumstances, a ban on the Confederate flag at school does not run afoul of the First Amendment.

The fact that the racial incidents at Farmington had not been specifically tied to display of the Confederate flag is immaterial. In *Scott* v. *School Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir.) (per curiam), cert. denied, 540 U.S. 824 (2003), the Eleventh Circuit held that school authorities did not violate the First Amendment by disciplining students for displaying the Confederate flag on school premises, even though there had been no prior incidents involving the Confederate flag on campus. The court based its decision on evidence of "racial tensions" and "fights which appeared to be racially based in the months leading up to the actions underlying [that] case." *Ibid*. To be sure, the Confederate flag carries different symbolic meanings for different people, but it is undeniable that the Confederate flag often has been used as a symbol of racism. See *Scott*, 324 F.3d at 1249; see also *Guiles ex rel. Guiles* v. *Marineau*, 461 F.3d 320, 330 (2d

Cir. 2006) ("Confederate flags have been associated with racist ideology."), cert. denied, 127 S. Ct. 3054 (2007); accord *D.B. ex rel. Brogdon* v. *Lafon*, 452 F. Supp. 2d 813 (E.D. Tenn. 2006), aff'd, 217 F. App'x 518, 523 (6th Cir. 2007) ("Even without evidence that Confederate flag displays had been the direct cause of past disruptions, school officials reasonably could surmise that such displays posed a substantial risk of provoking problems in the incendiary atmosphere then existing."). Accordingly, it was reasonable for school officials in this case to anticipate that the display of the Confederate flag in a school system that already had experienced numerous incidents of racial tension and violence could lead to material and substantial disruption of school activities.

3. Plaintiffs argue (Appellants' Br. 25) that there was no indication that the flag itself would cause disruption. But in each instance in which a student in this case wore the Confederate flag to school, the student was brought to the principal's office either at the very beginning of the day or shortly thereafter, so the flag was not displayed for any appreciable period of time. Moreover, the deference a federal court normally gives school administrators in their regulation of the operation of schools supports the administrators' decision here. "No single tradition in public education is more deeply rooted than local control," *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974), and this case underscores the value of the

Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood*, 484 U.S. at 273. The school's dress policy, which prohibited "[d]ress that materially disrupts the educational environment," left no doubt as to the school's concern about disruptive clothing. Doc. 31-11 at p. 3 (Exhibit 1 to Affidavit of Judith Delany). It was perfectly reasonable for the superintendent to anticipate that the display of the Confederate flag on student clothing, in a racially tense atmosphere with a recent history of racial violence, could well lead to material and substantial disruption at the school.

In addition, although the district court did not focus on the portion of the *Tinker* test that allows school officials to restrict speech that intrudes upon "the rights of other students," 393 U.S. at 508, this criterion further supports finding no First Amendment violation in this case. Public school students who may be injured by verbal assaults based on a characteristic such as race have a right to be free from such attacks while on school campuses. See also Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 10, 1994) ("The existence of racial incidents and harassment on the basis of race, color, or national origin against students is disturbing and of major concern to the Department [of Education.] Racial

harassment denies students the right to an education free of discrimination."). And as *Tinker* makes clear, students have a right "to be secure and to be let alone." 393 U.S. at 508. Speech that attacks high school students based on their race can injure and intimidate them, damage their sense of security, and interfere with their opportunity to learn. Those who administer public educational institutions reasonably may act to eliminate such harms. See *Saxe* v. *State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (stating that speech that "substantially interfer[es] with a student's educational performance" may satisfy the *Tinker* standard).

This is especially true in the instant case, where white students seek to display the Confederate flag, with its history of use as a symbol of racism, in a high school with only fifteen to twenty African-American students and a recent record of racial tension. Indeed, an African-American student withdrew from Farmington High School after B.W.A. wore clothing with the Confederate flag to school because he was "uncomfortable due to the racial tension." *B.W.A.,* 508 F. Supp. 2d at 745. Other students stated that they found the Confederate flag on student clothing "offensive," "disruptive[]," and that such displays "increase[d] racial tensions" in the school. Doc. 31-6 at p. 2 (Affidavit of Anthony Caruthers); Doc. 31-7 at p. 2 (Affidavit of Deon Glaspy); see also Doc. 31-16 at 4, p. 14

(Deposition of S.B.). B.W.A. admitted to the assistant principal at Farmington High School that he was a "racist." Doc. 31-14 at 4, pp. 19-20 (Deposition of Susan Barber); see also Doc. 31-9 (Exhibit 1 to the Affidavit of Susan Barber) (notes taken by Susan Barber). B.W.A. also stated that he knew students would view the Confederate flag on his hat as "racist" and that if someone asked why he was wearing it he would be "glad to tell them [his] reason." Doc. 33-5 at 3, p. 16 (Deposition of B.W.A.). The assistant principal stated that, having grown up in Farmington, she understood the Confederate flag to be a "symbol of racism and hatred." Doc. 31-14 at 2, p. 10 (Deposition of Susan Barber). Given these undisputed facts, it was not clearly erroneous for the district court to find that Farmington school officials could prohibit displays of the Confederate flag on student clothing because the flag posed a significant disruption to the educational environment at Farmington High School and represented a serious threat not only to school operations but also to African-American students' sense of security.

4. Plaintiffs further contend (Appellants' Br. 16-20), citing *Morse* v. *Frederick*, 127 S. Ct. 2618 (2007), that the ban on the Confederate flag constitutes unconstitutional viewpoint discrimination. *Morse* involved a high school student who was disciplined for displaying a banner bearing the phrase "BONG HiTS 4 JESUS" during a school-sanctioned and supervised event. *Id.* at 2622. The

Supreme Court upheld the discipline, but not in reliance on *Tinker*, which it characterized as "warn[ing] that schools may not prohibit student speech because of undifferentiated fear or apprehension of disturbance or a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 2629 (internal quotation marks and citation omitted). Rather, the *Morse* Court ruled that the school district could restrict student expression that it reasonably regarded as promoting illegal drug use, a concern "embodied in established school policy" that "extend[ed] well beyond an abstract desire to avoid controversy." *Ibid.* In reaching that conclusion, the Court reaffirmed that although "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, * * * the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, * * * and that the rights of students must be applied in light of the special characteristics of the school environment." *Id.* at 2622 (internal citations and quotation marks omitted).[5] *Morse* is inapposite in this case because the District's

[5] Plaintiffs incorrectly assert (Appellants' Br. 13) that the United States urged the Supreme Court in *Morse* to overturn *Tinker*. Rather, the United States argued, and the Court ultimately held, that the *Tinker* analysis did not apply to a student's display of a pro-drug message. The United States explained that the applicable analysis is that set out in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), and *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), and

(continued...)

ban on racially divisive speech, such as the Confederate flag, was instituted in an effort to forestall racial tension and violence, precisely the situation in which *Tinker* applies.

CONCLUSION

This Court should affirm the district court's holding that the school district's prohibition on student clothing depicting the Confederate flag at Farmington High School did not violate the First Amendment.

Respectfully submitted,

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[5](...continued)
that in the circumstances set forth in *Morse*, a school need not tolerate student speech that is inconsistent with its basic educational mission. See Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Morse* v. *Frederick*, No. 06-276, 2007 WL 118978.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using WordPerfect 12 and contains 6,594 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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April 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2008, two copies of the foregoing Brief For The United States As *Amicus Curiae* Supporting Appellees, along with a disk containing an electronic copy of the same brief, were sent by regular mail, postage prepaid, to each of the following counsel of record:

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