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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

C.S., by her next friend, Adam Stroub,
Plaintiff-Appellant,

v.

CRAIG MCCRUMB; AMY LEFFEL; MICHAEL PAPANEK,
Defendants-Appellees.

No. 24-1364

On Petition for Rehearing En Banc
United States District Court for the Eastern District of Michigan at Detroit;
No. 2:22-cv-10993—Terrence George Berg, District Judge.

Decided and Filed: August 12, 2025

Before: CLAY, GIBBONS, and STRANCH, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Eugene Volokh, STANFORD UNIVERSITY, Stanford, California, John R. Monroe, JOHN MONROE LAW, P.C., Dawsonville, Georgia, Michael F. Smith, THE SMITH APPELLATE LAW FIRM, Washington, D.C., for Appellant. **ON RESPONSE:** Gregory W. Mair, Daniel J. LoBello, O'NEILL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellees.

The court delivered an ORDER denying the petition for rehearing en banc. CLAY, J. (pp. 3–8), delivered an opinion concurring in the denial of the petition for rehearing en banc, in which STRANCH, J., concurred. GIBBONS, J. (pg. 9), delivered a concurrence in the denial of panel rehearing and a statement respecting the denial of rehearing en banc. READLER, J. (pp. 10–18), delivered a separate statement respecting the denial of the petition for rehearing en banc, in which THAPAR and BUSH, JJ., concurred.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision.

The petition was then circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

[*]In accordance with 28 U.S.C. § 46(c), Judge Gibbons, a senior judge, did not participate in the en banc proceedings; she writes separately as a member of the original panel in this case. See 6 Cir. I.O.P. 40(h)(1)-(2). Judge Stranch, who is now a senior judge, was an active judge while this petition was pending. Judge Hermandorfer did not participate in this decision.

CONCURRENCE

CLAY, Circuit Judge, concurring in the denial of rehearing en banc. The facts presented in the instant matter are indeed novel. But the panel's treatment of those facts is consistent with the Supreme Court's jurisprudence on student speech and the longstanding principle that school officials may restrict speech when they reasonably "forecast substantial disruption of or material inference with school activities." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Because Defendants' request for C.S. to remove her AR-15-themed hat ("the Hat") was predicated on a variety of factors that formed a well-founded fear of disruption in the school environment, the panel unanimously held that they did not violate C.S.'s First Amendment rights and were likewise entitled to qualified immunity.

Although this Court properly denied Plaintiff's petition for en banc rehearing, Judge Readler has since issued a "statement respecting the denial of rehearing en banc" (which he conspicuously avoids referring to as either a concurrence or dissent) accusing the original panel of sanctioning a "likely abridgment of [C.S.'s] First Amendment freedoms." Readler Op. at 11, 12. Although Judge Readler's statement acknowledges that the Oxford Shooting was "undeniably tragic," Readler Op. at 14, the statement also accuses the panel of over-emphasizing that tragedy and backdrop, as well as over-crediting Defendants' testimony about the impact of that event, as discussed in Principal Leffel's deposition. Judge Readler's contrary statement unduly minimizes the effect of the students' young ages and the Hat's provocative message with respect to the panel's treatment of the Oxford Shooting, all of which influenced the outcome of Plaintiff's appeal.

It also bears emphasis that the *Tinker* analysis draws from all information in the factual record and then applies the First Amendment "in light of the special characteristics of the school environment." 393 U.S. at 506. In the matter of C.S.'s Hat, the panel judged those key factors to be the proximity of the Oxford Shooting, the school's absorption of young students from the Oxford School District, the young age of C.S. and her third-grade classmates, and the Hat's provocative message. It was this unique interplay of factors that drove the panel's conclusion that

Defendants made a reasonable forecast of substantial disruption in the school environment under *Tinker*. *Id.* at 514.

Notably, the contrary statement purports to hold Defendants to a standard that *Tinker* does not require by suggesting that school officials must provide a contemporaneous written or verbal justification whenever they perceive a risk of substantial disruption (on account of student speech or expression) and take action to prevent it. The statement emphasizes that Principal Leffel "never made [the] connection [to the Oxford Shooting] on the day C.S. was ordered to remove her hat," Readler Op. at 15, and instead waited to discuss the shooting during her deposition, including its impact on certain traumatized members of the student body. Judge Readler further dismisses this testimony by Leffel as being invented out of thin air, in an attempt to "drum[] up a *post hoc* rationale" for asking C.S. to remove her Hat. *Id.*

But *Tinker* does not make any specific demands regarding where in the record the school's justification must reside, as long as the record altogether shows that school officials acted with more than an "undifferentiated fear or apprehension of disturbance" when restricting student speech. *Tinker*, 393 U.S. at 508. It is well-established that school officials' actions may be grounded in the "special characteristics of the school environment" and other facts known to them at the time, *id.* at 506, which naturally includes the ambit of recent or local events. Order, R. 25, Page ID #627 (noting that "'temporal factors and recent events' should be considered in evaluating whether school administrators *reasonably* anticipated that particular imagery risked creating a substantial interference" in school activities) (quoting *N.J. v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022)).

In the present case, Principal Leffel was aware that the recent *and* local Oxford Shooting had a direct impact on a portion of the student body at Robert Kerr Elementary, which had absorbed students who transferred out of the Oxford School District following the deadly mass-shooting event at Oxford High School. Leffel testified that these students "were receiving counseling and social work support to deal with the trauma," and that she knew this after having "several conversations with their parents." Leffel Dep., R. 17-4, Page ID #344. These concerns informed her belief that C.S.'s Hat, which pictured an AR-15-style weapon along with the slogan "Come And Take It," was not "appropriate" for the elementary school setting. *See id.* But because Leffel

did not expressly articulate this reasoning on Hat Day, as she did in her deposition, Judge Readler's contrary statement would apparently hold that her testimony is noncredible.

This is a hard point to swallow when the Oxford Shooting transpired less than three months before Hat Day, at a location less than one hour away from Kerr Elementary, with a semiautomatic handgun that caused the death and serious injury of several students and one staff member. Stephanie Saul & Anna Betts, *Michigan Teenager Who Killed Four Students Is Sentenced to Life*, N.Y. TIMES (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/us/michigan-oxford-school-shooting-sentencing.html. In the weeks preceding Hat Day, details about the Oxford Shooting were prevalent in the local and national news,[1] and help to contextualize Defendants' reasonable belief that C.S.'s AR-15-themed Hat was "[in]appropriate" for school. Emails, R. 17-12, Page ID #436. Neither Judge Readler's statement nor C.S's father dispute the proximity of this tragic event (nor can they); they simply disagree with the weight the panel afforded it.

But this Court has long recognized that special or unusual circumstances can justify greater restrictions on student speech than would otherwise be proper. *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 338 (6th Cir. 2010) (holding that school officials could ban the display of the confederate flag and other racially divisive symbols at a high school when the school had a history of racial tension); *Barr v. Lafon*, 538 F.3d 554, 577 (6th Cir. 2008) (same). This certainly extends to school officials' concerns about speech relating to recent, nearby events involving mass-shooting or other violence, such as the Oxford Shooting, which are made even more salient in an *elementary* school comprised of children under the age of ten. In this setting, the probability of a student's speech or expression to "solicit viewpoints" from other students is one factor we have considered in evaluating its appropriateness. *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 578–79 (6th Cir. 2008) (citing *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 278 (3d Cir. 2003)). While the slogan on C.S.'s Hat did not solicit other viewpoints outright, Principal Leffel noted that it arguably solicited a physical response to "Come And Take [the Hat]" if interpreted literally by students who were young and emotionally immature. Leffel's concern may seem far-

[1]Livia Albeck-Ripka & Sophie Kasakove, *What We Know About the Michigan High School Shooting*, N.Y. TIMES (Dec. 9, 2021), https://www.nytimes.com/article/oxford-school-shooting-michigan.html. The court further noted that "on the day [it] held oral argument in this case, the criminal trial for one of the parents of [the shooter] commenced." Order, R. 25, Page ID #623.

reaching to adults or even older children in middle or high school, but it was certainly not out of bounds for young elementary school students.

The contrary statement fails to adequately address these age-based concerns relating to the appropriateness of C.S.'s Hat, or how this aspect interacts with Defendants' apprehensions about the recent Oxford Shooting. Rather, it complains that Defendants did not tie all of their reasons neatly together on Hat Day when they asked C.S. to remove her Hat, and that because of this oversight, their appeal to the Oxford Shooting and the students' young ages was likely pretextual. To be sure, *Tinker* cautions that school officials must be motivated by actual fears of a substantial disruption in school activities and not just concerns that are simply vague or hypothetical. *See* 393 U.S. at 509. But *Tinker* does not require a school's reasoning to be laboriously or meticulously detailed in order for its officials to act; a "generalized" explanation of their reasons may suffice if rooted in facts that were actually known in real-time, and if their forecast of a substantial disruption was objectively reasonable. *See Lowery v. Euverard*, 497 F.3d 584, 593 (6th Cir. 2007). Nor does *Tinker* require school officials to provide that reasoning to a student subject to a rule's enforcement or to the student's parents. In the instant matter, Principal Leffel cited general concerns in her email to C.S.'s father about student safety and the inappropriateness of weapon-themed clothing in school. It may be true that these concerns taken alone would not withstand *Tinker*'s substantial-disruption test if not for the context surrounding the School's decision-making process; however, when viewed through the lens of the School's "special characteristics," 393 U.S. at 506, Defendants' actions were objectively reasonable.

Another notable feature of the contrary statement is that it purports to question the extent of the trauma experienced by the children who transferred to Kerr Elementary from the Oxford School District. Because the Oxford Shooting transpired at Oxford High School, Judge Readler remarks that these elementary-aged children were presumably too young to have witnessed the actual massacre in their school district. Needless to say, young children and their families still suffer legitimate trauma when their siblings, friends, neighbors, teachers, or other acquaintances from within the same school system are involved in a deadly school shooting. This is because tragedies such as the Oxford Shooting affect entire communities in which they occur—not simply those who personally know the shooting victims. And the specific identities of these victims have

no bearing on Principal Leffel's forecast that C.S.'s Hat could cause a substantial disruption in school activities, which is entitled to considerable deference based on her personal knowledge of those students' struggles. *See Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 360 (6th Cir. 2023) (noting that courts "provide educators a high degree of deference in the exercise of their professional judgment").

Moreover, nothing in the Supreme Court's jurisprudence on student speech requires school officials to remain helpless to stave off problems before they occur. *Lowery*, 497 F.3d at 591–92 ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* 'require certainty that disruption will occur.'" (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006))). It is thus perfectly appropriate for school officials to act preemptively to protect students from a substantial disruption in the school environment by relying on their professional knowledge of the student body and all relevant circumstances surrounding the school community. *See Barr*, 538 F.3d at 573; *Kutchinski*, 69 F.4th at 360. Furthermore, when contextual factors such as disruptive or tragic events are present, we presume that *any* reasonable forecast of substantial disruption accounting for those factors is necessarily attributed to school officials' considered judgment ("personal intuition" is the term used by Judge Readler's statement, at 13). *Barr*, 538 F.3d at 566–67. Just as school officials in *Barr v. Lafon* permissibly relied on the school's history of racial tensions (i.e., racial graffiti, threats, etc.) in restricting students' clothing that displayed racially insensitive symbols, *see id.* at 573–75, Defendants here relied, in part, on the school's proximity to the Oxford Shooting, and absorption of young students from the Oxford School District who were actively undergoing trauma therapy, in restricting C.S.'s Hat displaying an AR-15-style weapon. And as discussed, the weight of this special circumstance was greatly intensified by other factors in the record, especially the Hat's provocative message when viewed by elementary students.

Once again, the young age of these elementary students is paramount in judging their propensity to react to sensitive issues, which is why the panel's analysis was not limited to the proximity and impact of the Oxford Shooting. It also turned on the young age of C.S. and her schoolmates, and the elementary school setting, where certain topics (such as semiautomatic weapons) may require increased sensitivity and discretion. *See Hazelwood Sch. Dist. v.*

Kuhlmeier, 484 U.S. 260, 272 (1988); *see also Egg Harbor*, 342 F.3d at 278 (noting that "[c]ontext is essential in evaluating student speech in the elementary school setting"). Defendants' age-based concern regarding the Hat was also clearly supported by the record, by both the obvious character of an elementary school, as well as Leffel's express concern that "young kids who can be very impetuous" may perceive the Hat's provocative message "as a dare to try and take the hat" off of C.S. Leffel Dep., R. 17-4, Page ID #344. This broadly tracks the sentiment in Leffel's email to C.S.'s father on Hat Day, February 17, 2022, in which she quoted the handbook's mission to guard against "distract[ions] from the learning environment of the classroom." Emails, R. 17-12, Page ID #436.

For all these reasons, it is difficult to imagine a case better suited to *Tinker*'s exception than one where school officials were concerned about preventing a substantial disruption in a setting filled with elementary-aged students, some of whom were suffering trauma and undergoing school counseling after a recent massacre in their community. *See Tinker*, 393 U.S. at 506. The analysis does not begin and end with what school officials said to C.S., her father, or amongst themselves, on Hat Day. Rather, we must review the record as a whole and ask whether the decision was reasonable at the time it was made.

The panel correctly determined that Defendants relied on a number of factors to reasonably predict that C.S.'s AR-15-themed Hat could cause a substantial disruption in school activities due to the special characteristics of the student body. *Id.* at 514. We do not require more under these circumstances, where the Oxford Shooting was recent, local, and widely known; the principal's deposition testimony reflected her reasonable concerns about the effects of that shooting on the student body; the students were young and emotionally vulnerable; and the speech itself conveyed a provocative message about semiautomatic weapons (i.e., violence), a "sensitive topic" for children in C.S.'s age group. *See Kuhlmeier*, 484 U.S. at 272. The totality of these facts makes the instant case a prime candidate for *Tinker*'s allowance for school officials to restrict speech when they make a reasonable forecast of substantial disruption, 393 U.S. at 514, and indeed, renders en banc review unnecessary.

CONCURRENCE IN THE DENIAL OF PANEL REHEARING AND STATEMENT RESPECTING THE DENIAL OF REHEARING EN BANC

JULIA SMITH GIBBONS, Circuit Judge, concurring in the denial of panel rehearing and respecting the denial of rehearing en banc. Although I do not join the statement concurring in the denial of rehearing en banc issued by my colleagues on the panel, I do not disagree with its substance. I believe the panel opinion, in which I concurred, was entirely correct, despite the concerns raised by Judge Readler, and I stand behind it.

STATEMENT

READLER, Circuit Judge, statement respecting the denial of rehearing en banc. Today's case is a poor candidate for en banc review, in multiple respects. One, as the panel itself acknowledges, the matter was resolved on narrow, "novel," fact-specific grounds. *C.S. ex rel. Stroub v. McCrumb*, 135 F.4th 1056, 1068 (6th Cir. 2025) (noting the "novel circumstances of this case"); *see also* Clay Concurring Op. 3, 4 (hereinafter "Clay Op.") (emphasizing the "novel" and "unique interplay of facts" that led the panel to its holding). Driving the panel's conclusion was a rare confluence of events: the then-recent Oxford High School shooting, the location of C.S.'s school, and C.S.'s age. *Id.* at 1067. By the panel's own admission, in other words, it is exceedingly unlikely that a future First Amendment challenge will weave together a similar factual tapestry. None of this, of course, diminishes the importance of C.S.'s claim, which raises a serious charge of viewpoint discrimination. But the panel's fact-bound analysis means its opinion has little, if any, precedential value going forward. And that lowers the justification for rehearing this case en banc. *See* Fed. R. App. P. 40(a)–(b). Said differently, we understandably need not commit our limited en banc resources to further review of this "good for one-ride only" ticket.

Two, relatedly, because the panel's holding is so narrow, defendants were likely to prevail on the qualified immunity prong of the analysis, even if, as should have been the case, C.S.'s constitutional claim survived summary judgment. To overcome defendants' assertion of qualified immunity, C.S. had to show that defendants' conduct violated her clearly established constitutional rights. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009). And given the unusual events at play here, it would have been difficult for C.S. to cite a prior First Amendment holding establishing that elementary school students have a right to wear clothing depicting firearms as symbolic speech in the wake of a nearby school shooting. The panel correctly acknowledged as much. *McCrumb*, 135 F.4th at 1068. In light of this shared understanding, en banc review would likely have resulted in the same outcome for the parties, albeit on different grounds. Again, that the underlying First Amendment holding has exceedingly limited future application makes it an easy decision to leave the panel's holding in place.

That said, there are some odd features of this case that should give one pause. Start from the understanding that places of learning should welcome student speech and engagement, not fear it. Some speech, to be sure, may well cross a line that lawfully justifies school intervention. But before treading into First Amendment terrain, school officials must be reasonably certain that their actions are warranted. It is difficult to believe that is the case here, where officials at Robert Kerr Elementary School failed to articulate a contemporaneous justification for their actions restricting C.S.'s speech. Regrettably, the panel condoned the officials' likely abridgment of First Amendment freedoms.

A. As *Tinker*'s famous refrain reminds us, students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Rather, students retain the ability to express their views on controversial topics. *Id.* at 511. But that right is not without limits. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 692 (1986). Consistent with the First Amendment, schools may restrict student speech that "materially disrupts classwork." *Tinker*, 393 U.S. at 513. And a school need not wait for a material disruption to surface but instead may reasonably forecast such an event. *Id.* at 514. That said, the material disruption standard is "demanding." *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021). A school must, with evidence, "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509; *see also Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001) (declining to uphold restriction on Confederate Flags in school "without any showing of disruption").

With that framework in mind, turn to the events occurring on Kerr Elementary School's "Hat Day." The school principal made C.S., a third grader, remove her cap, which depicted a firearm and included the phrase "Come and Take It." The principal's concerns stemmed from her forecast about the hat's potential disruptive effects. Leffel Dep., R. 15-2, PageID 203, 206–07. That same day, the principal informed C.S. and her father that "[w]eapons of any kind are not appropriate for students to wear in a school setting." *Id.* at PageID 216. Months later, in her deposition, the principal "theorized" that she asked C.S. to remove the hat out of fear that students and staff "would be very uncomfortable" with the hat's depiction, *id.* at PageID 205, or would

"perceive ['Come and Take It'] as a dare" and attempt to remove the hat, *id.* at PageID 206. Despite these predictions, all agree there is no evidence that C.S.'s hat caused any actual disruption on Hat Day or that similar speech had caused disruption at the school in the past. *See id.* at PageID 203 (noting this was the "first instance" the principal had to address images of guns in the school).

The school's rationales fail to clear *Tinker*'s high bar, which "requires a specific and significant fear of disruption, not just some remote apprehension of disturbance," before school officials may silence a student's speech (in this case, by taking away her hat). *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J.) (applying *Tinker* to a college's harassment policy). In the words of *Tinker* itself, the "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508; *see also Mahanoy*, 594 U.S. at 210 (Alito, J., concurring) ("Speech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting[.]"). At bottom, rather than providing evidence of, say, prior material disruption among students upon seeing the image of a gun or, alternatively, examples of students taking language on clothing literally, the principal simply relied on her personal intuition about how others would feel "uncomfortable" with C.S.'s hat, a practice adopted by her successor as well. *See* Leffel Dep., R. 15-2, PageID 207; *see* Klount Dep., R. 15-2, PageID 275 (successor principal opining that "I just think [depictions of guns] would make kids uncomfortable").

That makes this case unlike those in Judge Clay's concurrence. *See* Clay Op. 5. In both *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010), and *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), the schools at issue banned wearing clothes depicting the confederate flag on the basis of specific evidence of a history of racial tension at the schools. *See Defoe*, 625 F.3d at 334 (noting that the record contained "uncontested evidence of racial violence, threats, and tensions" at the school); *Barr*, 538 F.3d at 566 (explaining that the school had presented evidence of racist graffiti that was accompanied by threats to African American students). No such similar school-specific evidence was presented here. School officials, at best, presented only generalized concerns. So, like the Fourth Circuit, I find it difficult to accept the notion that displaying an image of a gun on one's clothing at school, without more, would disrupt the school day in substantial ways. *See Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003) (rejecting

a school's argument that a middle school student's shirt with an image of a gun would disrupt the school day because "there simply [wa]s no evidence in the record . . . demonstrating that clothing worn by students at [the school] containing messages related to weapons . . . ever substantially disrupted school operations").

That leaves the argument that the school's conduct was justified by the recent Oxford High School Shooting. Those events were undeniably tragic, one of the worst days on record in the Oxford community. *See* Stephanie Saul & Anna Betts, *Michigan Teenager Who Killed Four Students Is Sentenced to Life*, N.Y. Times (Dec. 8, 2023), https://www.nytimes.com/2023/12/08/us/michigan-oxford-school-shooting-sentencing.html. But their legal significance here is quite contestable. The panel opinion deeply embraced that backdrop, holding that the fact that students, following the tragedy, had transferred from that district to C.S.'s district—one nearly an hour away from Oxford—was a significant factor in its analysis. *McCrumb*, 135 F.4th at 1062–63.

I am less convinced. As a factual matter, because the Oxford shooting occurred in a high school, the directly impacted students were unlikely to be elementary school age. Indeed, defendants do not even suggest as much, noting only that the Durand School District (home of Kerr Elementary) "had absorbed several students from [the] Oxford Area School District who moved to the area following the school shooting," without identifying the grades of those students. Defs.' Mot. Summ. J., R. 17, PageID 298–99. Defendants thus failed to directly tie the affected students in the third grade or, more generally, Kerr Elementary students as a whole to the horrific events at Oxford High School. *See Tinker*, 393 U.S. at 509 n.3 (concluding there was not enough in the record to find a material disruption even when the school provided evidence that a former student was killed in Vietnam and his friends still attended the high school). Perhaps, as Judge Clay suggests, the principal had "personal knowledge of . . . students' struggles." Clay Op. 7. Yet even then, the record is silent as to who these students were, how many attended Kerr Elementary, and whether those affected students interacted with C.S. Indeed, not even defendants advanced this point as aggressively as does Judge Clay. In their summary judgment briefing, it bears noting, defendants asserted only that that the Durand School District had "absorbed several students" from

Oxford, without locating these students specifically in Kerr Elementary School. Defs.' Mot. Summ. J., R. 17, PageID 298–99.

None of this should be read to suggest that elementary age students are immune from suffering the aftereffects of a traumatic high school shooting. Clay Op. 6. They surely can. Rather, the point is that defendants did not show with sufficient evidence that Kerr Elementary students were suffering from those effects here and, in light of that shortcoming, failed to clear *Tinker*'s high bar for silencing student speech.

More troubling on this front is the fact that Kerr Elementary officials seemingly did not share this concern as a basis to justify their actions, at least on Hat Day and in its wake. According to the school principal, any worry by school officials about disruptions tied to the Oxford shooting did not surface until ten months *after* the Hat Day incident. *See* Leffel Dep., R. 15-2, PageID 205; *id.* at PageID 216. On the day when C.S. was told to remove her headwear, it bears highlighting, the principal emailed C.S.'s father to announce, with little explanation, that an image of a weapon is categorically inappropriate in the school setting. *Id.* at PageID 216. All parties agree that the email never invoked the Oxford shooting (nor any of the school's other late-breaking justifications) as a basis for that conclusion. Judge Clay too, who, to his credit, admits that the "general concerns" in the principal's email, "taken alone[,] would not withstand *Tinker*'s substantial-disruption test." Clay Op. 6. It is thus difficult to reconcile the centrality of the Oxford shooting to both the panel's and the district court's reasoning with the fact that the principal herself never made this connection on the day C.S. was ordered to remove her hat.

The Oxford-based explanation surfaced only later. Ten months later, in fact, during discovery, when the school district was working with the aid of legal counsel. That delay should raise suspicions, especially when viewed in the light most favorable to C.S., as we must at the summary judgment stage. At that late date, the lengthy delay could fairly be attributable to the school drumming up a *post hoc* rationale. That point deserves emphasis, as after-the-fact justifications are especially problematic in the First Amendment context. The Supreme Court's recent decision in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), demonstrates as much. There, the school district sought to justify its termination of a football coach who prayed on the field before each game based on the theory that the coach's pre-game prayer may cause

disorder and disruption at the game. *Id.* at 543 n.8. Whatever merit that justification might have in the abstract, the Supreme Court refused to consider it in *Kennedy* because the school district "never raised concerns along th[ose] lines in its contemporaneous correspondence" with the coach. *Id.* "Government justifications for interfering with First Amendment rights," the Supreme Court emphasized, "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* (citation modified). This basic First Amendment principle applies equally well in the student speech context. That is likely one reason why *Tinker* requires schools fairly to *forecast* a material disruption, rather than justifying their decision to censor speech with the benefit of hindsight. 393 U.S. at 514. After all, allowing school officials to rely on "shifting rationales may provide convenient litigating positions for the school administrators in defending their decision," but later justifications "are too easily susceptible to abuse by obfuscating illegitimate reasons for speech restrictions." *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 26 (1st Cir. 2020).

It may be, as Judge Clay suggests, that these concerns are alleviated when later justifications are consistent with the earlier ones. Clay Op. 8. But that is not what happened here. Again, consider the principal's contemporaneous justifications: that depictions of weapons were inappropriate for schools and that schools may prevent "distract[ions] from the learning atmosphere of the classroom." Emails, R. 17-12, Page ID 436. As a starting point, these generic justifications are so broadly stated that almost any later explanation would be consistent under Judge Clay's rubric. But even taken at face value, those day-of justifications relate to the school principal's *post hoc* rationales in only the loosest sense. Especially when construing the evidence in C.S.'s favor, as we must at this stage, a reasonable juror could conclude that the school's later-stated reasons were pretextual and that officials made C.S. remove her hat simply because they disagreed or were uncomfortable with the viewpoint displayed there.

Indeed, it is difficult to believe the school officials here would have taken such aggressive measures against a student who wore a hat with a message contrary to C.S.'s, along the lines of "ban guns" or "erase the Second Amendment." And if that were the case, it is easy to detect hidden viewpoint discrimination in the officials' actions here, which sounds even more First Amendment alarms. *Bible Believers v. Wayne County*, 805 F.3d 228, 248 (6th Cir. 2015) (en banc) (noting that

"odious viewpoint discrimination" violates the First Amendment). Given that there is no record evidence one way or the other, we are left to guess as to the actual basis for the officials' actions. With that in mind, again, a reasonable jury could find that the school censored first because of its discomfort with the speech's viewpoint and drummed up justifications later.

Nor does the age of the students at issue change this conclusion. *See* Clay Op. 8 (emphasizing the young age of C.S. and her classmates); *McCrumb*, 135 F.4th at 1065. As an initial matter, the panel draws the idea that schools can aggressively regulate "potentially sensitive topics" like guns from *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *See also McCrumb*, 135 F.4th at 1065 ("Naturally, student speech centered on guns and other violent themes embodies this category."). *Hazelwood*, however, sets out a different test for different speakers, namely, that the government has more leeway for censoring speech that bears the "imprimatur of the school," *id.* at 271. It is odd to import those requirements into a student speech case. Separately, to the extent *Tinker* applies differently to different age groups, it does so only as to the type of speech that may cause a material disruption. Imagine a student who wears a hat to school reading "Santa Claus isn't real." A third grader's response to the hat may well be different from that of a high schooler. *See McCrumb*, 135 F.4th at 1065. Yet even in that instance, the elementary school must support its reasonable forecast of a substantial disruption before it may censor the student's speech. And, in line with *Tinker*, that evidence may not be speculative or motivated by discomfort for the view the speech expresses. *See* 393 U.S. at 509. At bottom, while disruption may be context dependent, the burden on the school never changes. But the panel erroneously lowered the bar by allowing school officials to "theorize" about the possibility of disruption and, further, crediting the principal's belief that students would be "uncomfortable" with C.S.'s hat. *Tinker* does not afford schools carte blanche to regulate "sensitive topics," even for younger audiences. *See Newsom*, 354 F.3d at 252 (applying *Tinker* to non-high school students).

B. Equally unusual is the panel's passing observation that the school may have been able to remove C.S.'s hat because her speech "was made as part of school activities," with Hat Day, a school-sponsored event. *McCrumb*, 135 F.4th at 1062 n.4 (acknowledging that this is a "colorable argument"); *id.* at 1064 n.7. And if Hat Day is part of the school curriculum, the panel went on to say, then a more deferential test for school-sponsored speech from *Hazelwood School District v.*

Kuhlmeier, 484 U.S. 260 (1988), seemingly would apply. *See McCrumb*, 135 F.4th at 1062 (noting that "[u]nder *Kuhlmeier*, school officials' actions would likely have been permissible to the extent that Hat Day was 'part of the school curriculum'") (quotation omitted).

As dicta, the panel's reflection has no legal significance. Nor should it. For this case, again, is a far cry from *Hazelwood*. There, the Supreme Court held that a school could censor two articles scheduled for publication in the school newspaper because the publication was a school sponsored activity, part of an advanced journalism class. *Hazelwood*, 484 U.S. at 268. In so holding, the Supreme Court emphasized that the school always "exercised a great deal of control" over the paper by selecting publication dates and story topics, assigning authors, providing supplies, and editing the written product. *Id.* (quotation omitted). As a result, readers would have perceived the articles in the paper as "bear[ing] the imprimatur of the school." *Id.* at 271. Kerr Elementary School, however, exercised no similar editorial control over its Hat Day. While the occasion was an official school event, students were free to select whatever cap they wished. *McCrumb*, 135 F.4th at 1059 ("[S]tudents were allowed to wear a hat of their choosing[.]"). No reasonable observer would assume that the school was endorsing a student's choice of hat, including the one worn by C.S. The school, I note, did not provide hats to the students or otherwise sponsor the messages the students' hats contained. *See Newsom*, 354 F.3d at 257 (rejecting the argument that a student's shirt constituted "school-sponsored" speech for these reasons). And, indeed, as students likely wore hats reflecting rival causes—the Wolverines and Spartans, as one example—it would be difficult to reconcile the school's supposed message of choice even if one thought it had some role in selecting student headwear. *Cf. Matal v. Tam*, 582 U.S. 218, 236 (2017) (explaining that it is "far-fetched" to suggest that something is government speech when the government allows for the expression of "contradictory views"). At all events, the special circumstances that led the Supreme Court to conclude the paper was school-sponsored speech in *Hazelwood* are absent here. Expanding *Hazelwood* to cover all speech that occurs against the backdrop of a school event would likely ensnare nearly every form of student expression and could be "easily . . . manipulated [by schools] in dangerous ways." *Morse v. Fredrick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). In the end, it would allow schools to sidestep *Tinker*'s demands in a large number of cases.

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By all accounts, the panel seemingly read the facts in a light most favorable to the school, rather than C.S., and, in so doing, justified the school officials' speech restraint through unstated or late-breaking explanations. But the panel's ungenerous (and legally backwards) understanding of the facts also makes this a very narrow case—one that centers on the unique risks of material disruption as understood by the panel. While the panel's factual review deserves no praise, that, along with the fact that some of its problematic reasoning is dicta, leads me to agree that en banc review is not justified in this case.

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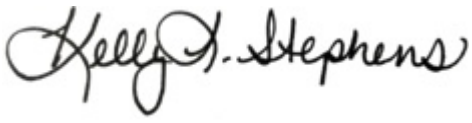

Kelly L. Stephens, Clerk