testimony that the dogs were in a fenced-in backyard had been contradicted by Thurston – according to her, the animals were in the house when the police got there – which only raised more questions for the majority.

http://cdn.ca9.uscourts.gov/datastore/memoranda/2014/01/09/12-15729.pdf
(last accessed Mar. 6, 2014).

Speech: School District Justified in Sending Students Home Who Refused to Remove or Cover American Flag Shirts Where Violence Might Result

Dariano v. Morgan Hill Unified School District, No. 11-17858 (9th Cir. Feb. 27, 2014).

The Ninth Circuit has upheld, under the standards in *Tinker*, the actions of a California school district in sending home several students who refused to remove or reverse their American flag shirts on Cinco de Mayo to defuse likely conflict and violence with Mexican-American students.

On Cinco de Mayo 2009 at California's Morgan Hill School, Mexican students carried Mexican flags and Caucasian students hung a makeshift American flag from a tree while chanting "USA." As might be expected this led to an altercation between the student groups. One student was wearing an American flag t-shirt was approached and threatened by a Mexican student.

The following Cinco de Mayo, in 2010, a group of students wore American flag T-shirts to school. Several were confronted by Mexican students. The assistant principal was approached by those worried about the safety of the American-flag wearers, and by a group of Mexican students asking why Caucasian students "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"

The principal directed the assistant principal to have those wearing American flag shirts turn them inside our or take them off. The students, while admitting their shirts put them at risk of violence, refused the instructions. Two students were allowed to return to classes because school officials determined their shirts were less "prominent" and did not put them at much risk. But the remaining students were told to turn their shirts inside out or go home (their absence would not count against them). They went home.

Students who went home were then threatened with phone calls and text messages. Rumors surfaced that gang members were coming to "take care" of the American-flag-wearing kids. Parents of three children that went home did not let them go to school May 6 or 7 and then sued the school under Section 1983, alleging violations of Equal Protection and Due Process under the California state and federal Constitutions. On cross motions for summary judgment the district court held school officials (the principal and assistant principal) did not violate the students' constitutional rights and dismissed all claims against the school district based on sovereign immunity.

HELD: The Ninth Circuit affirmed the district court, holding the facts led school officials to reasonably believe a substantial disruption of school activities would ensue from the First Amendment expression at issue.

DISCUSSION: The Circuit Court analyzed the case under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), wherein the Supreme Court held students may "express [their] opinions, even on controversial subjects . . . if [they] do so without materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." The court found that the possibility of interfering with discipline in the school was real. Each of the three students that filed suit had been confronted about their clothing on the day in question. The assistant principal had been approached twice about impending violence because of the attire. And there had been an altercation the previous Cinco de May on the campus, specifically due to the American flag shirts. Finally, the threats turned out to be real - the parents kept the children out of school for two days after the incidents in question. The Court also found it noteworthy that the school officials specifically addressed the *Tinker* issues – disruption, violence, and student safety – at the time of the events, in conversations with the students, in conversations with the parents, and in a press release issued the next day. Moreover, the Circuit Court appreciated the officials' tailoring their actions to the specific level and kind of threat at issue, evidenced by the fact that two students whose shirts were not as overt were permitted to go back to class because the threat to them was less serious.

The students' second claim, Equal Protection, was "a variation of their First Amendment challenge," alleging they were treated differently than students wearing the Mexican flag colors and that, as a result, their speech was suppressed based on the viewpoint expressed. The school responded that it had a viewpoint-neutral reason for the suppression: all students whose safety was at issue were treated identically. Again the Court looked to *Tinker* for guidance, noting it holds that schools do not have to "prohibit the wearing of all symbols of political or controversial significance" in order to justify a prohibition against the wearing of a certain symbol, if such a prohibition is "necessary to avoid material and substantial interference with schoolwork or discipline." Since the students wearing the Mexican flag were not targeted for violence and thus not at the same risk, there was no evidence of impermissible viewpoint discrimination.

Last, the students challenged the school dress policy in general, which prohibits wearing clothing that "indicate[s] gang affiliation, create[s] a safety hazard, or disrupt[s] school activities." The students sought to enjoin this code, alleging it does not contain objective standards to "referee" school attire and thus violates due process. The court first noted that the Supreme Court, recognizing a school's need to impose discipline for a range of unanticipated conduct, has held that school disciplinary rules need not be "as detailed as a criminal code." It looked to other cases, found the dress code here to be in-line with others upheld by federal courts. And importantly for the court, the dress code in question specifically referenced the *Tinker* standards – safety and disruption.

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/02/27/11-17858.pdf (last accessed Mar. 6, 2014).