

RECORD NUMBER: 09-2390

United States Court of Appeals
for the
Fourth Circuit

**C.H., by and through her Parents and Guardians
DARYL L. HARDWICK and PRISCILLA L. HARDWICK,**

Appellant,

– v. –

**MARTHA HEYWARD, in her individual capacity and in her official capacity
as Principal of Latta Middle School, et al.,**

Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT FLORENCE**

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

Appellants are satisfied with the arguments advanced in their Opening Brief, but there are other subsidiary but derivative principles of First Amendment jurisprudence worthy of great consideration and deliberation in adjudicating this action. The first is that government must seek the least restrictive alternative to the suppression of speech in seeking to alleviate any evil that ostensibly has arisen from a disputed expression. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *Reno V. American Civil Liberties Union*, 521 U.S. 844, 879 (1997). Secondly, government officials have no warrant to punish or otherwise suppress speech solely on the grounds that it might adversely affect the emotional state of those persons who might hear or see the putatively offending speech, writing or display. *Forsyth County, Ga. V. Nationalist Movement*, 505 U.S. 123, 134- 135 (1992) (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (Court refuses to allow speech to be proscribed because it may have an adverse emotional impact on the audience.) In other words, speech may not be banned or otherwise circumscribed because of a “heckler’s veto.” *Robb v. Hungerbeeler*, 370 F. 3d 735, 743 (8th Cir. 2004); *World Wide Street Preachers’ Fellowship v. City of Owensboro*, 342 F. Supp. 2d 634, 639 (W.D. Ky. 2004).

The Appellants fully understand that these precepts must be applied in this situation in the light of a school's overriding and unique mission to educate the students who have been placed in its care in as safe and efficacious a manner as possible. Thus constraints and perimeters can be placed on the time, place and manner (and concerning certain delicate topics even the content) of student speech that would not be permissible in other places and contexts. *Bethel School District No. 403 v. Fraser*, supra. That fact notwithstanding, the Appellants are aware of no decision of the United States Supreme Court that has wholly and completely abrogated the doctrine of less restrictive alternatives and the proscription against the heckler's veto as they might apply to the propriety of student speech and expression in institutions of secondary public education.

Even assuming the facts in the light most favorable to the Appellees, the Appellants suggest that the least restrictive policy¹ alternative that the school authorities herein could employ in lieu of the suppression of speech is simply the even-handed and firm enforcement of easily understood rules of conduct against harassment and violence of any kind by any student. The administration could make it clear that it expects every person to treat other members of the student

¹ Contrary to Appellees contention that no system-wide written policy banning Confederate symbols was in place, Appellants contend that when a Board of Education abrogates its duty to countermand an unreasonable and unconstitutional decision of a principal and instead "circles the wagons" around the principal while ignoring reasonable alternatives to resolve the issue – such a position amounts to a policy of the Board banning Confederate symbols.

body as well as faculty members and other school personnel with civility and respect no matter what any given individual's political views, mode of dress or other personal attributes might be. It could reinforce this message by meting out appropriate and effective punishment to those students who violate such standards and can make tolerance teaching seminars available for bigoted, offended or trouble-making students, as was offered to Appellees by Black Confederate activist H. K. Edgerton and the Sons of Confederate Veterans. H.K. Edgerton letter, J.A. 57-58; Guide to Confederate Issues, J.A. pp 59-88. It is a shocking revelation to Appellants that professional educators, in the business of educating should shrink from an opportunity to educate their charges in a manner that expands the first Amendment, and thus freedom, in their schools. Instead, Latta officials have played the (powerful and heretofore successful) race card, have isolated, demonized² and belittled Appellants' sincerely held beliefs by equating them with historic problems from the past with no provable current impact and by failing to educate her peers in tolerance³ to her inoffensive display of heritage.

Only when such measures have been utilized and have been proven to be ineffective should school authorities consider the use of censorship, which the

² Why else include portions of C.H.'s deposition (J.A. pp 418-455.2) in the Joint Appendix, if not a not-so-subtle attack on Appellant as a person not worthy of judicial relief.

³ And any such tolerance teaching initiative could expect success based on the petition signed in quick order by 10% (or so) of African-American students at Latta High School. Petition J.A. p. 149.

lower court has endorsed herein. The record below is clear that the Appellees have taken *no* such measures and just hope that inapplicable decisions like *B.W.A. v. Farmington R-7 Sch. Dist. & Barr, et al v. Lafon* will somehow come to their rescue in spite of the facts developed in this case, which is that there was no current demonstrable or provable, material or substantial disruption caused by Confederate symbols at Latta Middle or High School.

To those few students who are genuinely disturbed by the momentary display of the Confederate flag in hallways and classes and who are unresponsive to tolerance teaching, being a good citizen by respecting the rights of others, or other educational measures, the administration should say to these students that they should focus their attentions on the paramount task of completing their studies and of obtaining a good education rather than by being distracted in any manner by whatever attire any other of their fellow students may be wearing during school hours, *especially* if that attire is being worn to honor a legitimate ancestry or heritage. After all, anyone who dislikes the appearance of anyone or anything for any reason can usually alleviate any discomfiture on that account by simply looking in another direction – even high school students are capable of this behavior, if school administrators enforce such a policy sternly and fairly.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say those subjected to the raucous

emissions of sound tracks blaring outside their residences. Those in the Los Angeles courtroom could effectively avoid further bombardment of their sensibilities simply by averting their eyes. *Cohen v. California*, 403 U.S. 15, 21 (1971). The fact that no one was constrained to look at Appellant C. H.'s shirt on a continuing basis is a compelling factor that distinguishes this case from the scenario dealt with in the *Fraser* opinion and it consequently renders *Fraser* inapposite to the disposition of these proceedings, in addition to *Fraser*'s inapplicability already argued in Appellants' Opening Brief.

Reversal of the decision of the District Court is also required in order to demonstrate that there can be no "heckler's veto" of the exercise of legitimate First Amendment rights in a public school setting. Ultimately the action of the school administration in decreeing this act of censorship as endorsed by the lower court will be conducive of more – not less – discord, disharmony and disorder. Again assuming the facts as maintained by Appellees, the school's policy clearly punishes the innocent and rewards the ignorant and troublemakers who may take advantage of the historical "unrest" which led to the ban. Continuance of the ban cannot help but encourage the school's unruly element to believe that the administration will knuckle under to a continuous flow of complaints of a similar nature. After all, if such persons can create a situation whereby other students can

be forced – under threat of discipline – to change their wearing apparel, then will they not be fully justified in believing that “the sky is the limit” insofar as what they can achieve through an ongoing and calculated course of bickering and intimidation? Will any school administrator be able to retain effective control of the institution if such a scenario comes to pass? Will the ban then continue (as seems to happen at almost every school where the Confederate battle flag is banned) on into the eons of time, never subject to review again because perpetually “offended” students know when to make more noisome complaints?

The Appellants’ conclusions that the District Court both violated their free speech rights and that this ban will eventually impede the orderly function of the school gain particular force when this court considers the fact that the principals specifically singled out the Confederate battle flag for proscription and even protest shirts decrying the principals’ decision – a clear case of viewpoint discrimination. The wearing of shirts with the Confederate battle flag emblazoned on them was not prohibited as a result of the promulgation of a comprehensive school policy disallowing the wearing and display of any and all putatively disruptive symbols – black power symbols, Malcolm X signs, gang symbols, FUBU, visible underwear, etc. The ignorant and bigoted students at Latta Schools, black or white, who rejoiced at the ban, can therefore reasonably believe that the principal’s decision on this issue – as ratified by the District Court – was a victory

for them. Unless this Court intervenes and reverses that decision, they will surely conform their future actions in light of that deduction. The manner in which this circumstance will effect the learning environment at Latta Schools is therefore highly predictable.

AMICUS WANTS THEIR CAKE AND TO EAT IT TOO

As a Big Brother should, Amicus National School Boards Association commendably weighs in on behalf its sibling, the Appellees, to help them out in a disruption-starved case. With some reservations Appellants are not in total disagreement with their position nor hostile to their concerns. The crux of this case *does* involve one major legal question: whether this court should abandon its constitutional oversight and defer to the judgment of school administrators that a *Tinker* disruption *would* (not likely to) arise if they allowed the plaintiff to wear Confederate flag apparel in school. This case *does* lack the horrific facts of many (actually almost all) recent Confederate flag cases where numerous physical disputes (lacking here) have arisen over the flag, it includes extensive and compelling evidence of historical racial tensions in the district, but a paucity of any record of material disruption related to Confederate symbols. Appellees could have made a record of such incidents, and if it had been important at the time, *would* have done so. Though it is their burden, Amicus want you to let their little brother off the hook (so to speak) letting the historical disruption trump the

complete lack of current proof of disruption, while having their derelictions lauded as “constitutional.” (Having their cake, etc...)

The problem with Amicus request that this court defer to school principals in their judgment is that: one, principals are officials and employees of government vested with power and authority over children, and two, they are imperfect and fallible, capable of error, corruption and all the vagaries of abuse if left unchecked or unsupervised by a higher dispassionate authority such as a court, especially where there is an apparent institutional bias against the symbol being banned.

The next problem with Amicus position is that they ask this court to essentially take judicial notice that the Confederate flag is a racially divisive symbol, allowing them to then argue that proving a nexus between the Confederate flag and racially disruptive activity will be unnecessary. In all its dealing with C.H., the Latta Schools essentially took “Administrative Notice” that Confederate symbols were disruptive despite her inoffensive display of Confederate symbols and the paucity of current provable disruption caused by the symbol.

Amicus then attempts to bolster its case by suggesting that schools that allow free expression that include Confederate symbols risk Title VI Civil Rights suits because of racially tense environments. This illustrates the bankruptcy of Amicus argument that all Confederate flag cases are created equal, pose equal threats to school stability and should be treated equally – i.e., Confederate symbols

held to be racially divisive per se and banned in perpetuity – thus making the lives and careers of Amicus’ little brothers easier, trouble free and constitution free.

Sadly for Amicus and Appellants, *Tinker* and later *Morse*, make no such distinction between disruption caused by race and disruption caused by other issues and symbols. Decided in 1969, the Supreme Court was fully aware (as was Appellants’ counsel, who grew up in that time) how violently disruptive opposition to the War in Vietnam had become. Protests were violent, people shot and killed (as at Kent State a year after *Tinker*), buildings bombed; it was an awful time and it seemed the violence of the protests made civil rights protests tame by comparison. The point is, the Supreme Court, in deciding *Tinker* were very, very aware of the race strife that was going on in America’s schools, and they had the perfect opportunity in 1969 to make a distinction between race (or Confederate flag) speech issues and other types of political speech, but they chose not to make such a distinction, distinctions various Circuit Courts have made on their own by misapplying *Tinker*.

As Justice Fortas said (and bears repeating):

Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. *Terminiello v. Chicago*, 337 U.S. 1, 69 (1949); and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the

independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Appellants reasonably interpret Justice Fortas to say that the Constitutional rights of students is worth at least one black eye or bloody nose before imposing a ban. Reasonable forecast has been interpreted well beyond the spirit of *Tinker* so that now several circuit courts enshrine “undifferentiated fear of disturbance” as good law.

Though Amicus would never admit it to this court, their advocacy of unfettered discretion on speech issues for their members will transform schools into the “enclaves of totalitarianism” Justice Fortas warned about. Public schools are required to educate all eligible children. This means districts have to take into account the sensitivities of all students, including C.H. Erasing her rights to avoid the discomfort and unpleasantness that always accompany an unpopular (among school officials) viewpoint, furthers no compelling state interest. The cases cited by Amicus, showing severe disruption does nothing but illustrate why those cases are completely inapplicable here. Ancient history and opinions not buttressed by any current facts cannot be used to justify the violation of C.H.’s rights and the inoffensive display of a venerated symbol. School Districts should have wide latitude in citing relevant and current evidence that demonstrates material racial tension connected to the display of Confederate symbols as required by *Tinker*.

CONCLUSION

If this were 1950, 1980, or even 1995, Appellants would not have a proverbial leg to stand on. It is the fervent wish of Appellees and Amicus that this honorable court go along with their illusion that it is *always* 1950 at Latta Schools. Sadly for Appellees, nothing in the record justifies the manner in which C.H.'s wearing and display of the Confederate Battle flag was handled by school officials or the hypocrisy displayed by Latta proclaiming inclusiveness and diversity as a policy unless you are a Southerner with a little ancestral pride. Adopting Appellees proposed standard of evidence, without allowing a jury to hear both sides will be to enshrine "The Divine right of Principals: The Principal can do no wrong, as the law of the 4th Circuit. C.H. and other students should not be forced to shed their ancestry and heritage at the school room door. C.H. has developed more than sufficient evidence to put this case in the province of a jury – where this case belongs. The summary judgment of the District Court should therefore be reversed and this case remanded back to that forum for further proceedings consistent with such a holding.

Respectfully submitted,

/s/ Kirk D. Lyons

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2390

Caption: Daryl L. Hardwick et al., v. Martha Heyward, et al.

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