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

On Appeal from the United States District Court
for the District of South Carolina at Florence

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION AND SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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Brief Supporting Appellees and Affirmance of Decision of U.S. District Court of South Carolina

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
June 1, 2010
Case Number 09-2390
C. H. v. Martha Heyward

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1, the National School Boards Association and the South Carolina School Boards Association, who are Amici Curiae, make the following disclosures:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have any parent corporations?
   ( ) YES (X) NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% of more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
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   If yes, identify entity and nature of interest:

5. Is party a trade association?
   ( ) YES (X) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors committee: N/A

/S/ Francisco M. Negrón, Jr**.** June 1, 2010

Signature Date

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. Through its member state associations NSBA represents over 95,000 school board members who govern more than 14,000 local school districts serving about 49.8 million students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as amicus curiae in many cases involving school board authority and student free speech rights.

The South Carolina School Boards Association ("SCSBA") is a non-profit organization that serves as a source of information and as a statewide voice for boards governing the 85 public school districts in the state.

Both associations have a strong interest in ensuring that local school boards and school administrators are able to create and maintain a school environment where public school students feel safe and are able to effectively learn. Likewise, both associations have an interest in making sure that local school boards and school administrators do not infringe on the First Amendment rights of students while retaining discretion to limit speech that potentially disrupts learning.

This brief is filed with the consent of both parties under Federal Rule of Appellate Procedure 29.

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

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[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 schools."). Likewise, only in *Castorina v. Madison County Sch. Bd.*, 245 F.3d 536, 542 (6th Cir. 2000), has any court concluded that a school district must prove "racially motivated violence or threat" to prohibit the confederate flag.

[4] *See White v. Nichols*, No. 05-15064, 2006 WL 1594213 (11th Cir. June 12, 2006) (evidence of racial tensions included racial slurs, faculty concerns about unrest,

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 court[7] and other courts agree that the plaintiff's personal meaning of the confederate flag is of

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reports from minority parents about racial discord, and testimony of minority student about feeling intimidated and scared around confederate flag and racial slurs); *DeFoe v. Spiva*, 650 F. Supp. 2d 811 (E.D. Tenn. 2009) (evidence of racial tensions included use of the confederate flag to intimidate students, community members telling the principal he was lucky to not have any black students, Oreo cookies being thrown at a biracial student at a basketball game, racial slurs and graffiti); *see also Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000) (court found no evidence to forecast a disruption of any kind but nevertheless upheld the district's regulation of the confederate flag relying on *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

[5] *See Hardwick v. Heyward*, 674 F. Supp. 2d 725, 735 (D.S.C. 2009). Likewise, a number of after-the-fact threats of violence over racial issues occurred at the high school—one involving the confederate flag. *See id*. at 736-37.

[6] *See, e.g., Denno*, 281 F.3d at 1275 n.6; *Scott*, 324 F.3d at 1248-49.

[7] *Hardwick*, 674 F. Supp. 2d at 733.

little importance, because school administrators "might reasonably think that other students would perceive the display as racist or otherwise uncivil."[8]

Common sense indicates that students in a school with racial tensions are likely to respond to a racially divisive symbol like the confederate flag in a disruptive manner. Racial tensions indicate students of different races are having difficulty understanding differences, getting along, and accepting each other. Where any kind of tension exists, the possibility for conflict is greater, particularly if those tensions are further incited. In other words, a racially divisive symbol like the confederate flag in an already racially tense school thrusts the racial tensions to the forefront, with the flag-wearing student publically choosing a side on the issue and implicitly asking others to do the same. In short, this symbol fuels any existing racial tensions and is likely to ultimately cause conflict. To find proof of this phenomenon, this Court needs look no further than the facts of this case. After this case arose, a group of students threatened a white student who wore a confederate belt buckle to school.[9]

As the Sixth Circuit stated in a recent confederate flag case, courts need to consider the "psychological and developmental needs" of students when determining the "First Amendment standards applicable to student speech in public

[8] *Denno,* 281 F.3d at 1275 n.6; *B.W.A.*, 508 F. Supp. 2d at 749 ("Additionally, plaintiff's interpretation of the Confederate flag's meaning is largely irrelevant because courts recognize that it is racially divisive in nature.") (citations omitted).
[9] *See Hardwick*, 674 F. Supp. 2d at 736-37.

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

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[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 See* 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 Fifth[13] and Tenth Circuits[14] 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

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[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 results 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 worn at schools with racial tensions—usually relying on the testimony of administrators[17]—including: disruption to administrators who have to constantly deal with offended students,[18] fear and psychological and physical harm to students,[19] and higher student absenteeism.[20]

The following example illustrates how it might be difficult for minority students to learn in a racially tense environment where the confederate flag is present. Imagine a number of African-American students attending a racially tense school. Their learning is probably already disrupted as they think and worry about racial issues and how they might respond if confronted by all sorts of racial

[17] In some cases, courts have relied on administrator testimony of the confederate flag's disruptive effects to learning in their holdings; in other cases, the court has only cited this testimony in its description of the case's facts.

[18] *See Barr*, 538 F.3d at 567. The court concluded that administrators frequently having to deal with students offended by the confederate flag is disruptive based on testimony from the director of schools. The director of schools further testified that the disruption of dealing with offended students includes dealing with students' hurt feelings and worrying about insecurity and safety instead of instruction. *See id*. at 560.

[19] *See White*, 2006 WL 1594213, at *1 (court concluded school experienced racial tensions based in part on testimony of a minority student about feeling intimidated and scared to the point of feeling ill around the confederate flag and racial slurs); *DeFoe*, 605 F. Supp. 2d at 814-15 (when describing the case's facts, the court cited testimony of the principal that the confederate flag was disruptive, because the only African-American student in the school might have felt "threatened or intimidated" by it).

[20] *See Barr*, 538 F.3d at 566 (based on the director of schools' testimony the court concluded that racist graffiti caused absenteeism among African-American students, which is "the epitome of disruption to the educational process").

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 insensitivie 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 intimated 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*, the U.S. Supreme Court held that school districts could restrict student speech advocating illegal drug use, citing the severe "physical, psychological, and addictive effects"[25] of drug use on children. Some lower courts have concluded that while the holding of *Morse* is narrow, its reasoning of restricting speech to prevent harm to students is broad and have relied on *Morse* when concluding that school districts may restrict student speech that is psychologically harmful to students. For example, in *Harper v. Poway Unified School District*, the court relied on *Morse* to conclude that a school district could prohibit a shirt saying "Homosexuality is shameful" to "insulate students from

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[23] 508 F. Supp. 2d at 744.

[24] *See, e.g., J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851, 869 (Pa. 2002) (the most "significant disruption" caused by a student website which, among other things, listed 136 times "F___ You Mrs. Fulmer. You Are a B___. You Are A Stupid B____.," was the "emotional and physical injuries" to teacher Mrs. Fulmer who was unable to complete the school year and took a medical leave of absence the next year).

[25] 551 U.S. 393, 407 (2007).

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* "substantial disruption" could be psychological:

> Violence was not the issue in *Morse* . . . . In fact one of the concerns expressed by the Supreme Court in *Morse* was the psychological effects of drugs. Imagine the psychological effects if the plaintiff wore a T-shirt on which was written "blacks have lower IQs that whites" or "a woman's place is in the home."
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> From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech.[28]

Tinker was decided in 1969. School district legal responsibilities regarding students' psychological well being—and an understanding of the impact of school climate on student achievement[29]—have changed substantially in the intervening

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[26] 545 F. Supp. 2d 1072, 1098-2000 (S.D. Cal. 2007).
[27] 523 F.3d at 674 (citations omitted).
[28] *See also C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612, at *10 (D.N.J. Apr. 22, 2010) (quoting *Nuxoll* for the above proposition and stating that perhaps if the school district could show that some students actually were upset and "this somehow caused a disruption to the learning environment," the student in this case could have been prevented from distributing a flyer about abortion).
[29] *See, e.g.*, Angus MacNeil et al., *The Effects of School Culture and Climate on Student Achievement*, 12 INTERNATIONAL JOURNAL OF LEADERSHIP IN EDUCATION, Jan.-Mar. 2009, at 73-84; Greg Chen & Lynne A. Weikart, *Student Background, School Climate, School Disorder, and Student Achievement: An Empirical Study of New York City's Middle School*, 7(4) JOURNAL OF SCHOOL VIOLENCE 3-20 (2008).

40 years. These changes cast doubt on the wisdom of viewing a *Tinker* disruption narrowly in 2010. The laws most relevant to schools being required to protect students psychologically, which have been adopted post-*Tinker*, are Title IX and state anti-bullying statutes. Title IX of the Education Amendments of 1972 prohibits discrimination against students on the basis of sex,[30] including sexual harassment. Similar to Title IX, at least 40 states to date—including South Carolina[31]—have adopted anti-bullying statutes.[32] Unless a student is physically assaulted by sexual harassment or bullying, harm caused by either is psychological or emotional. In fact, South Carolina's School Climate Act defines "harassment, intimidation, or bullying" to include, among other things, harming a student emotionally and insulting or demeaning a student or group of students.[33] Numerous school districts have been successfully sued under Title IX for hundreds of thousands of dollars for failing to protect students from the psychologically damaging impact of sexual harassment.[34] Finally, the tragic and bizarre facts surrounding cases in which school districts have been sued related to a student's

[30] 20 U.S.C. § 1681 (2010) .
[31] S.C. CODE ANN. § 59-63-110 *et seq* (2009).
[32] *See* Stop Bullying Now, State Laws on Bullying, http://www.stopbullyingnow.hrsa.gov/adults/state-laws.aspx (last visited Apr. 19, 2010).
[33] S.C. CODE ANN. § 59-63-120 (2009).
[34] *See, e.g.*, Kathleen Lavey, *Jury Award Should Impact Bullying*, LANSING STATE JOURNAL, Mar. 12, 2010 ($800,000 verdict against a school district under Title IX were a student was bullied); *Around the Nation*, HOUSTON CHRONICLE, Dec. 24, 2005 (Kansas school districts settles Title IX bullying case for $440,000).

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 all[36]—is not appropriate in this case.

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[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 cases[40] that have facts worse than *Melton v. Young*,[41] which was decided almost 40 years ago,

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[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 districts allowed students to wear or display images of the confederate flag in an already racially tense environment.[43] The third reason schools should have more latitude under the First Amendment in cases involving racially divisive speech is, unlike other parts of government, public schools are required to educate all eligible children. This means districts have to take into account the sensitivities of all students. So, for example, if the South Carolina legislature chooses to fly the confederate flag over the capitol, offended citizens can avoid visiting the building. Students offended by the confederate flag cannot avoid attending a school where the display of such a flag is allowed without forfeiting their own right to a public education.

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[42] 42 U.S.C. § 2000 c, d (2010).

[43] *See Bryant v. Ind. Sch. Dist. No. I-38*, 334 F.3d 928 (10th Cir. 2003); *Williams v. Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306 (E.D. Mich. Mar. 30, 2010). It is also interesting that in the two confederate flag cases with the most egregious facts, federal agencies were asked to investigate racial issues. *See, e.g., B.W.A.*, 508 F. Supp. 2d at 744; *Barr*, 538 F.3d at 558.

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.

II. School Districts Should Have Wide Latitude In Citing Evidence That Demonstrates Racial Tensions.

To the extent that school administrators' reasonable perceptions of racial tensions are enough to forecast a *Tinker* disruption, administrators should have wide latitude in citing evidence that demonstrates the existence of racial tensions. Specifically, school administrators should be able to cite to a number of indicators of racial tensions, including observations and knowledge of blatant and subtle forms of racism, students' perceptions, and local history.

Confederate flag case law is rife with examples of obvious indicators of racist behavior that courts have relied on to conclude that racial tensions exist from racist graffiti[44] to students throwing Oreo cookies at a biracial student.[45] While the

[44] *See, e.g., Barr,* 538 F.3d at 557-59 (racial tensions included a physical altercation at a basketball game and racist graffiti involving "hit lists" of students).

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 allowed to cite obvious indicators of racial tensions where they exist to forecast a disruption, based on common knowledge, examples from prior precedent, and guidance from the Department of Education.

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[45] *See, e.g., DeFoe,* 650 F. Supp. 2d at 814-16 (racial tensions included use of the confederate flag to intimidate students, community members telling the principal he was lucky to not have any black students, Oreo cookies being thrown at a biracial student at a basketball game, racial slurs and graffiti).

[46] U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, PROTECTING STUDENTS FROM HARASSMENT AND HATE CRIME: A GUIDE FOR SCHOOLS 121 (Jan. 1999), *available at* http://www2.ed.gov/offices/OCR/archives/Harassment/harassment.pdf.

[47] *Id.*

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.

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[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 behaving in a discriminatory manner when it can be attributed to other, non-racial factors. Dana E. Mastro et al., *Exposure to Television Portrayals of Latinos: The Implications of Aversive Racism and Social Identity Theory*, 34 HUM. COMM. RES. 1, 3 (2008).

The perceptions of those in the schools every day, including school administrators, discussed in more detail in Section III, and students, are particularly helpful in determining whether racial tensions exist and what impact they have on the learning environment. Courts have credited the perceptions of students when evaluating racial tensions and determining whether school officials could reasonably forecast that confederate flag clothing would cause a disruption. For example, in *Barr v. Lafon*, the Sixth Circuit described the plaintiff's deposition testimony that he felt "friction" and "racially related tension" and that he could "feel the intensity" as "people walk[ed] by" as "[p]erhaps the most compelling evidence of the racial tension that existed at the school . . . ."[51] Similarly, student perceptions can provide evidence that demonstrates a lack of racial tension within a school. In *Bragg v. Swanson*, the district court credited the testimony of a multiracial student who said there was a good racial environment at the school.[52] As these examples illustrate, racial tensions, or lack thereof, are easily perceived by students and administrators who spend every day in the school environment. Therefore, in predicting whether a display of the confederate flag will cause a disruption, school officials should be able to factor in the perceptions of students about racial tensions within the school.

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[51] 538 F.3d at 566.

[52] 371 F. Supp. 2d at 817 (court held that the high school's policy banning items displaying the confederate flag was unconstitutionally overbroad and the school was enjoined from enforcing the policy).

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 girls 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"

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[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 "history or presence of unresolved racial conflict" as one of the indicators of racial tension).

[54] *See, e.g.*, *Phillips*, 987 F. Supp. at 492-93 (court relied on evidence of racial tensions involving the confederate flag that was at least six years old and evidence of a fight over the confederate flag that happened off campus).

[55] 585 F.3d at 218-19.

[56] *Id*. at 222.

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 school over race or a racist symbol was displayed on campus, districts should be able to consider evidence of past, more extreme examples of racial tensions when forecasting whether a symbol[59] like the confederate flag may cause a disruption.

III. Courts Should Defer To The Judgment Of School Administrators About Whether Racial Tensions Exist In A School And May Lead To A *Tinker* Disruption.

While the plaintiff would require school administrators to be certain a disruption *would* occur, *Tinker* only requires a reasonable forecast.[60] According to the Fifth Circuit, the burden on administrators to forecast a disruption is not great: "While school officials must offer facts to support their proscription of student speech, this is *not* a 'difficult burden' . . . and 'their decisions will govern' if they

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[57] 206 F.3d at 1362.
[58] *Id.* at 1366.
[59] Psychology professor Rita Smith-Wade-El noted the power of symbols, stating that symbols "get infused with meaning, and not just arbitrarily – they get infused with meaning based on history . . . on real events." Suzanne Cassidy, *The Symbols of Racism; For African-Americans, the Messages Delivered by Confederate Flags and by Nooses are From a Time and Place Not Forgotten*, SUNDAY NEWS (Lancaster, Pa.), Oct. 14, 2007, at A1.
[60] 393 U.S. at 513.

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 forfeit their First Amendment rights at the schoolhouse gate, "those rights should not interfere with a school administrator's professional observation that certain expressions have led to, and therefore could lead to, an unhealthy and potentially unsafe learning environment for the children they serve."[65] From their day-to-day experience in the school building, school administrators are able to base their assessment of whether racial tensions exist and how students might react to the confederate flag in a racially tense environment both on their own observations and overall knowledge of the school and district, as well as reports of racial tension and potential reactions to such tension which they receive from students, teachers, and parents.[66]

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[64] 523 F.3d at 671.
[65] 324 F.3d at 1247.
[66] For example, in *White v. Nichols* the court cited the testimony of the principal who had heard from students who reported racial slurs, heard the concerns of faculty members about potential racial unrest, and received reports from parents of minority students. 2006 WL 1594213 at *1 (11th Cir. 2006).

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 training[69] 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

uniquely qualified to accurately forecast that the confederate flag may disrupt the learning process for students in an already racially tense environment. As discussed at length in Section I of this brief, administrators know based on experience and training, what experts, anecdotal evidence, and the facts of this case suggest—that adolescents are ill-prepared to deal with racial conflict constructively and their learning can suffer if a racially divisive symbol like the confederate flag is introduced into a racially tense environment.

CONCLUSION

For the foregoing reasons and those stated in the brief of Appellees, amici respectfully request that this Court affirm the judgment of the lower court.

Respectfully submitted,

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Requirements Common Around the Country, DIVERSITY DIG. (2000), *available at* http://www.diversityweb.org/digest/F00/survey.html.

[69] *See, e.g.*, Elisabeth Hulette, *Schools Renew Racial Sensitivity Training*, MARYLAND GAZETTE, Jan. 16, 2008; Teaching Tolerance, Professional Development, http://www.tolerance.org/activities?keys=&level[]=7 (last visited Apr. 26, 2010).

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Dated: June 1, 2010 **/S/** Francisco M. Negrón, Jr.

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I hereby certify that on this 1st day of June 2010, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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