FIRST AMENDMENT — STUDENT SPEECH — NINTH CIRCUIT DENIES MOTION TO REHEAR EN BANC DECISION PERMITTING SCHOOL SUPPRESSION OF POTENTIALLY VIOLENCE-PROVOKING SPEECH. — *Dariano v. Morgan Hill Unified School District*, 767 F.3d 764 (9th Cir. 2014), *cert. denied*, 2015 WL 1400871.

The First Amendment right to freedom of speech is a guarantee that audiences will be confronted with messages they oppose. As a consequence, the protection of this individual freedom is often pitted against society's interest in keeping the peace. This conflict is heightened in the public school context. Recently, in *Dariano v. Morgan Hill Unified School District*,[1] the Ninth Circuit refused to reconsider en banc a ruling that high school administrators did not violate students' First Amendment rights by prohibiting them from wearing American flag emblems during a Cinco de Mayo celebration in order to prevent violence against those students. The court did so over the dissent of Judge O'Scannlain,[2] who criticized the ruling as enacting a "heckler's veto" in the school speech context and thereby allowing students to use the government to suppress speech they disagree with.[3] Yet importing the heckler's veto doctrine[4] as it presently exists into the school context would provide little guidance for school administrators attempting to respond to disruptive student speech. The precise dictates of the doctrine are unsettled and the unique circumstances of the school setting introduce distinct concerns not present in the police context.

On May 5, 2010, Live Oak High School in Morgan Hill, California, held its annual Cinco de Mayo celebration, honoring "the pride and community strength of the Mexican people."[5] When a group of Caucasian students arrived wearing shirts bearing American flag emblems, several students, including some of Mexican descent,[6] expressed concerns to Assistant Principal Rodriguez that the shirts would lead to a physical altercation.[7] The school had a "history of violence among students, some gang-related and some drawn along racial lines."[8]

---

[1] 767 F.3d 764 (9th Cir. 2014), *cert. denied*, 2015 WL 1400871.

[2] Judge O'Scannlain was joined by Judges Tallman and Bea in dissenting from denial of rehearing en banc.

[3] *Dariano,* 767 F.3d at 766–67 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[4] As defined by Judge O'Scannlain, this term refers to "a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech." *Id.* at 766.

[5] *Id.* at 774 (panel opinion) (internal quotation mark omitted).

[6] This comment uses the ethnic and racial terminology employed by both the Ninth Circuit and the district court. *See id.*

[7] *See id.* at 774–75.

[8] *Id.* at 774. During the Cinco de Mayo celebration a year prior, a near altercation had ensued when a group of Caucasian students hung a makeshift American flag on a tree and began chanting "U-S-A." *Id.*

Rodriguez directed the students to either turn their shirts inside out or take them off, explaining that he was concerned for their safety.[9] When the students refused to do either, he required they return home for the day with an excused absence.[10] The students subsequently received numerous threats, causing their parents to keep them home from school the following two days.[11]

These students, through their parents acting as guardians, brought suit against the school district as well as Principal Boden and Assistant Principal Rodriguez in their official and individual capacities.[12] They alleged that the school had violated their "federal and California constitutional rights to freedom of expression and their federal constitutional rights to equal protection and due process."[13] The district court disposed of all claims, holding that the school officials "did not violate the students' federal or state constitutional rights."[14]

The Ninth Circuit affirmed. Writing for the panel, Judge McKeown[15] analyzed the students' claims under *Tinker v. Des Moines Independent Community School District*,[16] which famously established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[17] *Tinker* held that schools may suppress student speech only when it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[18] In order "to 'justify prohibition of a particular expression of opinion,' school officials 'must be able 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.'"[19]

---

[9] *Id.* at 775.

[10] *Id.* Two students were allowed to return to class as their flag insignias were part of the logo of a popular martial arts company and were "less 'prominent.'" *Id.* at 775 & n.3.

[11] *Id.* at 775.

[12] *Id.*

[13] *Id.*

[14] *Id.* The court dismissed all claims against the district on sovereign immunity grounds, and did not address those against Boden because he was granted an automatic stay in bankruptcy. *Id.* On cross motions for summary judgment, the district court granted Rodriguez's motion to dismiss on all claims and denied those of the students. *Id.*

[15] Judge McKeown was joined by Judge Thomas and Judge Kendall, who was sitting by designation from the U.S. District Court for the Northern District of Illinois.

[16] 393 U.S. 503 (1969). In *Tinker*, the Supreme Court held that a school violated the First Amendment rights of a student by prohibiting him from peacefully wearing a black armband in protest of the war in Vietnam. *Id.* at 514.

[17] *Id.* at 506.

[18] *Id.* at 513.

[19] *Dariano*, 767 F.3d at 776 (quoting *Tinker*, 393 U.S. at 509). However, "the First Amendment does not require school officials to wait until disruption actually occurs before they may act. In fact, they have a duty to prevent the occurrence of disturbances." *Id.* (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)) (internal quotation marks omitted).

Judge McKeown distinguished the facts of *Dariano* from those of *Tinker*, finding that it was reasonable for Live Oak officials to determine that the students' shirts constituted a threat of substantial disturbance.[20] Moreover, she noted that Live Oak administrators had neither punished the students nor enforced a blanket ban on American flag apparel, and had thereby distinguished among students based on perceived threat level, rather than by viewpoint.[21] As a result, she determined, their conduct was appropriately tailored to preventing violence.[22]

Describing the court's role as reviewing "with deference[] schools' decisions in connection with the safety of their students,"[23] Judge McKeown defined the determinative inquiry as "not whether the threat of violence was real, but only whether it was 'reasonable for [the school] to proceed as though [it were].'"[24] Finding that "both the specific events of May 5, 2010, and the pattern of which those events were a part made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real," the court held that the school officials had not acted unconstitutionally under either the First Amendment or the California Constitution.[25]

Petitioners filed a motion requesting rehearing en banc, and the Ninth Circuit voted to deny the petition. Dissenting from the denial, Judge O'Scannlain argued that the panel's decision violates a bedrock principle of First Amendment law — the heckler's veto doctrine,[26] which holds that an audience's hostile response to a speaker they disagree with cannot serve as cause for silencing the speaker.[27] Judge O'Scannlain asserted that the panel's opinion "misinterprets *Tinker*'s own language, [Ninth Circuit] precedent, and the law of [other] cir-

---

[20] *Id.* Whereas in *Tinker* the Court determined that there existed "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work," *id.* (quoting *Tinker*, 393 U.S. at 508) (internal quotation marks omitted), Judge McKeown found "there was [such] evidence of nascent and escalating violence at Live Oak," *id.*, and that those warnings came "in [the] context of ongoing racial tension and gang violence within the school," *id.* at 777 (quoting Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037, 1045 (N.D. Cal. 2011)) (internal quotation mark omitted).

[21] *Id.*

[22] *Id.* (citing *Karp*, 477 F.2d at 176) (noting that "[s]chool officials have greater constitutional latitude to suppress student speech than to punish it").

[23] *Id.* at 779 (alteration in original) (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 992 (9th Cir. 2001)).

[24] *Id.* (alterations in original) (quoting Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1071 (9th Cir. 2013)).

[25] *Id.* The court affirmed the district court's summary dismissal of the petitioners' equal protection and due process claims on similar reasoning. *Id.* at 779–81.

[26] The term "heckler veto" was coined by University of Chicago professor Harry Kalven, *see* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140–60 (1965), and was first used by the Supreme Court in 1966, *see* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966).

[27] *Dariano*, 767 F.3d at 766–67 (O'Scannlain, J., dissenting from denial of rehearing en banc).

cuits . . . [by] claim[ing] that the *source* of the threatened violence at Live Oak is irrelevant."[28] The dissent condemned the panel's failure to require school officials to stop the source of the threat, and for accepting the "more 'readily-available' solution . . . [of] silencing the target."[29]

The dissent read *Tinker* as "counsel[ing] directly against the [panel's] outcome[,] . . . explain[ing] that students' speech . . . cannot be silenced merely because those who disagree with it 'may start an argument or cause a disturbance.'"[30] Judge O'Scannlain argued that because the speech did not fall within the well-recognized exceptions for "fighting words,"[31] speech that is "directed to inciting or producing imminent lawless action,"[32] or that constitutes a "true threat,"[33] "'the government may not give weight to the audience's negative reaction' as a basis for suppressing [it]."[34]

The panel's opinion, the dissent claimed, establishes the "perverse incentive"[35] that the "heckler's veto doctrine seeks to avoid"[36] — sending students the "clear message . . . [that] by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them."[37] While the disfavored speech at issue in this case was the display of an American flag, he warned that "[t]he next case might be a student wearing a shirt bearing the image of Che Guevara, or Martin Luther King, Jr., or Pope Francis."[38] Irrespective of the viewpoint being expressed, Judge O'Scannlain cautioned, the panel's opinion allows "[t]he demands of bullies [to] become school policy."[39] The dissent accordingly would have held that "the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech."[40]

The panel amended its opinion in response, recognizing the potential heckler's veto concern presented by the district's action, but con-

---

[28] *Id.* at 768. Judge O'Scannlain would have found *Tinker*'s "substantial disruption" standard satisfied only where the source of the violence was the student whose speech the school sought to suppress. *See id.*

[29] *Id.* (quoting *id.* at 778 (panel opinion)).

[30] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[31] *Id.* at 770 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (internal quotation marks omitted).

[32] *Id.* (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)) (internal quotation mark omitted).

[33] *Id.* (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)) (internal quotation marks omitted).

[34] *Id.* (quoting Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't, 533 F.3d 780, 789 (9th Cir. 2008)).

[35] *Id.* at 771.

[36] *Id.* at 772.

[37] *Id.* at 771.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 773.

cluding that "the language of *Tinker* and the school setting . . . [do not] require school officials to precisely identify the source of a violent threat before taking readily-available steps to quell the threat."[41] Judge McKeown argued that doing so "would burden officials' ability to protect the students in their charge — a particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet."[42]

Instead, although the panel acknowledged that the argument that the relevant disruption occurred only because of "wrongful behavior of third parties" might condemn the suppression of speech outside the school context, it concluded that the claim "ignores the special characteristics of the school environment."[43] It determined, rather, that "the *Tinker* rule is guided by a school's need to protect its learning environment and its students, and courts generally inquire only whether the potential for substantial disruption is genuine."[44]

The tension between the opinions highlights the lack of guidance provided by the Supreme Court with regard to how schools may respond to *Tinker*-qualifying disturbances. But in charging that the panel did not require the school to tailor its response in a way that sufficiently addressed the problem of the heckler's veto, Judge O'Scannlain failed to propose a realistic standard by which schools could be guided.[45] Nor does a readily available standard that could be imported into the school speech realm appear to exist. The requirements of the heckler's veto doctrine generally remain unclear, and moreover, the unique circumstances presented in the school setting make a test appropriate for the police context ill suited for the student speech domain.

First Amendment doctrine has long struggled to strike the appropriate balance between protecting speech rights and maintaining order. While the Supreme Court has generally maintained that the heckler's veto is not a legitimate rationale for suppressing speech,[46] the demands

---

[41] *Id.* at 778 (panel opinion).

[42] *Id.*

[43] *Id.* (quoting Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25, 38 (10th Cir. 2013)) (internal quotation marks omitted).

[44] *Id.* (quoting *Taylor*, 713 F.3d at 38 n.11) (internal quotation marks omitted) (citing Zamecnik v. Indian Prairie Sch. Dist., 636 F.3d 874, 879–80 (7th Cir. 2011), and Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1272 (11th Cir. 2004), as having looked to the reactions of onlookers to determine whether the speech could be regulated). The panel further likened its analysis to several cases in which schools' prohibitions on wearing the Confederate flag were upheld as a legitimate burden on students' right to freedom of expression. *Id.* at 778–79.

[45] *See id.* at 773 (O'Scannlain, J., dissenting from denial of rehearing en banc).

[46] In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Supreme Court found unconstitutional a statute that would allow the arrest of a speaker whose words were of a kind that "stirs the public to anger," even if his conduct was not "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Id.* at 1. But

of that doctrine remain in dispute.[47] It is fairly clear that government may not place prior restraints on speech in order to prevent disorder,[48] and that where suppressing the violent response is an available option, officials may not choose instead to silence the speaker.[49] But where simply restraining the heckler is for some reason not possible, the heckler's veto doctrine provides no definite guide. Courts have not typically held that police must "go down with the speaker."[50] But decisions have run the gamut in their understanding of how far the government must go in an effort to protect offensive speech. Do police simply need to take "reasonable action" to protect the speaker,[51] censoring him only where "objectively necessary,"[52] or must they go so far as to bring in the National Guard?[53] Merely rejecting the heckler's veto does not provide sufficient guidance for the response of those entrusted with protecting both the speech and the speaker.

Beyond the ambiguity of the heckler's veto doctrine, schools and their administration present a different dynamic than does policing speech on public streets. Since *Tinker*, the Supreme Court has consistently recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[54] and are in fact circumscribed "in light of the special characteristics of the school environment."[55] Two government inter-

---

the Court appeared to renege on this standard just two years later in *Feiner v. New York*, 340 U.S. 315 (1951), upholding a conviction for speech based on the "reaction which it actually engendered." *Id.* at 320. The Court, however, seemed to return to its prior stance in *Cox v. Louisiana*, 379 U.S. 536 (1965), holding that hostility to the exercise or assertion of constitutional rights could not serve as a reason that they be denied. *Id.* at 551.

47 *See* Ruth McGaffey, *The Heckler's Veto: A Reexamination*, 57 MARQ. L. REV. 39, 64 (1973).

48 Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939); *see* McGaffey, *supra* note 47, at 46.

49 *See* Edwards v. South Carolina, 372 U.S. 229, 237 (1963). *But see id.* at 244–45 (Clark, J., dissenting) (arguing that Justice Frankfurter's concurring opinion in *Feiner* controlled, and that no constitutional principle dictated that in every situation police must prevent violence from the crowd rather than silence the speaker).

50 KALVEN, *supra* note 26, at 140.

51 *See, e.g.*, Glasson v. City of Louisville, 518 F.2d 899, 906 (6th Cir. 1975); *see also Feiner*, 340 U.S. at 326 (Black, J., dissenting) ("But if, in the name of preserving order, [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him.").

52 *See, e.g.*, Bible Believers v. Wayne Cnty., 765 F.3d 578, 590 (6th Cir. 2014), *vacated for reh'g en banc*.

53 *See* McGaffey, *supra* note 47, at 64 (arguing that if they do suppress speech, "the burden of proof should be put on [police] to show that there was no other conceivable way to maintain order"); Franklyn Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q. J. SPEECH 99 (1967), *reprinted in* FREEDOM, DEMOCRACY, AND RESPONSIBILITY 75, 85 (Franklyn S. Haiman ed., 2000) ("Only by the firmest display of the government's intention to use all the power at its disposal to protect the constitutional rights of dissenters will hecklers be discouraged from taking the law into their own hands.").

54 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

55 Morse v. Frederick, 551 U.S. 393, 403 (2007) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

ests at play in the school context are particularly divergent from those relevant to police on public streets.

First, the imperative of protecting students from violence within the school environment, no matter the source, cannot be overstated. While police too are concerned with maintaining peace, the level and risk of violence tolerable in the school setting is markedly lower than in society at large. Violence has been shown to impede the educational process.[56] Moreover, because school attendance is compelled, students are not able to remove themselves, or be as easily removed, from the situation. Accordingly, the duty to protect them from harm is arguably heightened in this environment. And the panel correctly noted that in the school context, focusing solely on the source of the disturbance, rather than on the most efficient method of removing or preventing it, can be unacceptably costly.[57] Adolescents are prone to violence and conflict among them tends to escalate rapidly.[58] As a result, administrators may have to act quickly and with little information in order to ensure student safety. Moreover, students in schools are repeat players. Usually, the speaker and the heckler in the school environment can expect to see one another every day, year after year. For this reason, simply curtailing or preventing violence on one occasion is unlikely to fully resolve the issue. An appropriate standard must account for a school's need to make in-the-moment decisions to prevent tragedies, and for administrators' superior knowledge of their students and the situation.

Second, the nature of government involvement differs in the police and school contexts. The primary duty for police is reactive, namely protecting individuals from having their rights intruded on by one another. In contrast, state governments often have an affirmative responsibility to educate students.[59] The principal interest in the aca-

---

[56] "[V]iolence in schools . . . significantly interferes with the quality of education in those schools." United States v. Lopez, 514 U.S. 549, 619 (1995) (Breyer, J., dissenting) (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, 1 VIOLENT SCHOOLS — SAFE SCHOOLS: THE SAFE SCHOOL STUDY REPORT TO THE CONGRESS 118–19 (1977)) (additional citation omitted).

[57] *See Dariano*, 767 F.3d at 778 (noting the proliferation of "rampant school violence . . . involving guns, other weapons, or threats"). In 2012, 6.9% of high school students reported being threatened or harmed with a weapon on school grounds. Eleven homicides and 749,200 nonfatal victimizations took place at school among students twelve to eighteen years old. CTRS. FOR DISEASE CONTROL & PREVENTION, UNDERSTANDING SCHOOL VIOLENCE (2015), http://www.cdc.gov/violenceprevention/pdf/school_violence_fact_sheet-a.pdf [http://perma.cc/4UDE-F4US].

[58] *See* Daniel Lockwood, *Violence Among Middle School and High School Students: Analysis and Implications for Prevention*, NAT'L INST. OF JUSTICE (Oct. 1997), https://www.ncjrs.gov/pdffiles/166363.pdf [http://perma.cc/63NH-5YER].

[59] *See, e.g.*, CAL. DEP'T OF EDUC., DUTY TO PROTECT STUDENTS (July 3, 2012), http://www.cde.ca.gov/re/di/eo/dutytoprotect.asp [http://perma.cc/T2NH-VXXH] (noting that "[a]ccess

demic environment is to accomplish this goal, and it is reasonable for schools to take greater latitude in limiting disruptive speech in order to accomplish it than the government can take elsewhere.

For these reasons, courts have traditionally given school administrators wide leave in determining how to best accomplish the goals of student safety and education.[60] It is essential in the speech context as well that the individuals most competent to ensure these obligations are met be given the deference necessary to do so effectively. Accordingly, it simply is not practical to forbid schools from *ever* suppressing speech, as Judge O'Scannlain seems to advocate, when doing so is the only reasonable means of preventing a *Tinker*-qualifying disturbance. Nor is it sufficient to import the amorphous standard of the heckler's veto doctrine into the school context. In order to address the problem of the heckler's veto in the regulation of student speech, courts must provide school administrators and reviewing courts with a clear and realistic standard by which to guide their response.

To reject the heckler's veto in the school context is a worthy goal. Allowing the will of other students to proscribe student speech has implications far beyond the Cinco de Mayo celebration at Live Oak — not two months after the opinion was published, another California high school banned students' "I Can't Breathe" shirts, worn as a display of solidarity with a national movement protesting police brutality, in order to avoid a possible disruptive response from community members.[61] However, developing an effective standard for administrator response under *Tinker* requires balancing the protection of students' right to free expression and school officials' need to impart knowledge upon and prevent violence against their students.[62] While the exact dictates of an appropriate standard are not readily apparent, it is clear that any effective test would require a more nuanced approach than was presented by the dissent.

---

to quality education is a fundamental right of every student and is fully guaranteed and protected by the California Constitution").

[60] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[61] *See* Conor Friedersdorf, *Let Student Athletes Wear 'I Can't Breathe' Warmups*, ATLANTIC (Dec. 30, 2014, 7:00 AM), http://www.theatlantic.com/politics/archive/2014/12/why-high-school-athletes-should-be-allowed-to-wear-i-cant-breath-warmups/384102/ [http://perma.cc/9WL5-QRX2]. After extensive media attention and student threats to file suit, the school district rescinded the ban. Veronica Rocha, *High School Teams Can Wear 'I Can't Breathe' T-Shirts After All*, L.A. TIMES (Dec. 30, 2014, 8:43 AM), http://www.latimes.com/local/lanow/la-me-ln-school-athletes-to-wear-i-cant-breathe-shirts-20141229-story.html [http://perma.cc/28DU-UAQK].

[62] For one possibility, see generally John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569 (2009) (arguing that a narrow tailoring requirement would address many of the failings of the ambiguity underlying the *Tinker* requirements, including those of the heckler's veto and of insidious viewpoint discrimination).