No. _____

IN THE

Supreme Court of the United States

C.S., BY HER NEXT FRIEND, ADAM STROUB,

Petitioner,

v.

CRAIG MCCRUMB, AMY LEFFEL & MICHAEL PAPANEK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

EUGENE VOLOKH
434 Galvez Mall
Stanford, CA 94305

JOHN R. MONROE*
JOHN MONROE LAW, P.C.
156 Robert Jones Road
Dawsonville, GA 30534
(678) 362-7650
jrm@johmonroelaw.com

MICHAEL F. SMITH
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Ave. N.W.
Suite 1025
Washington, D.C. 20006

**Counsel of Record*

QUESTION PRESENTED

On Hat Day at her public elementary school, third-grader C.S. chose a baseball cap depicting an AR-15 and the historical phrase "come and take it," to show her support for the constitutionally protected right to bear arms. Because school officials believe wearing weapon imagery is never appropriate in school, they made her remove it. Months later, after C.S. sued, the same officials contrived the excuse that a high-school shooting two counties away made them concerned for emotional reactions the hat could prompt—a *post hoc* rationalization lower courts credited even though it was not referenced the day of the incident and even though there was no evidence any of C.S.'s schoolmates even knew of the tragedy.

Tinker v. Des Moines Independent Comm. Sch. Dist., 393 U.S. 503, 514 (1969), requires school officials seeking to restrict student speech to show "substantial disruption of or material interference with school activities." The justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022). This Court has never recognized a "hurt feelings" exception to this principle.

The question presented is:

Is *post hoc* speculation about emotional harm that speech could cause to other students insufficient to meet *Tinker*'s "substantial disruption" standard?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner (plaintiff-appellant below) is C.S. by her next friend and father, Adam Stroub, natural persons with no parent corporations or stockholders. Respondents (defendants-appellees below) are Craig McCrumb, Amy Leffel, and Michael Papanek, individually and in their official capacities, natural persons with no parent corporations or stockholders.

LIST OF ALL PROCEEDINGS

C.S. v. McCrumb, No. 24-1364, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 2, 2025.

C.S. v. McCrumb, No. 2-22-CV010993-TGB-EAS, U.S. District Court for the Eastern District of Michigan, Summary judgment granted and final judgment entered March 30, 2024.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional provisions

Statutes and Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner C.S., through her next friend Adam Stroub, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's May 2, 2025 Opinion affirming summary judgment for respondents is published at 135 F.4th 1056 and reprinted at App. 1a-27a. Its August 12, 2025 Order denying rehearing *en banc*, with related concurrences and statements, is published at 149 F.4th 848 and reprinted at App. 65a-90a.

The district court's memorandum opinion and order denying summary judgment for petitioner and granting it for respondents is published at 728 F. Supp. 3d 581 (E.D. Mich. 2024) and reprinted at App. 28a-64a.

JURISDICTION

The Sixth Circuit entered judgment on May 2, 2025, and denied a timely petition for rehearing on August 12, 2025. On November 7, 2025, Justice Kavanaugh extended the time for filing this petition for a writ of certiorari to and including January 9, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution in relevant part provides, "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

The Fourteenth Amendment to the Constitution in relevant part provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

Title 42 U.S.C. § 1983 in relevant part provides, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." 42 U.S.C. § 1983.

INTRODUCTION

On Hat Day at her elementary school, 8-year-old C.S., who enjoys sport shooting with her father, purposefully chose a baseball cap bearing an AR-15 and the phrase "Come and Take It" to show her support for the Second Amendment. School officials immediately made her remove the hat because, in their view, images of weaponry in school are never appropriate. Months later, after C.S. sued and the school officials retained counsel, they created a new justification:

that the hat could potentially traumatize her elementary-school classmates due to a recent shooting at a Detroit-area *high school*, 50 miles and two counties away.

In *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503 (1969), this Court declared that school officials seeking to justify restriction of student speech must produce evidence to "show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. They must show "substantial disruption of or material interference with school activities." *Id.* at 514. And the justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022).[1]

Officials at C.S.'s school ignored those directives, contriving a *post hoc*, litigation-motivated justification for their viewpoint-based squelching of C.S.'s speech on an issue of public importance with which they disagree. Based on nothing but their speculation about potential emotional harm, school officials thus crafted an end-run around *Tinker* that silenced a third-grader from proclaiming her demonstrated respect for Second Amendment protected rights. Rather than take the opportunity to convey to a bright, politically aware 8-year-old that her voice and thoughts

---

[1] *Tinker* also permits limiting student speech that involves "substantial . . . invasion of the rights of others," 393 U.S. at 513, which is not at issue here. App. 11a, panel opinion 8, citing *Tinker*, 393 U.S. at 514 and its analysis of "substantial disruption of or material interference with school activities."

matter, school officials instead told her to sit down and shut up—presumably because they personally don't like the Second Amendment or the rights it protects. Worse, the lower courts have let school officials do this.

The Sixth Circuit's ruling exposes large and growing cracks in *Tinker*. In his separate statement regarding the denial of *en banc* consideration, Judge Readler admitted that this case "raises a serious charge of viewpoint discrimination," in which school officials offered contrived rationales that "fail to clear *Tinker's* high bar," and "likely abridge[ed] [C.S.'s] First Amendment freedoms." App. 79a. He found the case unworthy of *en banc* review, however, because it involves "'novel,' fact-specific grounds" and "centers on the unique risk of material disruption as understood by the panel." App.78a, 90a. But those very things make certiorari imperative. As this case shows, school officials have learned to end-run *Tinker* by using case-specific details—which are always present in every case—to contrive *post hoc* speculative scenarios of supposed disruption and emotional harm and use them to censor speech with which they disagree. The Sixth Circuit opinions "give public school authorities a license to suppress speech on political and social issues based on disagreement with the view expressed," and "strike[] at the very heart of the First Amendment." *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

Tinker is being circumvented by school officials silencing views with which they disagree while hiding behind the notion of avoiding hurt feelings. This Court should restore for the Nation's schoolchildren

the promise of First Amendment protections *Tinker* guaranteed their grandparents' generation more than half-century ago.

STATEMENT OF THE CASE

Petitioner C.S. in 2021-22 was a straight-A third-grader at Robert Kerr Elementary School, a K-5 public school in Durand, Michigan, 85 miles northwest of Detroit. She had long engaged in shooting sports with her father and next friend, Adam Stroub, and advocated for Second Amendment protected rights. In September 2020, more than a year before the incident underlying this action, she attended a Second Amendment rally at the Michigan Capitol in Lansing with her parents, and appeared in news photos carrying a Gadsden flag with a toy rifle slung across her shoulder. [2]

During Kerr Elementary's weeklong "Great Kindness Challenge" in February 2022, Thursday was "Hat Day," when the school encouraged students to wear hats of their choice. C.S. chose a black baseball cap featuring a white star, a white image of an AR-style rifle, and the phrase "come and take it," App. 29a-30a.

It is undisputed that "come and take it," when used with an image of a star and weapon, is a common symbol supporting the right to keep and bear arms. Together those items comprise an homage to the Gonzales flag, a symbol of resistance to Mexico's

---

[2] Photo at ECF Doc. 20, p. 19 (Brief Opposing Summary Judgment).

invasion of the settlement of Gonzales, Texas during the Texas Revolution. ECF Doc. 1, p. 4 (Complaint). Its roots run deep in our history—American Col. John McIntosh in November 1778 also uttered the phrase in response to a British demand to surrender Ft. Morris, Georgia; the British declined his challenge. *Id*; *see also* Petitioner's 6th Circuit Brief, p. 4 (depicting replica Gonzales flag hanging in Texas state capitol).

As both lower courts acknowledged, C.S. chose that hat to wear from among several at home not only because it reminded her of her father, but in "support for the right of people to have guns." App. 8a & n.3; *see also* App. 38a.

Respondent Michael Papanek, the "On Track Coach" at Kerr Elementary whose duties include school discipline, noticed C.S. wearing the hat and immediately went to Principal Amy Leffel's office, where Durand Area Schools Superintendent Craig McCrumb was visiting. The school officials had Papanek call C.S.'s parents and ask for a substitute hat, but C.S.'s father declined. They then told C.S. to remove the hat and put it in her locker, which she did. App. 32a-35a.

As Principal, it is undisputed that Leffel had discretion to interpret and enforce the school dress code. The morning of Hat Day, Leffel deemed the hat inappropriate because in her view, any depiction of any weapon at any time on student clothing violates Kerr's dress-code policy: "I feel there is no appropriate pictures of weapons that would be appropriate in

the school setting at any time." ECF Doc. 15-2, p. 102 (Leffel Dep.). She also viewed its phrase "come and take it" "as inciting an altercation or could incite an altercation." App. 34a.

Oxford, Michigan is in metro Detroit, 50 miles and two counties away from Kerr Elementary. On Nov. 30, 2021, a deranged 15-year-old brought a firearm and opened fire at Oxford High School, killing four students and injuring six others and a teacher.

The evening of Hat Day, Leffel emailed Mr. Stroub, copying Superintendent McCrumb, to reiterate why they made C.S. remove her hat. Her email repeated that "[w]eapons of any kind are not appropriate for students to wear in a school setting." App. 5a. It made no mention of the Oxford shooting nor of concerns among Kerr Elementary students relating to it.

PROCEDURAL HISTORY

Through her father/next friend, C.S. in May 2022 filed her Complaint under 42 U.S.C. § 1983 against McCrumb, Leffel, and Papanek, alleging violations of the First Amendment and the Fourteenth Amendment's Due Process Clause. At her deposition 10 months post-incident, Leffel repeated her Hat-Day view that weapon imagery was never appropriate, and that she interpreted "come and take it" as something that "could incite an altercation." App. 34a. Then for the first time, she ascribed to the Oxford shooting a role in her decision:

> Well, other than the – we have students that attended – attended Robert Kerr that had moved from Oxford. And I had had several conversations with their parents. And those were receiving counseling and social work support to deal with the trauma. And so … with all the school shootings we have, it's a picture of an automatic weapon…. [App. 34a-35a].

No school official ever offered a single detail about the number of students who supposedly transferred to Kerr Elementary from Oxford in the three months between the shooting and Hat Day, nor elaborated on the "counseling and social work support to deal with the trauma" those grade-school pupils received due to the shooting at Oxford High. Nor has any explained why they said nothing about Oxford the day they made C.S. remove her hat.

The parties all sought summary judgment. Respondents abandoned the claim that Oxford students had come to Kerr Elementary, instead noting that "*Durand Area Schools* had absorbed several students from Oxford Area School District." ECF Doc. 17, pp. 7-8 (Brief). In its ruling denying C.S. summary judgment and granting it to Respondents, the district court edited the record in questionable fashion to give the Oxford high-school shooting significance far beyond that claimed even by Respondents:

> As Leffel explained at her deposition, she believed a depiction of a gun could

> cause fear and disrupt the classroom environment—particularly if tests were being administered:
>
> > Well, other than the—we have students that attended—attended Robert Kerr that had moved from Oxford. And I had several conversations with their parents. And those students were receiving counseling and social work support to deal with the trauma. And so . . . with all the school shootings we have, it's a picture of an automatic weapon . . . . I think [wearing the hat] would—could disrupt the educational environment. So anything that is involved in that from class work, if they're taking a test that day, it could have impacted it if kids were uncomfortable.

App. 34a-35a (shading added).

The shaded passage the court replaced with ellipses was actually a gap of *two full transcript pages*. ECF Doc. 15-2, pp. 104-06 (Leffel Dep.). There is no reasonable reading of those three transcript pages under which Leffel testified that Oxford-related trauma would "disrupt the educational environment."

C.S. appealed, and the Sixth Circuit affirmed in a published opinion. Outdoing the district court, the

panel's "Background" section opened not with the facts of *this* case, but an extended discussion of the Oxford shooting and its aftermath. App. 2a-3a. It later reemphasized that, citing news accounts and other extra-record material, including the district court's own extra-record observations. App. 3a ("this tragedy . . . traumatized many students in close proximity to the shooting and inflicted 'lasting scars' on Michigan schools") (quoting App. 57a). Indeed, the panel opinion cites to nothing but *the district court* when it says "[u]ndoubtedly, the record proves that 'the Oxford shooting was very close in time and space,'" App. 13a, quoting App. 61a, a "striking closeness" that "lends context to the School's apprehensions about Plaintiff's Hat disrupting the student environment." App. 13a; App. 71a.

The panel also ascribed to school officials "the unique challenge of educating and supporting students who fled the Oxford School District after the Oxford Shooting and relocated to Robert Kerr for their emotional and physical safety." App. 31a. It cited Leffel's supposed "firsthand knowledge of these students' struggles" as "inform[ing] her belief that Plaintiff's Hat could cause a substantial disruption by compounding the students' existing feelings of fear and distress over school shootings," *id.* — even though she made no mention of Oxford on Hat Day. The opinion directly based its finding of "substantial disruption" under *Tinker* on the outsized role supposedly played by the Oxford shooting on the school officials' thinking—a role only contrived long after the fact, by the officials and the district court. App. 8a-14a.

C.S. sought rehearing *en banc*, which was denied. In a separate statement, Judge Readler concurred in the denial but noted "some odd features of this case that should give one pause." App. 79a. He described the gaping factual holes both the district court and panel simply filled in themselves, and that with regard to an Oxford High-Kerr Elementary link, "not even defendants advanced this point as aggressively as does Judge Clay." App. 84a. Citing *Kennedy*, he noted Respondents' after-the-fact explanation, which surfaced only months later and with the aid of legal counsel, was "especially problematic in the First Amendment context." App. 85a. The "generic justifications" cited by Judge Clay "are so broadly stated that almost any later explanation would be consistent under Judge Clay's rubric," App. 86a. And the panel's analysis, though *dicta*, "would allow school to sidestep *Tinker*'s demands in a large number of cases." App. 90a.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit opinions create a "potential emotional harm" exception to the First Amendment and lay out a roadmap for circumventing *Tinker*'s substantial-disruption requirement.

The Sixth Circuit has effectively recognized a "potential emotional harm" exception to the First Amendment, improperly adding a fourth category of regulatable student speech to the three this Court has established, and ignoring *Tinker*'s mandate that avoiding "discomfort and unpleasantness" are insufficient grounds for restricting such speech. 393 U.S. at

509. Worse, the Sixth Circuit has done so to squelch student speech on a matter of public concern, simply because school officials disagree with the viewpoint expressed. Such a radical revision of First Amendment jurisprudence warrants this Court's attention.

1. "Speech on matters of public concern is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (cleaned up). "*Tinker* establishes that public schools cannot confine students to the expression of those sentiments that are officially approved," since "school officials cannot suppress expressions of feelings with which they do not wish to contend." *L.M. v. Town of Middleborough*, 103 F.4th 854, 875 (1st Cir. 2024) (cleaned up) (citing *Tinker*, 393 U.S. at 511). Notwithstanding *Tinker*, this Court has recognized three specific categories of student speech schools may regulate: "(1) indecent, lewd, or vulgar speech during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes illegal drug use; and (3) speech that others may reasonably perceive as bearing the imprimatur of the school, such as that appearing in a school-sponsored newspaper." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187-88 (2021) (cleaned up) (citations omitted).

But *Tinker* "does not permit a 'hurt feelings' exception that any opinion that could cause 'offense' may trigger." *L.M.*, 103 F.4th at 875, citing *Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874, 877 (7th Cir. 2011). "Otherwise, school authorities could do what *Tinker* clearly forbids: protect other students 'from the discomfort and unpleasantness that *always*

accompany an unpopular viewpoint.'" *Id.*, citing *Tinker*, 393 U.S. at 509 (*L.M.* court's emphasis).

In disregard of all that, the Sixth Circuit now has recognized such an exception, covering speech that school officials speculate could cause hurt feelings or emotional harm—something this Court has *never* countenanced. The panel tries to inoculate its holding with a cautionary note, saying "we nowhere suggest that the generalized potential for students' discomfort, offense, or other psychological distress, *without more*, is enough for schools to ban speech on topics such as the Second Amendment." App. 21a (court's emphasis). But that is *exactly* the result it creates. As noted above, the "more" on which the panel relies—supposed concern for emotional trauma to Kerr *Elementary* students because of the Oxford *high school* shooting two counties away—is wholly unsupported by the properly construed record.

The Sixth Circuit has approved the squelching of First Amendment protected rights based on nothing but sheer speculation about the effect C.S.'s hat conceivably could have on other students—assumptions school officials did not voice until months later, and which conveniently dovetail with their personal dislike of guns. As in *Tinker*, "[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." 393 U.S. at 508.

2. Indeed, school officials' *post hoc*, litigation-driven rationalization about fearing emotional harm

to former Oxford students mirrors one that *Tinker* rejected. There, an official memorandum prepared after the students were suspended for their black armbands raised only one suggestion of possible disorder—that a former high-school student had been killed in Vietnam, and with some of his friends still in school, school officials feared any demonstration "might evolve into something which would be difficult to control." *Tinker*, 393 U.S. at 509 n.3. This Court expressly rejected that as sufficient evidence of substantial interference with the school's work, or impingement on the rights of other students. *Id*. at 309. Here, similarly, Durand school officials speculated (long after the fact) that unnamed former Oxford district students *could* be traumatized by the hat. As in *Tinker*, such conjecture, even where credited (despite the lack of any supporting evidence here) is insufficient to show substantial interference or material disruption.

3. The opinions also ignore this Court's directive that *Tinker*'s "material disruption" standard is meant to be "demanding," *Mahanoy Area Sch. Dist.*, 594 U.S. at 193. Instead of applying that daunting standard, the Sixth Circuit crafted its own workaround. By deferring excessively to school officials' "self-serving observations," 393 U.S. at 509, the lower court defied *Tinker*'s directive for an "independent examination of the record" and allowed them to hide behind a *post hoc* excuse they invented (with the aid of counsel) months after the fact, and which is unsupported by the record. Simply put, "[t]he school's rationales fail to clear *Tinker*'s high bar." App. 81a (Readler).

The Sixth Circuit opinions blow a gaping hole in *Tinker*. School officials, with the luxury of 10 months' time and counsel's advice, will usually be able to contrive some justification for squelching student speech akin to the panel's notion of protecting "children reeling from an irrefutably tragic and traumatic event." App. 22a. As Judge Readler correctly apprised, "these generic statements are so broadly stated that almost any later explanation would be consistent under Judge Clay's rubric." App. 86a (Readler). But "government justifications for interfering with First Amendment rights must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Kennedy*, 597 U.S. at 543 n.8 (cleaned up), quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996). This Court should grant certiorari and re-establish the crucial substantive and procedural guardrails of *Tinker* and *Kennedy*. Otherwise, the "potential emotional harm" exception the Sixth Circuit has recognized, via school officials' *post hoc* justification, will quickly overwhelm both.

4. Shorn of the school officials' contrived *post hoc* rationale and the panel's strained reliance on it, what's left is "a serious charge of viewpoint discrimination." App. 78a (Readler). This Court has long refused to countenance such conduct. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public

expression of ideas many not be prohibited merely because the ideas are themselves offensive to some of their hearers."). School officials here have evaded those strictures by contriving the justification that unidentified transferees to Kerr Elementary might see C.S.'s hat, link it to the shooting at their former district's high school, and be emotionally injured. In that fashion they hope to evade the true reason they gave on Hat Day: their dislike of guns and a feeling that weapon imagery in school is "never appropriate." If that is enough to evade *Tinker*, the case soon will become a dead letter.

5. The same "fact-bound analysis" Judge Readler saw as undermining *en banc* review, supports certiorari. As Judge Clay's concurrence in the denial of rehearing *en banc* unwittingly shows, every student-speech case has its own peculiar facts. In his view, what overcomes what Judge Readler deemed the "likely abridgment of First Amendment freedoms" in this case, App. 79a (Readler) is "the unique interplay" of "the proximity of the Oxford Shooting [*sic*], 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." App. 68a (Clay). Of course, in *any* school-attire case there will be variables affecting the analysis and producing a "unique interplay" that could in theory justify speech suppression.

This is underscored by Judge Clay's admission that school officials' reliance on the Oxford high shooting was a *post hoc* contrivance. His remark that "*Tinker* does not require . . . that school officials must

provide a contemporaneous written or verbal justification whenever they perceive a risk of substantial disruption," App. 68a (Clay) illuminates the massive hole such a rule blows through *Tinker*. It is undisputed that school officials said *absolutely nothing* about the Oxford shooting, nor the feared impact C.S.'s hat could have on other students, the day they ordered her to remove it—that concern did not surface until months later, after they lawyered up. In Judge Clay's telling, "*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." App. 69a (Clay), quoting *Tinker*, 393 U.S. 508.

But if it's true that *Tinker*'s landmark protections can be so easily evaded, by testimony "hypothesized or invented *post hoc* in response to litigation," App 86a (Readler) quoting *Kennedy*, 597 U.S. at 543 n.8, this Court's intervention becomes all the more imperative. Such manufactured excuses "are too easily susceptible to abuse by obfuscating illegitimate reasons for speech restrictions." App. 86a (Readler), quoting *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d, 12, 26 (1st Cir. 2020). Contrary to *Tinker*, the panel opinion refused to require a "specific showing" of disruption, 393 U.S. at 508, but rather "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." App. 88a (Readler). In so doing, the panel opinion created a "hurt feelings" exception that

stripped a third-grader of her First Amendment protected rights.

6. Nor is this an isolated problem. In *L.M.*, the First Circuit defined *Tinker*'s "material disruption" standard "to include anything that that correlates with 'a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school,' whatever that means." 145 S. Ct. at 1496 (Alito, J., dissenting from denial of certiorari), quoting 103 F.4th at 870 (cleaned up). "That is a highly permissive standard, and it certainly requires far less than that which *Tinker* suggested would constitute a 'material disruption'[:] . . . "aggressive, disruptive action," "threats or acts of violence on school premises" and "group demonstrations." *Id* (Alito, J., dissenting from the denial of certiorari), quoting *Tinker*, 393 U.S. at 508. Here too, the panel applied a watered-down version of *Tinker*, one that required not a reasonable forecast of substantial disruption, but mere speculation about the hat potentially causing upset regarding a high-school shooting two counties away that not one Kerr Elementary student was exposed to. Notably, *Tinker* involved attire that actually distracted and traumatized students whose own friends and neighbors were among the dead and wounded of Vietnam—yet this Court found the black armband protected. *Tinker*, 393 U.S. at 509 n.3; *id.* at 524 (Black, J., dissenting).

7. This Court should grant certiorari to review whether its jurisprudence was misapplied. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986) ("We granted certiorari to address the question whether this Court of Appeals' decision conflicts with this

Court's repeated holdings that interest may not be awarded against the Government in the absence of express statutory or contractual consent."); *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. 435, 452 (2019) (Alito, J., dissenting) ("[w]e granted certiorari to decide whether the lower court's reading of *Shamrock Oil* is correct"). Likewise, this Court will grant certiorari when lower-court rulings over the decades have injected uncertainty into its legal doctrines. *Oliver v. United States*, 466 U.S. 170, 173 (1984) ("[w]e granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the [open fields] doctrine" first enunciated in *Hester v. United States*, 265 U.S. 57 (1924)). Both grounds constitute justification under Rule 10 for this Court to review the Sixth Circuit's opinion.

Last term, this Court declined to review a decision showing how lower courts have subverted *Tinker*'s "material disruption" test, evidenced "confus[ion] on how to manage the tension between students' rights and schools' obligations" and denied many students their full range of First Amendment rights. *L.M.*, 145 S. Ct. at 1496-97 (Alito, J., dissenting from the denial of certiorari). As the circuit court opinions here establish, ignoring the problem has made it worse.

This case confirms that, though it has been settled since 1969 that students have a First Amendment protected right not to be forced to remove attire based on the viewpoint expressed nor school officials' speculative fears of disruption, that legal regime is teetering precipitously. Multiple grounds exist under Rule 10 for this Court's grant of certiorari.

II. The Sixth Circuit has deepened a circuit split.

1. The opinion also deepens a circuit split as to the degree of latitude school administrators are allowed in determining whether student speech "materially disrupts classwork" so as to justify restriction. *Tinker*, 393 U.S. at 513. The material disruption standard is "demanding," *Mahanoy*, 594 U.S. at 193, and this Court requires schools to point to *evidence* to "show that its action was caused by something more than a mere desired to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. But here, school officials' only rationale is "to avoid the discomfort and unpleasantness" they conjecturally conjured up based on the Oxford school shooting two counties away. The Sixth Circuit thus has allowed C.S.'s core political speech to be suppressed absent any actual evidence of likely disruption.

This puts the Sixth Circuit in stark conflict with at least four other circuits that, consistent with *Tinker*, require evidence establishing "a specific and significant fear of disruption, not just some remote apprehension of disturbance" before school officials may silence student speech. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001) (Alito, J.), citing *Chandler v McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (where school officials punished students for wearing "SCAB" buttons to protest replacement teachers during a strike but failed to present "evidence" that "the buttons might reasonably

have led school officials to forecast substantial disruption to school activities," students' First Amendment claim could proceed); *see also Newsom v Albermarle Cty. Sch. Bd.*, 354 F.3d 249, 259–60 (4th Cir. 2004) (middle-school student entitled to injunction barring enforcement of dress-code ban on "messages . . . that relate to . . . weapons" where there was no evidence that such clothing worn by students at school ever substantially disrupted school operations or interfered with others' rights, thus under *Tinker* student "has demonstrated a strong likelihood of success on the merits"); *N.J. v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022) (reversing summary judgment for school administrators who used a dress code barring "inappropriate" attire to prevent middle-schoolers from wearing t-shirts with a picture of a gun, and remanding for application of *Tinker*).

2. Likewise, it sets the Sixth Circuit apart from at least three others that refuse to recognize a "hurt feelings" exception to the First Amendment. *Doe v. Univ. of Mass.*, 145 F.4th 158, 171 (1st Cir. 2025) (*Tinker* "does not permit a 'hurt feelings' exception that any opinion that could cause offense may trigger"), quoting *L.M.*, 103 F.4th at 875, and *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011); *see also Sypniewski v. Warren Hills Regional Bd. of Ed.*, 307 F.3f 243, 264-265 (3d Cir. 2002), citing *R.A.V. v. St. Paul*, 505 U.S. 377, 414 (1992) (White, J., concurring in the judgment), and *Saxe*, 240 F.3d at 215.

3. The Sixth Circuit's opinion also creates a split among the circuits as to whether student attire depicting weapons may be suppressed under *Tinker* in the absence of evidence of actual disruption. Thus, in *Newsom*, *supra*, a middle-schooler was made to turn inside out his t-shirt depicting silhouettes of three men holding firearms superimposed over the letters "NRA" and above the phrase "SHOOTING SPORTS CAMP." The school's assistant principal saw the shirt in the lunchroom and feared "it had the potential to disrupt the educational environment" because the graphics were so large and bold and because Newsom's fellow students would associate the images with the Columbine High School shooting. 354 F.3d at 252. The school official also felt the imagery could "reasonably be interpreted by other middle school students to promote the use of guns" and "was at odds with her obligation as a school administrator to discourage and prevent gun-related violence." *Id*. And she cited a prior incident where a student had brought a gun to the school. *Id*. When the school the following year amended its dress code to bar "messages on clothing . . . that relate to . . . weapons," Newsom sought a preliminary injunction.

The Fourth Circuit reversed the district court's denial of injunctive relief, holding that Newsom had a likelihood of succeeding on his claim that the policy was unconstitutionally overbroad under *Tinker*. For one thing, there was no evidence that Newsom's t-shirt nor any other student clothing ever substantially disrupted school operations, interfered with the rights of others or even caused (or was going to cause) a commotion. 354 F.3d at 259. Further, the policy also

barred the State Seal of the Commonwealth of Virginia, the University of Virginia's athletic mascot, and the middle school's own mascot, each of which also featured weaponry. *Id*. at 259-60. And the revised policy would apparently allow a peace sign with the message "No War," while barring a picture of an Army tank in desert camouflage urging support for U.S. troops. *Id*. at 260.

Newsom is functionally indistinguishable from this case. Here, too, there was no evidence of substantial disruption from C.S.'s hat, just school administrators' *post hoc* speculation about potential upset to students based on a school shooting elsewhere. Here, too, the school administrator personally opposed weapons imagery, and felt it her professional obligation to snuff out such attire in school. And, as C.S. pointed out below, Respondents' amorphous, malleable standard also would bar Michigan's state seal and flag, which, like Virginia's, depict a man with weaponry. App. 20a; *see also* ECF Doc. 15-1, p. 23 (MSJ Brief).[3] Yet, while C.S. was made to remove her hat, students in the five states of the Fourth Circuit would be free to wear it. *See also N.J. v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022) (where school administrators made A.L., a high-school student, cover up t-shirt expressing his support for Second-Amendment rights, which bore the logo of Wisconsin Carry, Inc. that includes a handgun, Seventh Circuit remanded for district court to analyze his claim under *Tinker*).

---

[3] The panel dismissed this point with its own subjective artistic critique, noting the "modest or even ambiguous" nature of the long gun on Michigan's Seal and flag and the "benign appearance of the man holding it." App. 20a.

"As *Tinker* itself made clear, the viewpoint-neutrality rule plays an important role in safeguarding students' First Amendment right to express an 'unpopular viewpoint at school." *L.M.*, 145 S. Ct. at 1494 (Alito, J., dissenting from the denial of certiorari), quoting *Tinker*, 393 U.S. at 509. School officials cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

III. Qualified immunity stands as no bar to certiorari.

Though Judge Readler viewed qualified immunity as a redundant basis for dismissal that made *en banc* review unwarranted, it should play no role here. *Tinker* itself provides the long-settled, clearly established rule rendering unlawful school officials' interference with C.S.'s First Amendment protected rights. *See, e.g.*, *Coy v. Bd. of Ed.*, 205 F. Supp. 2d 791, 801, 805–06 (N.D. Ohio 2002) (denying qualified immunity to two school officials who disciplined student for website in the absence of any evidence that it materially and substantially interfered with in the operation of the school under *Tinker*; "*Tinker* applies to this case [and the] Sixth Circuit has discussed and applied *Tinker* on numerous occasions"); *see also Gonzales v. Burley High Sch.*, 404 F. Supp. 3d 1269, 1293 (D. Idaho 2019) (no qualified immunity for school officials who dismissed students from cheerleading squad after they reserved their rights to challenge discipline

for a sit-in; "[w]here, as here, Defendants do not establish, or even suggest, that Plaintiffs' reservation of rights created substantial disorder, materially disrupted class work, or invaded the rights of others, a reasonable school official in the Individual Defendants' shoes would have known that taking disciplinary action against Plaintiffs for reserving their rights violated the First Amendment"); *see also L.W. v. Knox Cty. Bd. of Ed.*, 2006 U.S. Dist. LEXIS 76354, *30 (E.D. Tenn. Sept. 6, 2006) (principal who forbade fourth and fifth graders from conducting their own playground Bible study was not entitled to qualified immunity; "*Tinker* made clear that prohibitions on student speech are unconstitutional unless there is a showing that the speech would 'materially and substantially interference with the requirement of appropriate discipline in the operation of the school' or 'impinge on the rights of others'" (quoting *Tinker*, 393 U.S. at 509).

And in the specific context of this case, nearly 20 years before Kerr Elementary's Hat Day, *Newsom* made clear that the First Amendment protects students who wear clothing depicting weapons in a nonviolent, non-threatening manner. 354 F.3d at 259.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE VOLOKH
434 Galvez Mall
Stanford, CA 94305

JOHN R. MONROE
Counsel of record
JOHN MONROE LAW, P.C.
156 Robert Jones Road
Dawsonville, GA 30534
(678) 362-7650
jrm@johmonroelaw.com

MICHAEL F. SMITH
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Ave. N.W.
Suite 1025
Washington, D.C. 20006

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 2, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1364

C.S., BY HER NEXT FRIEND, ADAM STROUB,

Plaintiff-Appellant,

v.

CRAIG MCCRUMB; AMY LEFFEL;
MICHAEL PAPANEK,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Michigan at Detroit.
No. 2:22-cv-10993—Terrence George Berg,
District Judge.

Argued: January 30, 2025

Decided and Filed: May 2, 2025

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

Appendix A

OPINION

CLAY, Circuit Judge. Plaintiff C.S., by her father and next friend, Adam Stroub, appeals the district court's grant of summary judgment to Defendants Craig McCrumb, Amy Leffel, and Michael Papanek in this First Amendment action under 42 U.S.C. § 1983. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. The Oxford Shooting of 2021

On November 30, 2021, in Oakland County, Michigan, fifteen-year-old Ethan Crumbley opened fire on his classmates at Oxford High School in what would become "the deadliest high school shooting in Michigan history." 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. Armed with a nine-millimeter handgun, Crumbley shot and killed four people under the age of eighteen, and "severely injure[d]" seven others, including a teacher. Order, R. 25, Page ID #622; *see People v. Crumbley*, 346 Mich. App. 144, 11 N.W. 3d 576, 580-87 (Mich. Ct. App. 2023) (detailing the events leading up to the shooting). Communities in Oakland County and across Michigan were left reeling from this deadly attack, and the Oxford School District was bombarded with lawsuits brought by current high school students, their next friends, and the estates of

the deceased. *See, e.g., Franz v. Oxford Cmty. Sch. Dist.*, No. 21-cv-12871, 2024 U.S. Dist. LEXIS 176132, 2024 WL 4326812 (E.D. Mich. Sept. 27, 2024). Some families opted to change school districts [1] as result of this tragedy, which traumatized many students in close proximity to the shooting and inflicted "lasting scars" on Michigan schools. Order, R. 25, Page ID #622-23, 627. More than three years later, the impact of the Oxford Shooting "is still felt acutely state-wide." *Id.*

B. Factual and Procedural History

Plaintiff C.S., a minor child, attended Robert Kerr Elementary School ("Robert Kerr" or "the School") in Durand, Michigan, of Shiawassee County, less than an hour's drive from the Oxford School District in Oakland County. During the 2021-2022 school year, C.S. was enrolled in the third grade and had an Individualized Education Plan ("IEP"). On February 17, 2022, the school observed "Wear a Hat Day" as part of the "Great Kindness Challenge." School Newsletter, R. 17-9, Page ID #418. The Great Kindness Challenge was a weeklong initiative designed to encourage students "to complete as many acts of kindness as possible." *Id.* at Page ID #419. Some of the week's activities included "Kindness dress-up days," during which students could wear special clothing items to school and complete a "Great Kindness Challenge checklist." *See id.* On "Hat Day," students were allowed to wear a hat of their choosing throughout the day as

1. The Oxford School District is a public school system located in Oakland County, Michigan, that consists of both elementary and secondary schools.

an exception to the usual dress code policy, which only permitted hats to be worn during recess. *Id.* at Page ID #418; Handbook, 17-5, Page ID #364.

On the morning of Hat Day, C.S. arrived at school wearing a black baseball cap that displayed a white star, a white image of an AR-15-style rifle, and the capitalized phrase, "COME AND TAKE IT" ("the Hat"). Leffel Dep., R. 17-4, Page ID #342. C.S. chose to wear the Hat because it belonged to her father and "made [her] feel safe." C.S. Dep., R. 17-10, Page ID #424. At the School, Defendant Michael Papanek, who worked as the "On Track Coach" charged with administering discipline in the school, saw C.S. wearing the Hat and noticed that it depicted a gun. Papanek Dep., R. 15-2, Page ID #250-52. Papanek believed that the Hat may have been a violation of school policy and went to inform the Principal, Defendant Amy Leffel, to discuss what, if anything, should be done about the Hat. Based on Papanek's description of the Hat, Principal Leffel felt that the image of a firearm, combined with the phrase "Come And Take It," had the potential to incite an altercation between young children and disrupt the testing environment, and that some students may find it "threatening." Leffel Dep., R. 17-4, Page ID #342, 344-45.

Specifically, Leffel believed that the Hat could cause a disruption amongst students who had recently transferred to Robert Kerr from the Oxford School District as result of the Oxford Shooting on November 30, 2021, less than three months earlier, during which several students were killed or seriously injured. *See Crumbley*, 11 N.W.

3d at 579. Leffel knew that the students from the Oxford School District "were receiving counseling and social work support to deal with the trauma," after having "several conversations with [the students'] parents." Leffel Dep., R. 17-4, Page ID #344. She thought that the Hat could arouse fear in some of these students and that others "could perceive [the phrase "Come And Take It"] as a dare to try and take the hat off of [C.S.]." *Id.* Leffel also cited more generalized concerns that "[g]uns often suggest violence," which she thought was inappropriate for an elementary school setting, citing the student handbook and "gun-free zone." *Id.* at Page ID #342. Defendant Craig McCrumb, superintendent of Durand Area Schools, was also present in Leffel's office during these deliberations over C.S.'s Hat.

After discussing their concerns regarding the Hat, Papanek and Leffel decided to call C.S.'s parents and ask them to bring her a substitute hat to wear. C.S.'s father, Adam Stroub, declined to do so. From there, Papanek and Leffel went to C.S.'s classroom, called her into the hallway, and asked her to remove the Hat and put it inside her locker. C.S. complied without issue. [2] In a subsequent email exchange between Leffel and Stroub, Leffel explained that the Hat was inappropriate for school because it depicted a weapon in contravention of the student handbook, and that "[w]eapons of any kind are not appropriate for students to wear in a school setting." Emails, R. 17-12, Page ID #436. The dress code stated in pertinent part: "Anything printed on clothing must not be

2. The record does not indicate that C.S. experienced any anger, distress, or other negative emotions in response to school officials' request for her to remove the Hat.

offensive in any way. The building principal/staff has the right to decide what is offensive, but some examples are: words/slogans that advertise illegal substances, words/slogans that are racially or religiously offensive, violence themes, vulgar or sexual innuendo, etc." Handbook, R. 17-5, Page ID #364. In the email to Stroub, Leffel also referenced the handbook's mission to keep students safe and prevent distractions to "the learning atmosphere of the classroom." Emails, R. 17-12, Page ID #436.

On May 9, 2022, Plaintiff C.S., by her father Stroub, filed a lawsuit against Defendants Papanek, Leffel, and McCrumb ("school officials") under 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendments, and seeking declaratory and injunctive relief. Plaintiff moved for summary judgment on April 21, 2023, arguing that Defendants violated her First Amendment rights by asking her to remove the Hat, and Defendants filed a response. On April 24, 2023, Defendants filed their motion for summary judgment two days after the motion deadline set by the amended Case Management Order, arguing that the school was authorized to forbid the Hat under the circumstances in the record. Plaintiff moved to strike Defendants' motion as untimely. The district court denied Plaintiff's motion but cautioned Defendants to ensure their compliance with all future deadlines.

On January 23, 2024, the district court heard oral argument on the parties' cross-motions for summary judgment. Ultimately, the court denied Plaintiff's motion and granted summary judgment to Defendants. The court credited Principal Leffel's determination that the Hat was

inappropriate for the school setting and risked causing a substantial disruption in school activities. In evaluating the reasonableness of this determination, the district court stressed that certain factors proved important, such as the presence of students who had transferred to Robert Kerr from the Oxford School District and were undergoing trauma therapy, and the young age of Plaintiff and her third-grade classmates. This appeal followed.

II. DISCUSSION

A. Plaintiff's First Amendment Claim

This Court reviews *de novo* the district court's grant of summary judgment to school officials. *Barr v. Lafon*, 538 F.3d 554, 561 (6th Cir. 2008). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "We view all evidence in the light most favorable to the nonmoving party." *Barr*, 538 F.3d at 561 (quoting *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 700 (6th Cir. 2007) (internal quotation marks omitted)).

Plaintiff C.S. argues that she was entitled to wear the "Come and Take It" Hat under *Tinker v. Des Moines Independent Community School District*. *See* 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). She contends that school officials did not have enough evidence to reasonably forecast that allowing the Hat to be worn in school would cause a "substantial disruption"

in school activities under *Tinker*, and therefore lacked the authority to require its removal. 393 U.S. at 514. Plaintiff characterizes her decision to wear the Hat as political speech aimed at showing personal support for the Second Amendment. [3] She also claims that the district court gave improper weight to her young age in declining to protect her expression in wearing the Hat.

Defendants respond to these arguments by citing concerns relating to the student population of Robert Kerr Elementary School, which consisted of children who had transferred from the Oxford School District after the widely publicized Oxford High School Shooting of 2021. They argue that this special circumstance, combined with "the hat's provocative invitation to 'COME AND TAKE IT,'" led school officials to reasonably forecast a risk of substantial disruption under *Tinker*. *See* Appellee Br., ECF No. 31, 11-13. Further, Defendants claim that the district court properly accounted for Plaintiff's young age and the elementary school setting in concluding that her speech was not supported by the First Amendment. Due to the factors at play, we hold that school officials did not act improperly or in violation of the First Amendment by asking C.S. to remove the Hat.

---

3. This Court acknowledges Plaintiff C.S.'s "support for the right of people to have guns" as stated in her declaration; however, the record does not indicate that Plaintiff objected to school officials' request to remove the Hat or was otherwise upset by their request. C.S. Decl., R. 20-1, Page ID #504.

Appendix A

1. Constitutional Analysis

Central to this dispute is the Supreme Court's landmark ruling in *Tinker*, which protects the First Amendment rights of teachers and students in public school as long as their speech does not threaten to substantially disrupt or interfere with school activities. *See* 393 U.S. at 506, 514. In *Tinker*, three students aged thirteen to sixteen were suspended from school for wearing black armbands in protest of the Vietnam War. 393 U.S. at 504. The Court described the students' symbolic act as "closely akin to 'pure speech'. . . entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. Importantly, the Court found "no evidence" that the wearing of the armbands caused any interference whatsoever with school activities or the rights of other students, outside of a few "hostile remarks," and that the school officials were improperly motivated by the desire to avoid controversy. *Id.* at 508-10 (stressing that the suppression of student speech must be "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"). Because the school officials in *Tinker* "sought to punish [the students] for a silent, passive expression of opinion" that presented no reasonable threat of "any disorder or disturbance" in school activities, they infringed on the students' constitutional rights. *See id.* at 508.

Tinker also made clear that while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," these rights are not absolute. *See* 393 U.S. at 506; *Bethel Sch. Dist. No. 403 v.*

Fraser, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) (noting that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings"). School officials may therefore restrict student speech when the facts reasonably lead them "to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514; *see also Lowery v. Euverard*, 497 F.3d 584, 591-93 (6th Cir. 2007) (clarifying that school officials may intervene preemptively when such facts exist, because "*Tinker* does not require disruption to have actually occurred"). Although the forecasted disruption must be substantial, it need not be violent. *Barr*, 538 F.3d at 566. *Tinker* also allows school officials to regulate speech "as part of a prescribed classroom exercise." 393 U.S. at 513.

Moreover, *Tinker* applies the First Amendment to student speech "in light of the special characteristics of the school environment," which may include such factors as the age and emotional maturity level of schoolchildren viewing the speech, particularly with respect to sensitive topics. 393 U.S. at 506; *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187, 141 S. Ct. 2038, 210 L. Ed. 2d 403 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)). The Supreme Court's subsequent First Amendment cases inform us that schools may regulate student speech that is: (1) distractingly vulgar or lewd; (2) promotes illegal drug use; or (3) "bear[s] the imprimatur of the school." *See Fraser*, 478 U.S. at 685; *Morse v. Frederick*, 551 U.S. 393, 410, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007); *Kuhlmeier*, 484 U.S. at 271-73. Because the present matter

does not concern vulgar speech or illegal drug use, it is governed by *Kuhlmeier* or *Tinker*. Under *Kuhlmeier*, school officials' actions would likely have been permissible to the extent that Hat Day was considered "part of the school curriculum," but we analyze them instead under *Tinker*'s more speech-protective standard. [4] 484 U.S. at 270-71; *see Barr*, 538 F.3d at 564. Approaching the issue under *Tinker* means that school officials were authorized to prevent C.S. from wearing the Hat as long as the facts led them to reasonably forecast a "substantial disruption of or material interference with school activities." *See Tinker*, 393 U.S. at 514.

In the present case, this prediction was well-founded. Robert Kerr Elementary School had two key characteristics that Defendant school officials considered in asking Plaintiff to remove her Hat, and that underpin our analysis: first, the presence of transfer students who relocated from the Oxford School District after the Oxford Shooting, and second, the young age and emotional immaturity of elementary students in general. First, and perhaps most significantly, we consider the impact of the

4. The Great Kindness Challenge was a school-organized activity, including the dress-up days. R. 17-9, School Newsletter, Page ID #418-19. There is at least a colorable argument that C.S.'s speech "was made as part of school activities" and thus, that *Kuhlmeier*'s more school-friendly standard should apply. *Curry v. Hensiner*, 513 F.3d 570, 577-78 (6th Cir. 2008); *see Mahanoy*, 594 U.S. 187-88. *See n. 7, infra*. But because the Challenge was not a supervised or required assignment or otherwise part of the curriculum, and the school administrators' contemporaneous justifications focused on disruption, we analyze their actions under *Tinker*. *See Kuhlmeier*, 484 U.S. at 271.

Oxford Shooting. Earlier in the 2021-2022 school year, four students were murdered at the Oxford High School in Oakland County, Michigan, by a fifteen-year-old shooter using a semi-automatic handgun. As Defendants note, this was a "well-known event" that spurred nationwide coverage and had a calamitous and long-lasting effect on the state of Michigan. [5] Appellees' Br., ECF No. 31, 11. Although the record below does not provide great detail on the Oxford Shooting or its aftermath, the event was publicized so extensively that the district court did "not . . . ignore [its] reality" in assessing Defendants' argument. Order, R. 25, Page ID #622. On top of the heightened impact of the Oxford Shooting on Michigan as a whole, we also consider its proximate impact on areas in southeast Michigan just miles away from the Oxford School District, and in the months immediately following the attack.

Indeed, the School's relationship to this massacre was both spatial and temporal. *See* Order, R. 25, Page ID #627 (noting that "'temporal factors and recent events' should

5. For added context, the district court cited news coverage describing the Oxford Shooting and the criminal prosecution of its perpetrator. 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 district court further noted that "on the day [it] held oral argument in this case, the criminal trial for one of the parents of [Crumbley] commenced." Order, R. 25, Page ID #623. *See* Associated Press, *Michigan School Shooter's Mother to Stand Trial for Manslaughter in 4 Student Deaths*, U.S. NEWS (Jan. 23, 2024, 12:17 AM), https://www.usnews.com/news/best-states/michigan/articles/2024-01-23/michigan-school-shooters-mother-to-stand-trial-for-manslaughter-in-4-student-deaths.

be considered in evaluating whether school administrators *reasonably* anticipated . . . a substantial interference" in school activities) (quoting *N.J. v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022)). Located in Durand, Michigan, the School is less than a one-hour drive from Oxford Township, Michigan, where the Oxford Shooting occurred, and four students lost their lives. The shooting also transpired on November 30, 2021, less than three months before "Hat Day" on February 17, 2022, when third-grader C.S. wore the gun-themed Hat to school. Undoubtedly, the record proves that "the Oxford shooting was very close in both time and space." Order, R. 25, Page ID #627. This striking closeness lends context to the School's apprehensions about Plaintiff's Hat disrupting the student environment.

In addition, school officials had the unique challenge of educating and supporting students who fled the Oxford School District after the Oxford Shooting and relocated to Robert Kerr for their emotional and physical safety. Principal Leffel knew that these students were actively "receiving counseling and social work support to deal with the trauma" of the Oxford Shooting. Leffel Dep., R. 17-4, Page ID #344. Leffel also had firsthand knowledge of these students' struggles after engaging in "several conversations with their parents," which informed her belief that Plaintiff's Hat could cause a substantial disruption by compounding the students' existing feelings of fear and distress over school shootings. *See id.* Principal Leffel's testimony about the students' trauma is well-taken, and substantiated by media reports that were

pervasive at the time. [6] Surely it was reasonable for Leffel to perceive a risk that Plaintiff's Hat, sporting an image of an AR-15-style weapon, could cause traumatized children to become increasingly fearful about school shootings in a way that might cause a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514.

Plaintiff seeks to rely on *Schoenecker v. Koopman*, a decision from the Eastern District of Wisconsin, in arguing that students' generalized fear of gun violence and school shootings is not enough to suppress gun-related speech in schools. 349 F. Supp. 3d 745, 748, 754 (E.D. Wis. 2018). While true in theory, Plaintiff's argument glosses over the sizeable contrast between the facts in *Schoenecker* and those in the instant case. In *Schoenecker*, a high school student from Wisconsin wore T-shirts to school that "made some of the teachers . . . uncomfortable" because of their

6. In addition to testimony in the record, several media reports conveyed the trauma and fear experienced by students attending school in the Oxford School District after the 2021 shooting. *See, e.g.*, Koby Levin & Ethan Bakuli, *Oxford High School Shooting Trauma: How Michigan Families Can Get Help*, Detroit Free Press (Dec. 3, 2021, 11:20 AM), https://www.freep.com/story/news/local/michigan/oakland/2021/12/03/oxford-high-school-shooting-trauma-resources/8851793002/; Keenan Smith, *How to Help Your Kids Deal With Grief, Trauma After the Oxford High School Shooting*, WXYZ Detroit (Dec. 9, 2021, 6:59 AM), https://www.wxyz.com/news/oxford-school-shooting/how-to-help-your-kids-deal-with-grief-trauma-after-the-oxford-high-school-shooting; Tiarra Braddock, *Mother of Oxford High School Student Shares How Her Family Has Coped With 2021 Shooting*, WXYZ Detroit (Nov. 30, 2023, 6:09 PM), https://www.wxyz.com/news/oxford-school-shooting/mother-of-oxford-high-school-student-shares-how-her-family-has-coped-with-2021-shooting.

depiction of weapons stylized to spell out phrases such as "Celebrate Diversity" and "Love." *Id.* at 747-48. The staff members cited students'"general" concerns about experiencing a school shooting, because of the recent school shooting in Parkland, Florida, as well as the fact that some students at the school had "participated in a walkout to protest school gun violence and to remember the 17 victims killed in the Parkland shooting." *Id.* at 753.

The *Schoenecker* court was unpersuaded by these points and found no relationship between the Florida shooting and the Wisconsin student's T-shirts, which did not result in a substantial disruption at the Wisconsin school and could not reasonably be forecasted to do so. *See id.* at 752-54. By contrast, school officials in the present matter relied on their knowledge of Robert Kerr's "special characteristics" and student body in making such a prediction. *Tinker*, 393 U.S. at 506. Specifically, they knew that a group of young students from the Oxford School District had transferred to Robert Kerr because of the Oxford Shooting earlier that academic year and were suffering from trauma. Given the emotional vulnerability and age of the students, the School's decision to require C.S. to remove the Hat for its depiction of an AR-15-style weapon, in anticipation that it could "trigger emotional and fear-based responses" in children, was "reasonably related to the legitimate pedagogical objective of preventing school and classroom disturbances before they occurred." [7] Order, R. 25, Page ID #628.

7. We also recognize *Tinker*'s allowance for speech restrictions "as part of a prescribed classroom exercise," 393 U.S. at 513, and that the School's "Great Kindness Challenge" was meant to promote a "culture of kindness and compassion in [the] school." School

Clearly, there is a distinction between the generalized fear of school shootings in *Schoenecker* versus the potential for very *particularized* fears in the instant case. At Robert Kerr, school officials did not base their forecast of a substantial disruption on an out-of-state or other remote shooting; they were concerned about inflaming the effects of a recent, local shooting—in Michigan and less than one hour away—that had a direct impact on a portion of the student body. These students were actively undergoing counseling "to deal with the trauma" surrounding the Oxford Shooting, an event that brought death and serious injury to members of their community—while inflicting fear, shock, and sadness onto many others. *See* Leffel Dep., R. 17-4, Page ID #344. These conditions were manifestly more serious than the generalized fears expressed by staff members in *Schoenecker* and thus contributed to the School's reasonable forecast of a substantial disruption. *See* 349 F. Supp. 3d at 753.

Schoenecker is further distinguishable because of the language on the student's T-shirts, which displayed arguably tongue-in-cheek phrases such as "Love" and "Celebrate Diversity" spelled out using firearms. 349 F. Supp. 3d at 747-48. These phrases do not have the same provocative tone as Plaintiff's "Come And Take It" Hat, which the School interpreted as "threatening" and "trying to incite someone to come and have an altercation to take the weapon," or even the Hat itself. *See* Leffel Dep., R. 17-

---

Newsletter, R. 17-9, Page ID #419; *see Kuhlmeier*, 484 U.S. at 271. While *Tinker* broadly stands for the speech rights of students in public school, these rights may be limited to "maintain[] the focus of the class on the assignment in question." *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995).

4, Page ID #342, 344. This view is understandable given the School's student body, comprised of traumatized and elementary-aged children, who may be more likely to react strongly or "impetuous[ly]" to depictions of AR-15-style weapons. *See id.* at Page ID #344.

Likewise, we also consider the young age of Plaintiff and her classmates in assessing the School's decision to request removal of the Hat, since the dynamics in an elementary school are markedly different from those in a high school. While children mature at different ages, it remains true that the issues sensitive to teenagers are not the same as those sensitive to children under ten years of age. *See Kuhlmeier*, 484 U.S. at 272. For instance, much of the speech on dating or sexuality may be acceptable or even advisable discourse in high school, yet unfit for students under ten years of age. *See id.* Similarly, the existence of Santa Claus or the Tooth Fairy may be a sensitive issue for young children that merits some discretion in an elementary school setting but is largely irrelevant for teenagers. *See id.* School officials may thus account for the significant emotional and developmental limitations of young students in deciding what speech to permit, insofar as "potentially sensitive topics" are concerned. *Id.* Naturally, student speech centered on guns and other violent themes embodies this category.

We must therefore account for the age and relative emotional immaturity of Plaintiff's classmates. Robert Kerr Elementary is a school for students in the second to the fifth grades, corresponding generally with the ages of seven through ten. As Plaintiff was in the third grade, she and most of her classmates were presumably aged

eight, or close to it, which is many years younger than most student plaintiffs in the case law governing student speech. *Tinker* primarily concerned high school students wearing armbands to protest the Vietnam War who, at fifteen and sixteen years of age, were nearly twice the age of eight-year-old C.S. 393 U.S. at 504. The youngest plaintiff in *Tinker*, a thirteen-year-old in junior high, was still considerably older than C.S. and her third-grade classmates. *Id.*

Plaintiff relies on decisions from the Fourth and Seventh Circuits for guidance on gun-related speech in schools, both of which feature students several years older than C.S. *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003) (protecting the speech rights of a twelve-year-old student who wore a T-shirt depicting the acronym "NRA" alongside a graphic of individuals aiming firearms); *Sonnabend*, 37 F.4th at 417, 427 (remanding for further proceedings consistent with *Tinker* when a high-school sophomore wore a T-shirt depicting a handgun); *see also Schoenecker*, 349 F. Supp. 3d at 754 (protecting a high school freshman's right to wear gun-themed shirts). While parts of our analysis might be different had C.S. been in high school or even junior high school, this Court is faced with the reality that C.S. and her classmates were elementary-aged children in the third grade.

Plaintiff correctly notes that elementary students enjoy at least some free speech protections, [8] *Good News*

8. We further observe many significant differences between this case and *Good News Club*, which analyzed the speech issue as viewpoint discrimination in a limited public forum, concerned a Christian club seeking to meet at school after school hours, and

Club v. Milford Cent. Sch., 533 U.S. 98, 120, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001), but the decision to tolerate speech on sensitive matters must be made in light of "the emotional maturity of the intended audience." *Kuhlmeier*, 484 U.S. at 272. Even the Seventh Circuit's decision in *Sonnabend*, cited in Plaintiff's appellate brief, supports this notion: "The application of *Tinker* must account for such factors as the age and grade level of the students to whom the speech is directed and any factors particular to the educational environment or history of the school or student body in question." 37 F.4th at 426 (citation omitted). This is for good reason.

In the present matter, the particularly young age of C.S. and her classmates gives weight to Defendants' prediction that the Hat could cause a substantial disruption in school activities, since "[t]hese students are less mature and capable of [reining] in emotional outbursts than junior high or high schoolers." Order, R. 25, Page ID #628. This concern was intensified by the provocative nature of the Hat's phrase "Come And Take It," which Principal Leffel judged problematic around "young kids who can be very impetuous and could perceive [the phrase] as a dare to try and take the hat off of [C.S.]" *See* Leffel Dep., R. 17-4, Page ID #344. Due to the presence of very young children, coupled with students who were already suffering emotional trauma from the local and very recent Oxford Shooting, Leffel and other school officials reasonably forecasted a risk of substantial disruption when they asked C.S. to remove her Hat. *Id.* at Page ID #344.

---

discussed neither *Tinker* nor disruptions in instruction or regular school activities. 533 U.S. at 102, 105.

Plaintiff's brief on appeal also cites to the design of the Michigan Great Seal and Coat-of-Arms,[9] which shows a man beside a lake "with his right hand raised up and his left hand holding a long gun," all pictured on a dark blue shield. *See* Appellant Br., ECF No. 30, 28. The shield is framed by the more prominent images of an elk, a moose, and a bald eagle, with the Latin word "Tuebor" written across the top, meaning "I Will Defend." *See id.*; STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/michigan/state-seal/seal-michigan (last visited Mar. 26, 2025). Because the Michigan Coat-of-Arms features a weapon, Plaintiff argues that the School's decision to restrict the AR-15-themed Hat would also proscribe clothing items depicting the state seal and flag. *See* Appellant Br., ECF No. 30, 27-28. Notwithstanding the hypothetical nature of this point, we disagree that such a result follows logically from the School's decision to restrict the Hat, because other restrictions on student expression would still be subject to *Tinker*'s substantial disruption standard. 393 U.S. at 514. On this point, we note the modest or even ambiguous nature of the long gun on the state seal and flag, and the benign appearance of the man holding it, which unlike Plaintiff's Hat, does not emphasize the gun's presence or tempt anyone to "Come And Take It." *See* Leffel Dep., R. 17-4, Page ID #344.

---

9. Plaintiff cites to an informational page on the Michigan State Seal which defines the Latin phrases on the design and states that "Michigan's Coat of Arms was inspired by the 17th Century coat of arms of the Hudson's Bay Company, one of the earliest and largest fur-trading companies in North America." STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/michigan/state-seal/seal-michigan (last visited Mar. 26, 2025).

Plaintiff's comparison also assumes that the modest depiction of a man holding a hunting rifle outdoors, as seen on the state seal and flag, would carry the same risk of a substantial disruption or material interference in school activities as the Hat's prominent display of an AR-15-style weapon. *Tinker*, 393 U.S. at 514. There is a clear difference between these two portrayals, especially in light of the upsurge in school shootings carried out using AR-15-style weapons, and the potential for young children to have an acute response after surviving, witnessing, or otherwise feeling the front-row impact of such tragedy. *See* Leffel Dep., R. 17-4, Page ID #344; *see Staples v. United States*, 511 U.S. 600, 603, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (describing the AR-15 as "the civilian version of the military's M-16 rifle"). Given the Hat's graphic and slogan, school officials made a reasonable forecast of a substantial disruption based on its provocative nature and "picture of an automatic weapon," which both stood to worsen the students' shooting-related trauma. Leffel Dep., R. 17-4, Page ID #344.

As a word of caution, we nowhere suggest that the generalized potential for students' discomfort, offense, or other psychological distress, *without more*, is enough for schools to ban speech on topics such as the Second Amendment. The record must show the existence of facts allowing school officials to reasonably forecast a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. To be sure, "political speech [is] at the core of what the First Amendment is designed to protect," *Virginia v. Black*, 538 U.S. 343, 365, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), and

courts must be vigilant in safeguarding student expression in schools. But we must also account for the difficult jobs of school administrators and educators in maintaining a school environment that is, above all, conducive to learning for all of its students. Schools are under no obligation to tolerate speech that frustrates this goal or runs the reasonable risk of doing so. *See Tinker*, 393 U.S. at 514. This is especially true when young children engage with sensitive topics, *Kuhlmeier*, 484 U.S. at 272, and is ever more compelling in the face of children reeling from an irrefutably tragic and traumatic event.

As Defendants acknowledge, this is a fact-driven case. The district court's analysis, as well as our own, "might have been different if the Oxford tragedy had not occurred, if it had not occurred less than an hour's drive from Durand Area Schools, or if students from Oxford had not transferred into the District," as well as "if C.S. was in high school as opposed to third grade." Appellees' Br., ECF No. 31, 12. As it stands, however, these facts support our conclusion that Defendants' actions were readily defensible. The record demonstrates that school officials relied on their knowledge of the student body to make a reasonable forecast of a substantial disruption in school activities, and therefore did not violate the First Amendment by asking C.S. to remove her Hat. *See Tinker*, 393 U.S. at 506.

2. Qualified Immunity

Defendant school officials argue that the case against them is precluded by the doctrine of qualified immunity because "no prior case law clearly established that restricting firearm imagery in this context was

unconstitutional." Appellees' Br., ECF No. 31, 21. This Court uses a two-prong test to evaluate whether qualified immunity may shield a government official from trial. *Lowery*, 497 F.3d at 587. First, we determine whether the official's conduct violated a constitutional right. *Id.* If the answer is yes, we proceed to determine whether the right was clearly established at the time of the violation. *Id.* We need only resolve "one of the two inquiries" in Defendants' favor to grant them summary judgment. *McElhaney v. Williams*, 81 F.4th 550, 556 (6th Cir. 2023) (citing *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

Because school officials acted on the reasonable belief that Plaintiff's Hat could cause a substantial disruption in school activities, their actions did not run afoul of *Tinker* or offend the Constitution as required by the first prong of this test. 393 U.S. at 514. This ends our analysis on qualified immunity, and we need not proceed to the second prong. *McElhaney*, 81 F.4th at 556. Even assuming, for argument's sake, that a constitutional violation occurred, school officials would still be shielded from trial because it was not clearly established in 2022 that students may wear gun or weapon-themed clothing to school, particularly under the novel circumstances of this case. In consideration of the above, we affirm the district court's grant of summary judgment to Defendant school officials.

B. Defendants' Motion For Summary Judgment

Plaintiff argues that the district court improperly considered Defendants' untimely motion for summary judgment that they submitted on April 24, 2023, two days past the filing deadline of April 22, 2023, as set

by the court's scheduling order. Plaintiff then filed a motion to strike Defendants' motion as untimely, which the district court denied. [10] In acknowledgement of their own untimeliness, Defendants' attribute the mistake to a misinterpretation of Rule 6(a) read in conjunction with the local rules, explaining that they believed they were permitted to file on April 24, 2023, a Monday, since the original deadline of April 22, 2023, fell on a Saturday. We affirm the district court's decision to accept and consider Defendants' untimely motion.

"[A] district court's decision to amend its scheduling order to allow a late filing" is reviewed for an abuse of discretion. *Andretti v. Borla Performance Indus., Inc.*, 426 F.3d 824, 830 (6th Cir. 2005) (noting that a late motion may be properly construed by the district court "as a request to modify the scheduling order"). Similarly, this Court reviews "the decision to grant or deny a motion to strike for an abuse of discretion, and decisions that are reasonable, that is, not arbitrary, will not be overturned."

---

10. Under Rule 12(f), courts may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Considered a drastic remedy, "[m]otions to strike are viewed with disfavor and are not frequently granted." *Operating Eng'rs Local 324 Health Care Plan v. G & W Constr. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015); *see also Oppenheimer v. City of Madeira*, 336 F.R.D. 559, 566 (S.D. Ohio 2020) (noting that there typically "must be evidence that the moving party has been prejudiced" for a motion to strike to be granted). Plaintiff's motion to strike Defendant's motion for summary judgment, a non-pleading, is not governed by Rule 12(f), and she provides no other procedural basis for her motion; nonetheless, she argues that the district court should have rejected Defendants' motion for being untimely pursuant to this Court's interpretation of Rule 6(a).

Collazos-Cruz v. United States, 117 F.3d 1420, *2 (table) [published in full-text format at 1997 U.S. App. LEXIS 17196] (6th Cir. 1997) (per curiam). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or when it employs an erroneous legal standard." *Andretti*, 426 F.3d at 830 (quoting *United States v. Cline*, 362 F.3d 343, 348 (6th Cir. 2004)).

"This Court follows the general principle that 'a district court has broad discretion to manage its docket.'" *Franke v. Norfolk S. Ry. Co.*, No. 21-3848, 2023 U.S. App. LEXIS 11717, 2023 WL 3413919, at *3 (6th Cir. May 12, 2023) (citing *ACLU of Ky. v. McCreary County*, 607 F.3d 439, 451 (6th Cir. 2010)). After a deadline expires, we may extend it "for good cause . . . if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). This entails an analysis of five factors, including:

> (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith.

Nafziger v. McDermott Int'l, Inc., 467 F.3d 514, 522 (6th Cir. 2006).

In the present matter, Plaintiff has not shown that any prejudice resulted from Defendants' two-day delay in submitting their motion for summary judgment, which

weighs against rejecting Defendants' motion on that basis. Because the delay was only two weekend days, it can hardly be argued that this slip had any impact on judicial proceedings. *See Varsity Brands, Inc. v. Star Athletica, LLC*, No. 10-2508, 2012 U.S. Dist. LEXIS 85836, 2012 WL 2368436, at *3 (W.D. Tenn. June 21, 2012) (denying a plaintiff's motion to strike in connection with a defendant's late filing because "the length of the delay was just one day," and "had an extremely minimal, if any, impact on th[e] proceedings"); *see also Oppenheimer*, 336 F.R.D. at 566 (noting that "untimeliness alone is not enough to grant a motion to strike an answer").

On appeal, Defendants explain that this oversight was due to a misunderstanding of Rule 6, which caused them to interpret a later deadline than that prescribed by the Case Management Order. While Defendants could have exercised greater diligence in interpreting the rules, we do not find that they acted in bad faith, and the balance of factors tilts in their favor. Additionally, other courts have wielded their discretion to permit untimely summary judgment motions. *See D.B. v. Lafon*, No. 3:06-CV-75, 2007 U.S. Dist. LEXIS 20609, 2007 WL 896135, at *3 (E.D. Tenn. Mar. 22, 2007); *Pendleton v. Bob Frensley Chrysler Jeep Dodge Ram, Inc.*, No. 3:14 C 02325, 2016 U.S. Dist. LEXIS 27607, 2016 WL 827744, at *3 (M.D. Tenn. Mar. 3, 2016). Thus, we hold that the district court did not abuse its discretion in denying Plaintiff's motion to strike and proceeding to consider Defendants' untimely motion for summary judgment.

III. CONCLUSION

In consideration of Robert Kerr Elementary School's "special characteristics" and circumstances, such as its absorption of students from the Oxford School District and the especially young age of Plaintiff and her classmates, combined with the Hat's provocative message, school officials made a reasonable forecast of substantial disruption to the school's educational environment, *Tinker*, 393 U.S. at 514, and did not violate Plaintiff C.S.'s First Amendment rights by asking her to remove her Hat. The district court also did not abuse its discretion by considering Defendants' untimely motion for summary judgment. For the reasons set forth above, we **AFFIRM** the district court's order in full.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED MARCH 30, 2024

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

2:22-CV-10993-TGB-EAS

C.S., BY HER NEXT FRIEND, ADAM STROUB,

Plaintiff,

vs.

CRAIG MCCRUMB, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER RESOLVING CROSS MOTIONS FOR SUMMARY JUDGMENT (ECF NOS. 15 & 17)

In February 2022, Robert Kerr Elementary School, located in Durand, Michigan, held an event for students called "Wear a Hat" Day. School officials noticed that one of their young students, a third-grade girl, was wearing a black, baseball-style cap embroidered with a white star, an AR-15 assault rifle, and the slogan "COME AND

TAKE IT." After they asked the student to put the hat in her locker, and because she was not allowed to wear it, her father Adam Stroud filed this lawsuit on her behalf. Because she is a minor, C.S. is identified only by her initials. The complaint filed on her behalf asserts that the school's refusal to let C.S. wear the hat violated her rights under the First and Fourteenth Amendments. *See* 42 U.S.C. § 1983.

Both parties have asked the Court to enter summary judgment in their favor. The Court held a hearing on their motions on January 23, 2024. For the reasons below, C.S.'s motion will be **DENIED**, and Defendants' motion will be **GRANTED**.

I. BACKGROUND

On February 17, 2022, C.S. wore a hat with an AR-15 and the slogan "COME AND TAKE IT" embroidered on it to her third-grade class at Robert Kerr Elementary School. Papanek Dep., ECF No. 15-2, PageID.251. According to her mother, C.S. had given the hat to her father, Adam Stroub, as a birthday present. Linfield Dep., ECF No. 17-6, PageID.385. Before going to school that morning, C.S. selected it from a pile of hats and asked if she could wear it. Her mother said, "Yes." *Id.* The image of the hat below was included in the complaint.

Appendix B

Robert Kerr Elementary School has a dress code that generally prohibits students from wearing hats during school hours, except outdoors for recess. Student Handbook, ECF No. 15-2, PageID.231. The Student Handbook provides:

> We want to be sure our students are safe and do not distract from the learning atmosphere of the classroom. Below you will find our school dress code. We may call home for a change if your child's clothing does not meet this code.
>
> -Skirt/dress length — at fingertips with arms extended down

> -Shorts — at fingertips with arms extended down
> -Shirts — cover the shoulders, no large armholes, and no bare midriffs
> -Pants — all pants should fit appropriately to cover under garments
> - Shoes - **No flip-flops**, tennis shoes (required for PE and without high heels), *no HIGH HEELS AT ALL*
> -Make-Up — Not for any elementary child, please
> ***-Hats/head scarves are not worn by boys or girls during school hours, except for recess outdoors***.
> -No pajamas worn at school (unless school sponsored event)
> -Anything printed on clothing must not be offensive in any way. The building principal/ staff has the right to decide what is offensive, but some examples are: words/slogans that advertise illegal substances, words/slogans that are racially or religiously offensive, violence themes, vulgar or sexual innuendo, etc.

Id. (emphasis on shoes provision in original but otherwise added).

But February 17, 2022 was "Wear a Hat" Day, so hat-wearing was encouraged. It was part of a program that encouraged different dress-up options for each day of the week as part of Robert Kerr's "Great Kindness Challenge," a week-long event focusing on "the difference a

culture of kindness and compassion ... [could] make." "RK Locomotion" Newsletter, ECF No. 17-9, PageID.418-19. "Wear a Hat" Day stood alongside other dress-up days, such as "Wear Red, Pink, or Hearts!" Day, "Mix It Up" Day, "Wear Neon Colors, Sparkles, or Sunglasses!" Day, and "Wear Blue and White" Day. *Id.* In connection with the "Great Kindness Challenge," students were also given "Great Kindness Challenge" checklists, which they could complete to receive a small prize. *Id.*

C.S.'s locker was across the hall from the office of Michael Papanek, the school's behavioral specialist. Papanek Dep., ECF No. 15-2, PageID.251-52. Papanek testified that students often stopped by his office to say "hi." *Id.* at PageID.250-51. That morning, C.S. did just that and, during their brief exchange, Papanek noticed her hat. *Id.* at PageID.251-52.

At that point, Papanek said nothing to C.S. about the hat, and she went to class. *Id.* at PageID.252. But he was concerned that the hat could be a violation of the dress code and went to the office of the principal, Amy Leffel, to seek guidance. *Id.* at PageID.253; Leffel Dep., ECF No. 15-2, PageID.191-92. The part of the dress code that concerned him was the prohibition on "offensive" clothing. Papanek Dep., ECF No. 15-3, PageID.253. Superintendent Craig McCrumb happened to be in Leffel's office that morning for unrelated reasons. McCrumb observed the conversation between Leffel and Papanek but did not contribute to it. McCrumb Dep., ECF No. 15-2, PageID.125.

Papanek and Leffel later recalled that the "Wear a Hat" Day incident with C.S. was the first time they dealt with a possible dress code violation involving the depiction of a weapon. Leffel Dep., ECF No. 15-2, PageID.200-03; Papanek Dep., ECF No. 15-2, PageID.261. On hearing Papanek's description of the hat, Leffel determined that it was not school-appropriate for three separate reasons.

First, Leffel concluded that the hat violated the dress code's prohibition on "violence themes" because it depicted a weapon. As Leffel later explained during a deposition:

> Well, it has a weapon on it, and the phrase, "Come and take it." I took that as threatening. The phrase itself seems like it's trying to incite someone to come and have an altercation to take the weapon. ... [W]e're in an elementary school setting and it is a gun-free zone. And I didn't feel that any type of weapons are appropriate in the school setting or anything that suggests violence. Guns often suggest violence.

Leffel Dep., ECF No. 15-2, PageID.196-97. Leffel interpreted the code broadly as prohibiting "violence, vulgar language, for example, beer logos or slang statements, things that would not be appropriate ... for a school setting," but staff and students could wear "anything that doesn't have ... vulgar wording, inappropriate pictures, logos not appropriate for school." *Id.* at PageID.189. The Handbook provided that enforcement of the code was "at the principal's discretion;" Leffel generally applied it

when confronted with "anything that incites—has violent themes or can incite violence or disrupt the educational setting." *Id.* at PageID.197. From her perspective, "there is no ... pictures of weapons that would be appropriate in the school setting at any time." *Id.* at PageID.203.

Second, because young elementary school students can be "impetuous," Leffel was concerned that some students would interpret the "Come and Take It" slogan on the hat as a dare to *literally* try to come and take the hat from its wearer. *Id.* at PageID.206. As she explained, "[W]e strive to teach kindness to our kids. And making a declarative statement, 'Come and take it,' is often—I interpreted it as inciting an altercation or could incite an altercation." *Id.* at PageID.203.

Finally, Leffel worried that the imagery on the hat could disrupt the learning environment at Robert Kerr Elementary because some of its students recently transferred from the Oxford school district—where a mass school shooting at Oxford High School on November 30, 2021 claimed the lives of four people and wounded seven others. *Id.* at PageID.205. As Leffel explained at her deposition, she believed a depiction of a gun could cause fear and disrupt the classroom environment—particularly if tests were being administered:

> Well, other than the—we have students that attended—attended Robert Kerr that had moved from Oxford. And I had several conversations with their parents. And those students were receiving counseling and social

> work support to deal with the trauma. And so ... with all the school shootings we have, it's a picture of an automatic weapon. ... I think [wearing the hat] would—could disrupt the educational environment. So anything that is involved in that from class work, if they're taking a test that day, it could have impacted it if kids were uncomfortable.

Id. at PageID.205-07.

With these concerns in mind, Leffel asked Papanek to contact C.S.'s parents and see whether they were able and willing to bring a replacement hat for C.S. to wear. *Id.* at PageID.191.

Following Leffel's instructions, Papanek called C.S.'s parents to ask if they were willing to bring another hat. Papanek Dep., ECF No. 15-2, PageID.256. Stroub said no. *Id.* at PageID.257. Neither he nor Papanek remember the exact details of their exchange. Stroub recalls he told Papanek that C.S. chose to wear the hat, she has the right to wear the hat, and the "hat's not hurting anybody." Stroub Dep., ECF No. 15-2, PageID.153. According to Papanek, Stroub told him "at least a couple" more things, including something to the effect that "no one better lay a hand on her hat" and that "the 1st Amendment does not end at the schoolhouse gates." Papanek Dep., ECF No. 15-3,PageID.257.

When Leffel learned from Papanek that Stroub was not going to bring another hat, she tried to contact him

herself and then went with Papanek to C.S.'s classroom. Leffel Dep., ECF No. 15-2, PageID.193. The two briefly took C.S. out of class. *Id.* Leffel told her that she "hadn't done anything wrong, it's just her hat with a picture on it isn't something that's appropriate for school." *Id.* Papanek and Leffel asked C.S. if she would put the hat in her locker. *Id.*; Papanek Dep., ECF No. 15-2, PageID.258. According to Papanek, C.S. was "receptive" to the request, complied with it, and returned to class. She was not disciplined, and no one spoke to her about the hat again. *Id.* at PageID.259; Leffel Dep., ECF No. 15-2, PageID.193. Later that day, C.S.'s teacher told Leffel she was concerned about the hat when she saw it and also didn't believe it was appropriate. Leffel Dep., ECF No. 15-2, PageID.206.

In the afternoon, Stroub emailed the following note to Leffel: "So I'm told you guys made [C.S.] put her hat in her locker after we spoke; is that true?" *Id.* at PageID.194. Leffel responded:

> Yes, we requested that [C.S.] put her hat in her locker, which she did. She was not upset or disturbed and happily went on with her day. I called you at 11:03 am to discuss this with you further and left a message. Mr. Papanek did report that he had called you and related your concerns to me. I addressed those in my voicemail but will address them again[.]
>
> I respectfully appreciate your individual rights as a citizen, however, those do not supercede [sic] school rules. Our handbook states that "we want to be sure our students are safe and do not

> distract from the learning atmosphere of the classroom." The hat in question had a picture of an AR type weapon on the front of it. Weapons of any kind are not appropriate for students to wear in a school setting.
>
> I have also included Mr. McCrumb in this email as he was present when I addressed this earlier today. I understand that you might not agree with me regarding this issue, and I respect your opinion. However, it is my responsibility as principal, to provide an appropriate learning environment for our students. Thank you for reaching out.

Email, ECF No. 15-2, PageID.115.

C.S.'s parents did not raise the issue again or make any effort to discuss the incident with the school. Stroub Dep., ECF No. 15-2, PageID.155. Three months later, however, Stroub filed this lawsuit on C.S.'s behalf, asserting that Leffel, Papanek, and McCrumb violated her rights under the First and Fourteenth Amendments when they told her she could not wear the hat. ECF No. 1. His complaint seeks: (1) a declaration that C.S.'s act of wearing the hat is protected speech and may not be restricted; (2) an injunction prohibiting the school from restricting C.S. from wearing the hat; (3) nominal damages; and (4) attorney fees.

C.S. testified at a deposition that she picked the hat because it was her dad's and "made [her] feel safe." C.S. Dep., ECF No. 15-2, PageID.111. In a later declaration,

she also swore that she "enjoy[s] shooting rifles with [her] father" and wore the hat "to hat day ... because it shows [her] support for the right of people to have guns." C.S. Declaration, ECF No. 20-1, PageID.501.

C.S.'s parents, Linfield and Stroub, maintain that C.S. came home very upset over the incident. Stroub Dep., ECF No. 15-2, PageID.155; Linfield Dep., ECF No. 17-6, PageID.387. Stroub insists that nothing about the hat could be seen as having a violent theme because the star and the "Come and Take It" slogan are well-known from several historical events: the ancient Battle of Thermopylae in 480 B.C., a 1778 battle between the British and Americans in Georgia, the Texas Revolution, and the United States Special Operations Command Central slogan. Stroub Dep., ECF No. 15-2, PageID.160-72. He says that C.S. has since asked for other clothing showing her support for the Second Amendment, but he has not granted those requests because this incident reflected that she would not be allowed to wear such clothing at school and the family cannot afford clothes C.S. cannot wear daily to school. *Id.* at PageID.172.

According to Stroub, C.S. attends a yearly Second Amendment rights rally in Lansing with him, and the two shoot guns together as a recreational activity. *Id.* at PageID.160. He acknowledges that C.S. owns no guns, has never taken a gun safety course, and has never written any school essays expressing her opinions about the Second Amendment. *Id.* at PageID.161. He further acknowledges that he has never discussed the dress code policy with any school officials. *Id.* at PageID.155.

Since the incident, the school has not revised its dress code policy, but it has added a "Freedom of Expression" section to its handbook. Klont Dep., ECF No. 15-2, PageID.273. According to the new principal, Tanya Klont, this new section says that students have the right to express themselves, but they need to do it responsibly and appropriately. Material cannot be displayed if it is obscene, libelous, indecent, vulgar, advertises products or services not permitted to minors by law, or if it is insulting or harassing or intends to incite a fight or causes disruption at school. *Id.* Klont testified that, even under the new policy, the hat would not be acceptable.

First, Klont believed that the gun could be interpreted as a sign of violence, especially given the proximity of the Oxford school shooting:

> I think mainly it would be objectionable because it has a gun. And we are trying to teach kids how to be peaceful. And I just think that having a gun with school shooting going on I had to deal with a lot of kids with anxiety last year over school shootings after Oxford, I just think it would make students uncomfortable.

Id. at PageID.175.

Second, Klont shared Leffel's concerns that elementary students might not understand the "Come and Take It" slogan:

> I just—not sure if elementary schools would know—kids, sorry—would know how to

> interpret it, like, "Come and take it," like "come and take this hat" or "come and take my gun." I don't know if they would understand what that would mean.

Id. at PageID.274-75.

With discovery now complete, the parties have filed cross motions for summary judgment.

II. LEGAL STANDARDS

"The fact that the parties have filed cross-motions for summary judgment does not mean ... that summary judgment for one side or the other is necessarily appropriate." *Parks v. LaFace Records*, 329 F.3d 437, 441 (6th Cir. 2003). Instead, the Court must apply the well-recognized summary-judgment standard in evaluating both motions.

A party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). No genuine material factual dispute exists if "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)

At summary judgment, the Court construes the evidence in the light most favorable to the nonmoving

party and draws all reasonable inferences in that party's favor. *Id.* The nonmoving party's evidence need not be in an admissible form. *Celotex Corp v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). But that party "must show that she *can* make good on the promise of the pleadings by laying out enough evidence that *will be* admissible at trial to demonstrate that a genuine issue on a material fact exists." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009).

III. DISCUSSION

C.S.'s father argues that C.S.'s act of wearing the hat was akin to "pure speech." Urging that the record lacks sufficient evidence from which school officials could reasonably forecast that the hat would lead to material and substantial disruption of school activities, he argues that the school violated C.S.'s First Amendment rights by barring her from wearing it. ECF No. 15-1, PageID.92-100.

Defendants disagree that the act of wearing the hat was pure speech. ECF No. 17, PageID.300. They continue that, because C.S. wore the hat during a school-sponsored event, they were entitled to exercise control over its contents. *Id.* at PageID.303. To the extent they could not, they urge that there is enough evidence showing that the hat could work a substantial disruption on classroom activities. *Id.* at PageID.304-06.

A summary of the seminal cases necessary to understand these arguments and the standards of review they invoke follows.

Appendix B

A. Supreme Court Cases

The Supreme Court has held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Nonetheless, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986). A student's right to free speech must be balanced against the need for school officials "to maintain the discipline and learning environment necessary to accomplish the school's educational mission." *Barr v. Lafon*, 538 F.3d 554, 562 (6th Cir. 2008).

A trilogy of Supreme Court cases establishes the framework governing student speech.

The first case, *Tinker*, concerns high school and junior high students who were suspended for wearing black armbands to school to express opposition to the Vietnam War. 393 U.S. at 504. The Supreme Court concluded that, under the circumstances (which included the students, their parents, and several community members discussing that they would voice their opposition to the war by wearing the armbands), the wearing of armbands to oppose a war was "closely akin to 'pure speech,'" and was therefore entitled to comprehensive First Amendment protection. *Id.* at 505-06. According to the Court, the

armbands were "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance," and there was no evidence in the record that the students had interfered "with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Id.* at 508. While the "variation from the majority's opinion" could cause discomfort, "undifferentiated fear or apprehension of disturbance [was] not enough to overcome the right to freedom of expression." *Id.*

C.S.'s father asks this Court to apply the standard announced in *Tinker* to her act of wearing a hat depicting an AR-15 and the slogan "COME AND TAKE IT." Under this standard, "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to 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 ... [there must be a] showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509 (citations omitted).

While *Tinker* remains good law, in two later cases, the Supreme Court elaborated that—depending on the circumstances in which student speech occurs—restrictions on it need not always be accompanied by a showing that the speech could materially and substantially interfere with the requirements of appropriate discipline in a school.

Appendix B

In *Bethel School District No. 403 v. Fraser*, the Court considered a case where a public high school student had given a speech at a school-sponsored assembly in support of another student's candidacy for a student-body office and referred to that student candidate with "an elaborate, graphic, and explicit sexual metaphor." 478 U.S. at 677-78. The school suspended the student for violating the school's policy prohibiting "[c]onduct which materially and substantially interferes with the educational process..., including the use of obscene, profane language or gestures." *Id.* The student challenged the suspension as a violation of his First Amendment rights.

The Court held that it did not follow from *Tinker* that the constitutional rights of students in public schools were automatically coextensive with the rights of adults in other settings. *Id.* at 682. Unlike the discipline imposed on the students in *Tinker*, there was no indication in *Fraser* that the suspension was motivated by or related to any political viewpoint. *Id.* at 685. With regard to enforcing a school policy prohibiting vulgar and lewd speech, the Court concluded that, because the use of such language would undermine the school's basic educational mission, the First Amendment did not prevent school officials from regulating it, and they were well within their power to prohibit it. *Id.*

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), meanwhile, the Supreme Court examined the First Amendment's application to the scope of a school administrator's authority to exercise editorial control over the content of a school-sponsored newspaper. Student newspaper staff

members sued the school after the principal deleted two pages of articles discussing student experiences with pregnancy and the impact of divorce on their classmates. *Id.* at 262-63. The principal explained that he deleted the pages because he was concerned that, although the articles used pseudonyms, the students might still be identifiable—and he also believed that the articles' references to sexual activity were inappropriate for the school's younger students. *Id.* at 263.

The Court determined that, because the school lent its name and resources to the paper, *Tinker* did not apply to regulating its contents. *Id.* at 271-73. It reasoned that, when student speech occurs as part of a curriculum, educators need latitude to ensure that students learn whatever lesson a particular activity is designed to teach, that students are not exposed to material inappropriate for their level of maturity, and that the views of individual students are not erroneously attributed to the school. *Id.* at 271-72. Accordingly, it held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Ultimately, the Court concluded that the principal did not violate the students' First Amendment rights in redacting their publications because the principal reasonably related his editorial decisions to legitimate pedagogical concerns. *Id.* at 275-76.

The Sixth Circuit has interpreted this trilogy of cases as establishing three basic principles:

(1) Under *Fraser*, a school may categorically prohibit vulgar, lewd, indecent, or plainly offensive student speech;

(2) Under *Hazelwood*, a school has limited authority to censor school-sponsored student speech in a manner consistent with pedagogical concerns; and

(3) The *Tinker* standard applies to all other student speech and allows regulation only when the school reasonably believes that the speech will substantially and materially interfere with schoolwork or discipline.

Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 332 (6th Cir. 2010) (citations and quotations omitted).

A fourth Supreme Court case, *Morse v. Frederick*, reiterates that "schools may regulate some speech even though the government could not censor similar speech outside the school" and that *Tinker* "is not the only basis for restricting student speech." 551 U.S. 393, 405-06, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (quotations omitted). There, a high school principal suspended a student for refusing to take down a 14-foot banner with the phrase: "BONG HiTS 4 JESUS." *Id.* at 397-98. A majority of the Court agreed that the principal was justified in disciplining the student, though the Justices were divided over the reasons why. The narrow holding that emerged from *Morse* is that a public school may prohibit student speech at a school or at a school-sponsored event during

school hours that the school "reasonably view[s] as promoting illegal drug use." *Id.* at 403.

B. Sixth Circuit Court Cases

Sixth Circuit case law establishes that, at a minimum, to invoke First Amendment protections, a student must show that her conduct is "imbued with elements of communication which convey a particularized message that will be understood by those who view it." *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 390 (6th Cir. 2005) (quotations and alterations omitted). Simply wanting to wear clothes that students believe "look nice" and reflect their middle-school individuality, for instance, does not trigger First Amendment protections. *Id.* at 389.

If a student can establish that her conduct was expressive and intended to convey some sort of message, a school may nonetheless regulate speech that is vulgar, plainly offensive, or inconsistent with its basic educational mission. *See Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000). Under this framework, the Sixth Circuit approved a school's decision to ban as offensive a Marilyn Manson t-shirt despite arguments that the three-headed Jesus figure it depicted carried religious implications. *Id.* at 471.

The Sixth Circuit has not yet addressed student clothing featuring depictions of firearms, other lethal weapons, or Second Amendment-related slogans. It has, however, addressed school regulation of clothing featuring controversial images—and in particular, shirts depicting

Confederate flags, which students wanted to wear to express pride in their southern heritage. *See, e.g.*, *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008); *Castorina ex rel. Rewt v. Madison Cty. Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001). In these cases, the Sixth Circuit found that the act of wearing such symbols is akin to "pure speech," and that the regulation of such speech is thus subject to *Tinker*'s rule. *Defoe*, 625 F.3d at 332; *Barr*, 538 F.3d at 564; *Castorina*, 246 F.3d at 540. In *Defoe* and *Barr*, two panels of the Sixth Circuit concluded that the schools adequately justified their restrictions on such clothing because the record showed evidence of racial unrest in the schools. In particular:

- In *Defoe*, there was uncontested evidence of racially charged graffiti, including slurs, a Swastika, comments about white power, and a hangman's noose; an incident where Oreo cookies were thrown onto a basketball court when a biracial basketball player attempted to warm up before a game; and several racially-charged altercations between students. *See* 625 F.3d at 334-35.

- In *Barr*, there was racist graffiti, fights between black and white students, hit lists containing student names, a fear-motivated increase in absenteeism among black students, and a school lockdown implemented because of a breakdown in student discipline and the threat of race-related violence. *See* 538 F.3d at 566-67.

In *Castorina*, however, the panel found insufficient evidence of racial tensions or a risk of substantial school disruption to justify a prohibition on a t-shirt with a Confederate flag on the back commemorating the birthday of country singer Hank Williams. 246 F.3d at 538. And although the school maintained that its "anti-racist" dress code was viewpoint neutral, fact questions remained over whether the school enforced the policy in a way that targeted only certain viewpoints—for instance, there was evidence that, though the school banned the Confederate flag, it allowed clothing venerating Malcolm X. *Id.* at 541.

C. Other Circuits

The Seventh Circuit recently considered a case that specifically addressed the question of Second Amendment-related speech by students. In *N.J. by Jacob v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022), the reviewing panel was tasked with evaluating whether school officials violated the First Amendment rights of two teenagers who wanted to wear t-shirts expressing their support for the right to bear arms.

Ultimately, the panel came to no definite answer. Judge Diane Sykes, who authored the opinion, concluded only that the district judge had been misguided by a prior Seventh Circuit decision in his analysis and therefore erroneously applied the *Hazelwood* standard in concluding that barring the teenagers from wearing the shirts was constitutionally permissible. 37 F.4th at 425. Judge Sykes instructed that the situation instead should have been analyzed under *Tinker*, as the shirts were not "vulgar" within the meaning of *Fraser* and could not reasonably

be considered to "bear the imprimatur of the school," like the newspaper in *Hazelwood*. The appeal of one of the students became moot because he graduated while it was pending. The reviewing panel vacated the judgment as to the second and remanded the case to the district court to apply the *Tinker* standard in the first instance.

In providing guidance to the district judge on remand, Judge Sykes emphasized that, under *Tinker*, "mere speculation [of disruption] won't do, and there's no generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students." *Id.* at 426 (quotations and citations omitted). Nonetheless, Judge Sykes advised that "[t]he application of *Tinker* must account for such factors as the age and grade level of the students to whom the speech is directed and any factors particular to the educational environment or history of the school or student body in question." Additionally, "[t]emporal factors and recent events might be included." *Id.* Moreover, the analysis should "account[] for the professional knowledge and experience of school administrators in setting and enforcing disciplinary standards." *Id.*

(On remand, the district judge dismissed the case as moot because the second student graduated, so it is unknown how the district judge would have applied *Tinker* to the shirts in the first instance.)

D. The Case at Bar

With this background, the Court turns to the parties' dispute over which standard—*Tinker*, *Hazelwood*, or

something else entirely—applies to the school's decision to ask C.S. to put her hat in her locker.

C.S.'s father maintains that C.S.'s act of wearing the hat was "akin to pure speech" because—according to him—C.S. supports the Second Amendment, and any reasonable person would understand the message on the hat as simply conveying support for the Second Amendment. ECF No. 15-1, PageID.92-100. In his view, *Tinker* governs. Urging that the record does not have sufficient evidence that school officials could reasonably forecast disruption of school-related activities based on the hat's AR-15 image and "COME AND TAKE IT" slogan, he argues that the decision to bar C.S. from wearing it violated the First Amendment. He contends that Principal Leffel's concerns about disruptions in the school based on the Oxford shooting were "minimal."

Robert Kerr officials, meanwhile, challenge whether the act of wearing that hat is conduct protected by the First Amendment at all. And even if it is, they contend, the *Hazelwood* standard governs because C.S. was only wearing the hat as part of "The Great Kindness Challenge," a school-sponsored event. ECF No. 17, PageID.303. Urging that other students, parents, and members of the public might perceive the hat as tacitly or explicitly approved by the school as part of the week-long event, school officials maintain that they were authorized to prohibit it because it was not conveying a message in line with the school's pedagogical mission of teaching children kindness.

The record is not well-developed as to the threshold question: whether C.S. herself wore the hat with the

intention of conveying a message about her support for the Second Amendment—or any message at all. When Papanek and Leffel asked her to put the hat in her locker, she made no mention of her interest in expressing an opinion about the Second Amendment. At her deposition, when asked why she wore the hat, she again did not mention the Second Amendment but said only that she chose the hat because it was her dad's and "made [her] feel safe." The Court acknowledges that, in a later declaration submitted by counsel, C.S. made a new sworn statement that she wore the hat "because it shows [her] support for the right of people to have guns." ECF No. 20-1, PageID.501. But courts generally do not permit litigants to use later-arriving declarations conflicting with earlier sworn testimony to manufacture fact disputes defeating summary judgment. *Moore v. Ohio River*, 960 F.2d 149 (Table), 1992 WL 78104, at *3 (6th Cir. 1992).

At oral argument, the Court noted this issue and asked C.S.'s counsel whether, for First Amendment protections to apply, a speaker needed to *intend* to convey a message—and if it mattered whether the speaker and her intended audience *understood* that the use of a particular symbol and language (here, the "COME AND TAKE IT" slogan, which C.S.'s father insists is well known and should be easily recognizable from the famous ancient Battle of Thermopylae) conveyed the intended message. Counsel initially dodged these questions, maintaining that the answers to them did not matter in the context of a "pure speech" case. This is not quite correct: the anti-war armbands in *Tinker* were protected by the First Amendment *because* they were intended and understood to convey a message.

When pressed further on the reality that any message C.S. was intending to convey about her support for the Second Amendment was being expressed exclusively through the use of a symbolic slogan, counsel responded that "what the speaker thought that the words and symbols meant is not really the determining factor" and "it doesn't matter what the audience understands." These responses suggest counsel believes that First Amendment protections apply even when a speaker does not intend to express any particular idea—and when the audience is not capable of understanding that any idea is being expressed. This cannot be correct. As the Sixth Circuit held in *Blau*, the threshold for invoking First Amendment protections is that a particular action or symbol is "imbued with elements of communication which convey a particularized message that will be understood by those who view it." *Blau*, 401 F.3d at 390 (quotations and alterations omitted).

As to the argument that the AR-15 rifle and the slogan on the hat should be treated as "pure speech," C.S.'s father further relies in his briefs on the Seventh Circuit's decision in *N.J.* to support his position. But nothing in *N.J.* addresses the issue of whether C.S. has presented sufficient evidence to establish that she was intending to convey a message by wearing the hat. And there are two problems with his reliance on *N.J.* to support his entitlement to judgment.

First, there are differences between the shirts there and the hat here. In *N.J.*, the shirts depicted below were the subject of the litigation.

Appendix B

Like C.S.'s cap, these t-shirts show images of firearms. One references "Wisconsin Carry, Inc." and the other pays tribute to the well-known firearms manufacturer "Smith & Wesson." But neither shirt features a message comparable to the commanding "COME AND TAKE IT" statement embroidered on C.S.'s hat.

Second, the students in *N.J.* were teenagers. C.S., by contrast, was in the third grade. While Judge Sykes ultimately concluded that *Tinker* governed the analysis in that case, as discussed above, she advised that application of *Tinker* must "account for such factors such as the age and grade level of the students to whom the speech is directed and any factors particular to the educational environment or history of the school or student body in question." 37 F.4th at 426. There is no dispute here that C.S. was an elementary school student. The age difference is significant.

C.S.'s father also points to a decision from a district court in the Seventh Circuit which preceded *N.J.* by a few years, *Schoenecker v. Koopman*, 349 F. Supp. 3d 745 (E.D. Wis. 2018). That decision, also involving a high school student, granted a motion for a preliminary injunction to prevent the school from prohibiting the student from wearing shirts like the following:

In *Schoenecker*, Judge Lynn Adelman—to whom the case was assigned—agreed with the student plaintiff that the act of wearing these shirts was protected under the First Amendment as pure speech. *Id.* at 752. He acknowledged that there was evidence in the record that the school had experienced some disruptions because of the shirts: news media came to the school to conduct interviews about them; arguments had erupted between students because of the shirts; and teachers had expressed discomfort because of the recent occurrence of the Parkland shooting in Florida. But he saw no indication

that the shirts themselves disrupted any teacher's ability to provide instruction or promoted gun violence. *Id.* at 753. Nor was there evidence of "a threat of a decline in test scores, an upsurge in truancy, or other symptoms of a sick school." *Id.*

But again, *Schoenecker* does not address the question of whether some evidence should be required to show that a student's act of wearing clothing is intended to convey a protected form of speech; it appears that there was no question in that case that a pro-Second Amendment or pro-gun message was intended and expressed. And reliance on the decision is also problematic because it is in the wrong posture to dictate the outcome of this case. The Court here is tasked with determining, on the merits, whether there exists a fact question requiring the case to go to a jury—not with determining whether the plaintiff has made an adequate showing that she is likely to succeed on the merits at a later point in time.

Additionally, *Schoenecker* was a Wisconsin case where students and staff expressed discomfort and fear over the Parkland shooting in Florida. Here, by contrast, the school shooting in Oxford, Michigan was more immediate and occurred in the same state. Indeed, there is evidence in the record that students from the Oxford district where the shooting happened had transferred to C.S.'s district. Of course, the parties do not provide extensive details about the Oxford shooting in the record for this case. But the Court is not required to ignore the reality of that event—in which a firearm was used to take the lives of four high school students and severely injure seven other

people, including a teacher. This tragedy has caused lasting scars on Michigan schools, and its impact is still felt acutely state-wide.[1]

Assuming that—in spite of the poorly-developed state of the record—C.S. has submitted sufficient evidence to show that she *intended* to wear the hat to convey a protected message about her opinions on the Second Amendment (not merely as a comfort object or a statement of her individuality), the Court concludes that C.S. has failed to raise a genuine issue of material fact that a jury would need to decide. Rather, the undisputed facts in the record support entry of summary judgment in favor of the school officials.

Fraser is inapplicable here because nothing about the hat can be considered "plainly offensive," like the explicit and vulgar speech made to the student body by the student in that case. And the Court does not necessarily agree with school officials that the act of wearing a hat with a certain message during "Hat Day" should be considered school-sponsored speech, such that school administrators had heightened control over its contents. The wearing of

1. For an account, *see What We Know About the Michigan High School Shooting*, NYT (Dec. 9, 2021), https://www.nytimes.com/article/oxford-school-shooting-michigan.html. Indeed, on the day the Court held oral argument in this case, the criminal trial for one of the parents of the shooter commenced. *See Michigan School Shooter's Mother to Stand Triail for Manslaughter in 4 Student Deaths*, U.S. News (Jan. 23, 2024), https://www.usnews.com/news/best-states/michigan/articles/2024-01-23/michigan-school-shooters-mother-to-stand-trial-for-manslaughter-in-4-student-deaths.

particular hats on "Hat Day" does not appear to entail the kind of expression that a reasonable observer would be likely to view as carrying "the imprimatur of the school," like the newspapers at issue in *Hazelwood*. This is so despite Defendants' observations at the hearing that—since the school generally prohibited hats—a passerby might be surprised to see a student leaving school wearing a hat. The Court therefore concludes that the standard set out in *Tinker* must govern. But the analysis does not end there.

As *Tinker* holds and C.S.'s father has observed, the First Amendment does not end at the doors of a schoolhouse. Yet its protections must be "*applied in light of the special characteristics of the school environment*." *Tinker*, 393 U.S. at 506 (emphasis added). "That the First Amendment protects speech in the public square does not mean it gives students the right to express themselves however, whenever and about whatever they wish." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012).

Teachers and administrators may not force students to "utter what is not in [their] mind," *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), or to be silent about their opinions when expression of those opinions does not disrupt the learning environment, *Tinker*, 393 U.S. at 509. For these reasons, schools may not expel students who refuse to recite the Pledge of Allegiance, *Barnette*, 319 U.S. at 642, or prohibit students from wearing black armbands to signal protest against the Vietnam War when there is no evidence that the armbands could cause disruption to the educational goals of the school, *Tinker*, 393 U.S. at 509.

By the same token, however, teachers and administrators must have latitude to further legitimate pedagogical goals and account for the "level of maturity" of the students whom they teach. *Hazelwood*, 484 U.S. at 271. They can, for instance, reject proposed topics for essays when they reasonably determine those topics defeat the learning goals of the assignment, *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995), refuse to allow a student to wear a Marilyn Manson shirt, *Boroff*, 220 F.3d at 470, and censor student publications when they reasonably believe that the content of those publications is ill-suited to the maturity level of the student body population, *Hazelwood*, 484 U.S. at 271.

Here, the record is undisputed that school officials at Robert Kerr Elementary School made the decision to prohibit clothing featuring "violence themes," interpreted as depictions of any sort of weapons, because they teach elementary school students, and they believed such depictions could work disruptions in the school environment. Facially, this dress code regulation is viewpoint-neutral and does not target slogans, symbols, or language intending to convey support for the Second Amendment; as Robert Kerr officials have interpreted it, the regulation simply bans all depictions of weapons and violent themes. There is no evidence in the record, as there was in *Castorina*, that the school applied this regulation selectively or in a manner that singled out students based on disagreement with their political beliefs—or that the proffered justification for the regulation was somehow pretextual. To the extent that C.S.'s father attempts to suggest that the regulation is ambiguous because it could be interpreted to ban Michigan's seal (which, for those

who have not carefully examined it, depicts among other things a hunter with a long gun) or hunting t-shirts, he has not offered evidence that the school has previously allowed clothing with such imagery.

Moreover, school administrators presented undisputed evidence supporting their professional judgment that allowing students to wear clothing featuring images of firearms—especially assault-style rifles—carries a substantial risk of disruption, and that C.S.'s hat with its "COME AND TAKE IT" slogan in particular caused a risk of scuffles.

First, because of the maturity level of elementary school students, teachers and administrators worried that the slogan carried a risk of inciting fights because younger students might misinterpret it as an invitation or a dare to actually come try to take the hat. As Judge Sykes noted in *N.J.*, a *Tinker* analysis should "account for such factors as the age and grade level of the students to whom the speech is directed." 37 F.4th at 426. And it should incorporate "the professional knowledge and experience of school administrators." *Id.* The Court sees no reason to question the judgment of school administrators here—informed by many years of experience with elementary school students—that the slogan carried with it a not-insignificant risk of classroom disruption. This is especially so because C.S.'s father has presented no evidence that would call this judgment into question.

Second, both former principal Leffel and current principal Klont testified that, after the Oxford shooting,

several students from the Oxford district transferred to Robert Kerr Elementary. Since transferring, those students have been receiving counseling and other services to mitigate trauma from being in proximity to the Oxford shooting. In combination with the maturity level of the elementary students dealing with this lasting trauma, administrators' worries of classroom disruption, distraction, and the undermining of teaching goals here amount to more than simple discomfort with an unpopular viewpoint. Leffel, in particular, worried that seeing a depiction of an AR-15 in a classroom could work a disruption by distracting students during tests. As *N.J.* advises, "temporal factors and recent events" should be considered in evaluating whether school administrators *reasonably* anticipated that particular imagery risked creating a substantial interference in the work of the school. At the time that C.S. wore this hat, the Oxford shooting was very close in both time and space.

The Court has considered C.S.'s father's position that the concerns of administrators were "minimal" because there is no evidence that any disruption has yet occurred at Robert Kerr Elementary on account of school-shooting-related fear. As the Sixth Circuit explained in *Defoe*, however, "such an argument misapplies the *Tinker* standard because *Tinker* does not require disruption to have actually occurred. Instead, the Court evaluates the circumstances to determine whether the school's forecast of substantial disruption was reasonable." 625 F.3d at 333 (quotations and citations omitted). To be sure, the record does not contain evidence of the volume of tension and hostility present in *Defoe*. But this case concerns

students who are far younger: Robert Kerr Elementary is a school for students in the second to the fifth grades. These students are less mature and capable of reigning in emotional outbursts than junior high or high schoolers. And given that some of these students were actively receiving counseling for shooting-related trauma, the administrative decision to interpret the dress code to prohibit depictions of weapons that could trigger emotional and fear-based responses was reasonably related to the legitimate pedagogical objective of preventing school and classroom disturbances before they occurred.

The Court recognizes that C.S.'s father disagrees with this judgment call by Robert Kerr officials—and strongly so. He has the indisputable right to do so and hold his own beliefs. But C.S.'s father does not have the responsibility to maintain discipline and prevent disruption in an elementary school. Because he offers no evidence showing that administrators were applying their regulations in a selective matter or presented any countervailing proof that would call into question the reasonableness of their predictions, he has not succeeded in assembling a factual record that would support C.S.'s entitlement to judgment or in creating a fact dispute that would defeat the school's.

One final note. At oral argument, C.S.'s counsel changed the scope of the injunction originally requested—which was for an order to allow C.S. to wear her hat—to an injunction forcing school officials to allow students to wear any clothing depicting weapons in a "non-violent, non-threatening" manner. Even if C.S. had offered sufficient evidence to establish a violation of her constitutional

rights, such an injunction would suffer from vagueness that would make it unenforceable. Someone would need to stand in judgment of what sort of weapons depictions were "non-violent" and "non-threatening" and which ones were not. The dispute in this case, which entails a parent disagreeing with school officials that his daughter's hat contained a "violence theme," illustrates the difficulty of the injunctive relief proposed. Absent evidence of viewpoint discrimination not present here, such decisions are best left to school officials, who have experience and training in such matters.

To the extent that the school officials rely in any way on qualified immunity to insulate their conduct, that doctrine would protect them from any monetary damages sought because elementary school students have no clearly established right to wear clothing depicting weapons.

IV. CONCLUSION

For the reasons above, C.S.'s motion for summary judgment (ECF No. 15) is hereby **DENIED**, Defendants' motion (ECF No. 17) is **GRANTED**, and judgment will enter in Defendants' favor.

C.S. is now in the fifth grade. Next year, she is bound for middle school. In reaching the conclusion that it does, the Court does not question C.S.'s sincere support for the Second Amendment, or her right to express that support. But under First Amendment case law, school administrators may place reasonable regulations governing the manner of that expression while she is in the

school setting if reasonably necessary to avoid disruptions of the teaching and learning process in light of the age of the students and the context of recent experiences.

It may very well be that, in school settings with older students, the rules will allow her greater latitude to express her opinions through clothing. But here, Robert Kerr Elementary school officials made a policy decision to prohibit the wearing of a hat with an AR-15 and the phrase "Come and Take It" based on the written requirements of the student handbook and out of concern that the violence associated with an assault rifle and the aggressive nature of the slogan would be disruptive to the teaching atmosphere. The decision was justified by undisputed evidence in the record and therefore does not violate the First Amendment.

SO ORDERED, this 30th day of March, 2024.

BY THE COURT:

/s/ Terrence G. Berg
TERRENCE G. BERG
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1364

C.S., BY HER NEXT FRIEND, ADAM STROUB,

Plaintiff-Appellant,

v.

CRAIG MCCRUMB; AMY LEFFEL;
MICHAEL PAPANEK,

Defendants-Appellees.

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.

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.

Appendix C

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, 89 S. Ct. 733, 21 L. Ed. 2d 731 (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

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.

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-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, 108 S. Ct. 562, 98 L. Ed. 2d 592 (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.

Appendix C

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.

Appendix C

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, 129 S. Ct. 808, 172 L. Ed. 2d 565 (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, 89 S. Ct. 733, 21 L. Ed. 2d 731 (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, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (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, 141 S. Ct. 2038, 210 L. Ed. 2d 403 (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, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (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, 108 S. Ct. 562, 98 L. Ed. 2d 592 (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, 108 S. Ct. 562, 98 L. Ed. 2d 592 (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, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (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. Frederick*, 551 U.S. 393, 423, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (Alito, J., concurring). In the end, it would allow schools to sidestep *Tinker*'s demands in a large number of cases.

* * * *

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.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk