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Exhibit A

RECOMMENDED FOR PUBLICATION
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File Name: 25a0112p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

v.

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

No. 24-1364

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.

COUNSEL

ARGUED: Eugene Volokh, STANFORD UNIVERSITY, Stanford, California, for Appellant. Daniel J. LoBello, O'NEILL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellee. **ON BRIEF:** Eugene Volokh, STANFORD UNIVERSITY, Stanford, California, John R. Monroe, JOHN MONROE LAW, P.C., Dawsonville, Georgia, Michael F. Smith, THE SMITH APPELLATE LAW FIRM, Washington, D.C., for Appellant. Daniel J. LoBello, O'NEILL, WALLACE & DOYLE, P.C., Saginaw, Michigan, for Appellee.

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*, 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 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

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

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 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 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'

[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.

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 (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.

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"

[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.

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 (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 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (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 (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*

[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

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 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 be considered in evaluating whether school administrators *reasonably* anticipated . . . a substantial

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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.

[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.

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.

[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.

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 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 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).

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. 17-4, 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 Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001), but the decision to tolerate speech on sensitive matters must be made in light of "the emotional maturity of the

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

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.

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

[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).

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.

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 (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 (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 (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." *Collazos-Cruz v. United States*, 117 F.3d 1420, *2 (table) (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)).

[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).

"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 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 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 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 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.

Exhibit B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0220p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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

v.

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

No. 24-1364

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

Decided and Filed: August 12, 2025

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

COUNSEL

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

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

ORDER

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

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

Therefore, the petition is denied.

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

CONCURRENCE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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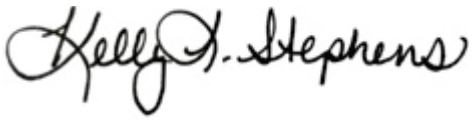

Kelly L. Stephens, Clerk