



Written by [Alex Newman](#) on March 5, 2014

Court Upholds Ban on U.S. Flags at Calif. School; Battle Goes On

In an incredible decision that shocked Americans nationwide, a panel of judges on a federal appeals court ruled unanimously last week that school officials in the San Jose, California, suburb of Morgan Hill acted appropriately and legally by preventing students from wearing T-shirts with U.S. flags on Cinco de Mayo. According to the panel of judges, despite free-speech rights, the controversial ban on American flags was supposedly needed to prevent “racial tension” from exploding into open violence at the school. Multiple concerns have been raised about the scandal. The battle, however, is far from over.



The saga officially began on May 5, 2010, when Live Oak School bosses ordered students to either turn their patriotic apparel inside out, take it off completely, or be sent home. The administrators’ supposed reasoning for the infringement on free speech, which the three-judge panel on the U.S. 9th Circuit Court of Appeals agreed with, was that wearing U.S. flags on the “Cinco de Mayo” celebration could have stoked racial violence. The Cinco de Mayo holiday commemorates the May 5, 1862 victory over French forces by the Mexican Army in the Battle of Puebla. It is celebrated primarily in the Mexican state of Puebla and by Americans of Mexican ancestry.

The American Freedom Law Center, one of the heavy-hitting organizations supporting the targeted students, slammed the ruling as a discriminatory attack on the First Amendment. “It is truly a sad day when government officials are permitted to ban the American flag on a public high school campus for any reason,” said AFLC co-founder and Senior Counsel Robert Muise, who argued the case before the Ninth Circuit.

“Here, school officials feared that our clients would offend ‘Mexican’ students if they wore their flag shirts to school on Cinco de Mayo, so they ordered the students to either remove their shirts or leave school in direct violation of their First Amendment rights,” Muise added in a statement released after the ruling. AFLC also pointed out that clothing with Mexican-flag colors was not banned by school officials.

The pro-freedom legal group, led by an orthodox Jew and an orthodox Catholic, said it intends to file a petition for a full-court review. “These students and their parents should be commended for standing up and exercising their rights under the First Amendment,” said AFLC Senior Counsel David Yerushalmi, the other co-founder. “Our rights will only have meaning if we are willing to fight for them.”

Another legal organization defending the students’ rights, FreedomX, was outraged by the controversial decision as well. The organization, which said after the unanimous panel ruling that “the fight is far from over,” will also be seeking a new review by the full Ninth Circuit Court. If necessary, the non-profit



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group, which defends political and religious freedom, vowed to take the case all the way to the Supreme Court.

“The 9th Circuit upheld the rights of Mexican students celebrating a holiday of another country over U.S. students proudly supporting this country,” noted attorney William Becker, Jr., who is representing the affected students and leads the liberty-minded legal non-profit FreedomX. “I am pretty astonished that in this country you can’t express your patriotic freedom without offending people of other national origins.”

If school officials truly did fear “race-related violence,” as the judges put it, they should have cancelled the Cinco de Mayo celebration at the school rather than “deprived students of their 1st Amendment rights to patriotic expression,” Becker told the *Los Angeles Times*. In siding with the Morgan Hill Unified School District, however, the federal court disagreed.

Citing a 1969 Supreme Court decision purporting to allow government schools to limit free speech if they expect disruptions or interference, the three-judge panel ruled that authorities at Live Oak were justified in banning U.S. flags due to previous threats of violence against students who wore them. “On Cinco de Mayo in 2009, a year before the events relevant to this appeal, there was an altercation on campus between a group of predominantly Caucasian students and a group of Mexican students,” reads the decision upholding the lower-court ruling.

According to the decision, tensions between Mexican flag-wielding students and other youngsters sporting the U.S. flag almost led to violence as pro-Mexico, anti-America students cursed out and threatened the “**** white boys” for alleged racism. The hatred and threats of violence against American students wearing American flags continued into 2010 prior to the Cinco de Mayo ban, the appeals panel said.

“Our role is not to second-guess the decision to have a Cinco de Mayo celebration or the precautions put in place to avoid violence,” Judge M. Margaret McKeown wrote for the panel in its unanimous ruling. The prior events described in the decision, she added, “made it reasonable for school officials to proceed as though the threat of a potentially violent disturbance was real.”

While such restrictions on speech would not generally be allowed, legal analysts said, because of the 1969 *Tinker v. Des Moines Indep. Comm. School District* decision by the Supreme Court, the panel ruled that it is constitutional at school. “This is a classic ‘heckler’s veto’ — thugs threatening to attack the speaker, and government officials suppressing the speech to prevent such violence,” explained UCLA law professor Eugene Volokh, who teaches, among other fields, free speech law.

“‘Heckler’s vetoes’ are generally not allowed under First Amendment law; the government should generally protect the speaker and threaten to arrest the thugs, not suppress the speaker’s speech,” Volokh continued in an analysis for the *Washington Post*. “But under *Tinker*’s ‘forecast substantial disruption’ test, such a heckler’s veto is indeed allowed.”

Outraged parents of the five students were appalled. “This is the United States of America,” the mother of one of the students, Kendall Jones, was quoted as saying by the *San Jose Mercury News*. “The idea that it’s offensive to wear patriotic clothing ... regardless of what day it is, is unconscionable to me.” Across America, countless commentators and analysts expressed similar sentiments.

Aside from the free-speech elements, the California school case has also raised a wide range of other issues among analysts. More than a few commentators, for instance, have wondered how it is possible that an American flag could be considered offensive at a U.S. school — let alone unsafe. It was also not



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clear how supporting the U.S. flag could possibly be considered a “racial” issue when Americans come from all different ethnic backgrounds.

Beyond the legal implications, Volokh from the UCLA School of Law raised numerous other important arguments. “Somehow, we’ve reached the point that students can’t safely display the American flag in an American school, because of a fear that other students will attack them for it — and the school feels unable to prevent such attacks (by punishing the threateners and the attackers, and by teaching students tolerance for other students’ speech),” he wrote. “Something is badly wrong, whether such an incident happens on May 5 or any other day.”

“And this is especially so because behavior that gets rewarded gets repeated,” he continued. “The school taught its students a simple lesson: If you dislike speech and want it suppressed, then you can get what you want by threatening violence against the speakers. The school will cave in, the speakers will be shut up, and you and your ideology will win. When thuggery pays, the result is more thuggery. Is that the education we want our students to be getting?”

Where the case goes from here remains to be seen, but the students and the legal organizations supporting them have vowed not to give up. The broader issues and concerns raised by the entire scandal, though, are unlikely to be resolved any time soon — especially when authorities buy into the notion that an American flag can be prohibited to avoid violence and “racial tensions” from those who dislike it.

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