508 F.3d 765
United States Court of Appeals,
Fifth Circuit.

Enrique PONCE, Jr.; Rocio Ponce, Individually and as next friends of E.P., a minor child, Plaintiffs–Appellees,
v.
SOCORRO INDEPENDENT SCHOOL DISTRICT, Defendant–Appellant.

No. 06–50709.
|
Nov. 20, 2007.

Synopsis
Background: Parents of high school student transferred to an alternative education program based on the content of his journal sued school district under § 1983 alleging violations of student's constitutional rights. The United States District Court for the Western District of Texas, Kathleen Cardone, J., 432 F.Supp.2d 682, granted a preliminary injunction on First Amendment grounds, and school district appealed.

[Holding:] The Court of Appeals, E. Grady Jolly, Circuit Judge, held that student speech that threatened a Columbine-style attack on a school was not protected by the First Amendment. Vacated and remanded.

E. GRADY JOLLY, Circuit Judge:

This appeal presents the question of whether student speech that threatens a Columbine-style attack on a school is protected by the First Amendment. Today we follow the lead of the United States Supreme Court in *Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007), and hold that it is not because such speech poses a direct threat to the physical safety of the school population. We therefore VACATE the preliminary injunction entered by the district court and REMAND for further proceedings, if appropriate.

I.

While enrolled as a sophomore at Montwood High School, a minor student identified as E.P. kept an extended notebook diary, written in the first-person perspective, in which he detailed the "author's" creation of a pseudo-Nazi group on the Montwood High School Campus, and at other schools in the Socorro Independent School District ("SISD" or "School District"). The notebook describes several incidents involving the pseudo-Nazi group, including one in which the author ordered his group "to brutally injure two homosexuals and seven colored" people and another in which the author describes punishing another student by setting his house on fire and "brutally murder[ing]" his dog. The notebook also details the group's plan to commit a "[C]olumbine shooting" attack on Montwood High School or a coordinated "shooting at all the [district's] schools at the same time." At several points in the journal, the author expresses the feeling that his "anger has the best of [him]" and that "it will get to the point where [he] will no longer have control." The author predicts that this outburst will occur on the day that his close friends at the school graduate.

On August 15, 2005, E.P. told another student (the "informing student") about the notebook and supposedly showed him some of its contents. The informing student told a teacher about the notebook. After waiting a day, the teacher told Assistant Principal Jesus Aguirre ("Aguirre") about the notebook. Aguirre called the informing student into his office and questioned the student about the conversation with E.P. Aguirre then decided to call E.P. into his office for a meeting.

During the meeting, Aguirre told E.P. that students had complained to him that E.P. was writing threats in his diary. E.P. denied these accusations and instead explained that he was writing a work of fiction. Aguirre asked E.P. for permission to search his backpack and E.P. consented. Aguirre discovered the notebook and briefly ***767** reviewed its contents. E.P. continued to maintain that the notebook was a work of fiction.

Aguirre called E.P.'s mother to tell her about the notebook. She too maintained that the notebook was fiction, and explained that she also engaged in creative writing. Aguirre informed her that he would read the notebook in detail and "call her the next day with an administrative decision based on the safety and security of the student body." Aguirre then released E.P. back into the general student population to complete the school day. Aguirre took the notebook home and read it several times. He found several lines in the notebook alarming and ultimately determined that E.P.'s writing posed a "terroristic threat" to the safety and security of the students and the campus.

As a "terroristic threat," Aguirre determined that the writing violated the Student Code of Conduct. He therefore suspended E.P. from school three days and recommended that he be placed in the school's alternative education program at KEYS Academy.[1]

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III.

We are guided by the Supreme Court's recent decision in *Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). . . . The Supreme Court (held) that Frederick's suspension violated no constitutional right. In reaching this conclusion, the Court expressly declined to apply the *Tinker* standard of "risk of substantial disturbance" to drug speech. *See Morse,* 127 S.Ct. at 2627. The Court's refusal to apply *Tinker* rested on the relative magnitude of the interest it considered to be at

stake, *viz.,* prevention of the "serious and palpable" danger that drug abuse presents to the health and well-being of students. *Id.* at 2629. Because the already significant harms of drug use are multiplied in a school environment, the Court found "that deterring drug use by schoolchildren is an 'important-indeed, perhaps compelling' interest," *id.* at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)), not arising from an "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," as was the case in *Tinker.* 393 U.S. at 508, 509, 89 S.Ct. 733. Accordingly, on the Court's reasoning, school administrators need not evaluate the potential for disruption caused by speech advocating drug use; it is *per se* unprotected because of the scope of the harm it potentially foments.

The Court's evaluation of the harm led to an evidently potent remedy. To the extent that preventing a harmful activity may be classified as an "important-indeed, perhaps compelling interest," speech advocating that activity may be prohibited by school administrators with little further inquiry. But the Court did not provide a detailed account of how the particular harms of a given activity add up to an interest sufficiently compelling to forego *Tinker* analysis. As a result of this ambiguity, speech advocating an activity entailing arguably marginal harms may be included within the circle of the majority's rule. Political speech in the school setting, the important constitutional value *Tinker* sought to protect, could thereby be compromised by overly-anxious administrators.

It is against this background of ambiguity that Justice Alito's concurring opinion opens. It begins by making two interpretive points about the majority opinion:

> (a) [the majority opinion] goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use.

Morse, 127 S.Ct. at 2636 (Alito, J., concurring) (internal citation and quotation marks omitted). By making these points, the concurring opinion makes clear from the outset that the majority is focused on the particular harm to students of speech advocating drug use; the concurring opinion is not itself announcing a general rule defining the requirements for applying *Tinker* whenever the safety of the school population is threatened in some other ***770** context. On this reading, the majority opinion "does not hold that the special characteristics of the public schools *necessarily* justify any other speech restrictions." *Id.* at 2637 (emphasis added). But importantly, Justice Alito's concurring opinion goes on to expound with further clarity why some harms are in fact so great in the school setting that requiring a school administrator to evaluate their disruptive potential is unnecessary. In doing so it provides the specificity necessary for determining the harms that are so serious as to merit the *Morse* analysis.

The central paragraph of Justice Alito's concurring opinion states:

> [A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. *The special characteristic that is relevant in this case is the threat to the physical safety of students.* School attendance can expose students to threats to their physical safety that they would not otherwise face. Outside of school, parents can attempt to protect their children in many ways and may take steps to monitor and exercise control over the persons with whom their children associate. Similarly, students, when not in school, may be able to avoid threatening individuals and situations. During school hours, however, parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. *Experience shows that schools can be places of special danger.*

Id. at 2638 (emphasis added). On Justice Alito's analysis, the heightened vulnerability of students arising from the lack of parental protection and the close proximity of students with one another make schools places of "special danger" to the physical safety of the student. *Id.* And it is this particular threat that functions as the basis for restricting the First Amendment in schools. . . .

The constitutional concerns of this case—focusing on content—fall precisely within the student speech area demarcated by Justice Alito in *Morse.* That area consists of speech pertaining to grave harms arising from the particular character of the school setting. The speech in question here is not about violence aimed at specific ***771** persons,[2] but of violence bearing the stamp of a well-known pattern of recent historic activity: mass, systematic school-shootings in the style that has become painfully familiar in the United States. . . . We therefore "find it

untenable in the wake of Columbine and Jonesboro that any reasonable school official who came into possession of [E.P.'s diary] would not have taken some action based on its violent and disturbing content." *Doe v. Pulaski County Special Sch. Dist.,* 306 F.3d 616, 626 n. 4 (8th Cir.2002). Our recent history demonstrates that threats of an attack on a school and its students *must* be taken seriously. . . .

Of course, we do not remotely suggest that "schools can[ ] expel students just because they are 'loners,' wear black and play video games." *LaVine,* 257 F.3d at 987. We do hold, however, that when a student threatens violence against a student body, his words are as much beyond the constitutional pale as yelling "fire" in crowded theater, *see Schenck v. United States,* 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919), and such specific threatening speech to a school or its population is unprotected by the First Amendment. School administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance. . . .

IV.

VACATED AND REMANDED.

All Citations
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