RECORD NO. 03-1125

In The

United States Court of Appeals

For The Fourth Circuit

ALAN NEWSOM,

a minor by and through FRED NEWSOM, his Parent and Next Friend,

Plaintiff-Appellant,

v.

ALBEMARLE COUNTY SCHOOL BOARD, et al.,

Defendants – Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT CHARLOTTESVILLE**

BRIEF OF *AMICI CURIAE*, NATIONAL SCHOOL BOARDS ASSOCIATION, VIRGINIA SCHOOL BOARDS ASSOCIATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, MARYLAND SCHOOL BOARDS ASSOCIATION AND SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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Brief supporting position of Defendants/Appellees.
Brief supporting affirmance of decision by United States District Court for the Western District of Virginia.

Richmond, Virginia

April 18, 2003

Case Number 03-1125
Newsom v. Albemarle County School Board

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1.

National School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have a parent corporation(s)?
   ( ) YES (X) NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

   If yes, identify all such owners: NONE.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO

   If yes, identify entity(ies) and nature of interest(s): NONE.

5. Is party a trade association?
   ( ) YES (X) NO

   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock: NONE.

_____ _____

(Signature) (Date)

Richmond, Virginia

April 18, 2003

Case Number 03-1125
Newsom v. Albemarle County School Board

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1.

Virginia School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have a parent corporation(s)?
   ( ) YES (X) NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

   If yes, identify all such owners: NONE.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO

   If yes, identify entity(ies) and nature of interest(s): NONE.

5. Is party a trade association?
   ( ) YES (X) NO

   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock: NONE.

_____ _____

(Signature) (Date)

Richmond, Virginia

April 18, 2003

Case Number 03-1125
Newsom v. Albemarle County School Board

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1.

North Carolina School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have a parent corporation(s)?
   ( ) YES (X) NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

   If yes, identify all such owners: NONE.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO

   If yes, identify entity(ies) and nature of interest(s): NONE.

5. Is party a trade association?
   ( ) YES (X) NO

   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock: NONE.

_____ _____

(Signature) (Date)

Richmond, Virginia

April 18, 2003

Case Number 03-1125
Newsom v. Albemarle County School Board

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1.

Maryland School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have a parent corporation(s)?
   ( ) YES (X) NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations: *National School Boards Association*

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

   If yes, identify all such owners: NONE.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO

   If yes, identify entity(ies) and nature of interest(s): NONE.

5. Is party a trade association?
   ( ) YES (X) NO

   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock: NONE.

_____ _____

(Signature) (Date)

Richmond, Virginia

April 18, 2003

Case Number 03-1125
Newsom v. Albemarle County School Board

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Pursuant to FRAP 26.1 and Local Rule 26.1.

South Carolina School Boards Association, who is Amicus Curiae, makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

2. Does party have a parent corporation(s)?
   ( ) YES (X) NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of a party's stock owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO

   If yes, identify all such owners: NONE.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO

   If yes, identify entity(ies) and nature of interest(s): NONE.

5. Is party a trade association?
   ( ) YES (X) NO

   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a party's stock: NONE.

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(Signature) (Date)

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INTEREST OF *AMICI*

The National School Boards Association ("NSBA") is a not-for-profit federation of state associations of school boards across the United States, together with the school boards of the District of Columbia, Guam, and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members, who, in turn, govern the 14,890 local school districts serving more than 47 million public school students. The Virginia School Boards Association, North Carolina School Boards Association, Maryland School Boards Association and South Carolina School Boards Association are voluntary associations of school boards within their respective states and are members of the NSBA.

The associations have a strong interest in the effective implementation of school board policies, including policies that promote school safety and prevent violence in schools. To this end, the associations have an interest in insuring that local school boards maintain the autonomy to implement effective student disciplinary policies that do not infringe on students' constitutional rights, but that advance the goals of promoting a safe learning environment and preventing violence in schools.

A motion for leave to file this brief is filed herewith.

STATEMENT OF THE CASE

Amici adopt the Appellees' Statement of the Case.

STATEMENT OF THE FACTS

Amici adopts the Appellees' Statement of the Facts, which can be summarized as follows.

On April 29, 2002, Alan Newsom wore a shirt to Jouett Middle School that had images of three human figures holding firearms in a firing position superimposed on the letters "NRA" on both sides of the shirt. The phrase "Shooting Sports Camp" appeared below these letters and images on the back of the shirt. The phrase did not appear on the front of the shirt. JA at 86.

Upon observing Newsom's shirt, an assistant principal advised him that the shirt was not appropriate school attire because it depicted "pictures of men shooting guns" and suggested that he either take it off or turn it inside out. The assistant principal further explained that alcohol and drugs were not allowed in school and that the school did not permit students to wear clothing with references to alcohol or drugs. She further explained that the school did not permit weapons in school or the images of weapons on student clothing. JA at 225.

Newsom's shirt gave the assistant principal the impression of sharpshooters reminiscent of the shootings at Columbine High School. JA at 224, 225. She was concerned that Newsom's fellow students would associate the images on his shirt with the tragedy at Columbine and other schools which suffered gun-related violence. *Id.* She was also concerned that the shirt would be distracting and would

confuse the students regarding the appropriate boundaries between firearms and the schools. *Id.* Lastly, she felt that the images on the shirt conflicted with her duty to prevent gun-related violence in the school. *Id.*

During the Summer of 2002, the middle school revised its handbook to expressly prohibit messages on clothing that relate to "weapons" and "violence." JA at 101-02, 125. Subsequent to the adoption of these revisions, Newsom wore, without objection, shirts with the letters "NRA," an NRA logo, and other messages referencing the NRA. JA at 226.

SUMMARY OF ARGUMENT

Albemarle acted in a constitutionally permissible manner when it prohibited Newsom from wearing a T-shirt with images of gunmen and guns. The standard for regulating freedom of speech set forth in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969), does not apply in the instant case. Newsom's shirt was not protected symbolic speech because he did not show that he intended to convey a protected message with the shirt and that the message would be understood by those around him. Further, Newsom's shirt bore no resemblance to the "pure speech" present in *Tinker*.

Assuming that Newsom's shirt is protected symbolic speech, Albemarle may still regulate it because it conflicts with the school's educational mission that "Guns and schools don't mix." The Supreme Court of the United States has

recognized that the educational mission of our nations' public schools is not limited to preparing students for higher education or the workforce and that the mission is not static. Albemarle's educational mission that "Guns and schools don't mix" has arisen out of the requirements of federal and state law, as well as the serious problem confronting public education today of weapons in schools. Adopting a policy which prohibits student clothing that depicts weapons is entirely consistent with Jouett Middle School's mission to prohibit weapons and prevent violence.

Finally, the policy should be upheld applying the analytical framework set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The school clearly had the authority under state law to adopt the policy; the policy clearly furthers an important and substantial interest in keeping weapons and weapons out of, and preventing violence in, the school; the school's interest in keeping violence and weapons out of the school is unrelated to suppression of student expression; and the school did not implement the policy in such a way as to restrict Newsom's ability to express his beliefs in the NRA.

ARGUMENT

I.

THE *TINKER* STANDARD DOES NOT APPLY.

Newsom contends that the school's regulation of clothing must be judged by the standard established in *Tinker, supra*. In *Tinker*, the Supreme Court held that a

specific prohibition against students wearing armbands violated the First Amendment where school officials failed to demonstrate that the "forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* at 509. The regulation at issue in *Tinker* was promulgated for the purpose of preventing the students from voicing their opposition to the war in Vietnam, an activity the Court considered to involve "direct, primary First Amendment rights akin to 'pure speech.'" *Id.* at 508-09. This case does not involve expressive activity, much less the type of expressive activity subject to the *Tinker* standard.[1]

In order for the wearing of his shirt to be considered constitutionally protected activity, Newsom must show (1) that he had "[a]n intent to convey a particularized message" by wearing the shirt and (2) that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-411 (1974).

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[1] Even if the image of sharpshooters on Newsom's t-shirt could be considered expressive conduct within the *Tinker* definition, the school policy of prohibiting such images would still be permissible. Barring Albemarle from prohibiting such images would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker* at 509. These images might reasonably inspire violent reactions in other students viewing the t-shirt because it may conjure up images of the recent sniper shootings during the Fall of 2002 or other recent school shootings. Such incidents would interfere with the operation of the school. Under *Tinker*, therefore, the school policy prohibiting images like those on Newsom's t-shirt is

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There is no evidence in the record establishing a particularized message Newsom intended to convey when he wore the shirt. To be sure, Newsom proffers two messages he says he intended to convey by wearing the shirt, e.g., that one "could" conclude that he was expressing his pride in exercising his Second Amendment rights and that he was expressing pride in attending a sports camp. *See* Brief of Appellant at 33-34. However, unlike in *Tinker* where "the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern – the Vietnam hostilities," *Spence*, *supra*, at 410, there is nothing in the circumstances surrounding the wearing of the shirt that would support a finding that Newsom's proffered messages would be understood by those who viewed the shirt.[2] Newsom's shirt is no different from the ubiquitous shirt proclaiming attendance at a band camp or at a football camp or at the limitless number of activities available to youth in this day and time. It certainly does not convey "an unmistakable message" about a matter of "intense public concern." Newsom cannot satisfy the two-pronged test

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permissible because it is necessary to prevent possible disruption and chaos among students that is inspired by the images.

[2] The assistant principal certainly did not understand the messages that Newsom contends he intended to convey. Rather, it brought to mind the tragedies of Columbine and concerns about violence in schools. *See* JA at 224, 225.

for establishing symbolic speech and, therefore, his shirt is not entitled to First Amendment protection.

Even if one assumes, as did the District Court, that Newsom's shirt constitutes protected symbolic speech, *see* JA at 282, it bears no resemblance to the "pure speech" present in *Tinker*. Unlike the problem confronting the Supreme Court in *Tinker*, "[t]he problem posed by the present case does [ ] relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment." *Tinker*, *supra*, at 507-508. Moreover, unlike the intended ban on the particularized message present in *Tinker*, this case involves a general policy which is not aimed at a particular message. The record is clear that Newsom was permitted to wear NRA shirts after the April incident and after the challenged policy went into effect. Thus, the District Court's finding that "the school sought to suppress the form of the message (graphic depictions of gunmen), and not the message itself," JA at 282-83, is plainly correct.

Simply stated, this case does not involve the specific regulation of the type of speech found in *Tinker*, and it would be inappropriate to apply the *Tinker* standard to the policy in this case.

II.

SCHOOLS HAVE THE RIGHT TO REGULATE STUDENT SPEECH THAT CONFLICTS WITH THE SCHOOLS EDUCATIONAL MISSION.

Assuming that Newsom's shirt is protected symbolic speech, the *Tinker* standard is not the only standard by which the school's clothing policy may be judged. In *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), this Court upheld a prohibition against a student publication containing an advertisement of drug paraphernalia and a derogatory cartoon of a school administrator. In doing so, the Court correctly observed that the disruption standard in *Tinker* was "merely one justification for school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification." *Id.* at 1206. The teachings of the Supreme Court make it clear that *Tinker* is not boundless and that the regulation of speech may be justified on grounds other than material disruption of the educational process or substantial disorder in the school. One such ground is when the protected activity conflicts with a school's educational mission.

In *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), the Court upheld disciplinary action against a student for making sexual comments during a school speech. The Court rejected the application of the *Tinker* standard to the expressive activity in question.

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students

> wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondents would undermine the school's basic educational mission.

Id. at 685. The Court reaffirmed the authority of school officials to regulate speech based upon the school's educational mission in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside of school." *Id.* at 266. (citing *Fraser*, *supra*, at 685.) *See Littlefield v. Forney Independent School Dist.*, 268 F.3d 275, 283 (5th Cir. 2001). ("[T]he free expression rights of students are balanced by the corresponding interest of furthering the educational mission of schools."); *See also Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding the school's prohibition of a Marilyn Manson t-shirt containing a three headed Jesus with the word "believe," capitalizing the letters "LIE" as violative of the school's "Dress and Grooming policy. The Court held that "where Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts."); *Scott v. School Board of Alachua County*, 2003 U.S. App. LEXIS 5392 (11th Cir. Mar. 20, 2003) (Students' First Amendment rights "should not interfere with a school administrator's

professional observation that certain expressions … could lead to [ ] an unhealthy and potentially unsafe learning environment for the children they serve.")

Fraser and *Kuhlmeier* recognize that the educational mission of our nation's public schools is not limited to imparting knowledge to prepare the students for higher education or the workforce, nor is it static. Our schools must adapt their mission to meet the challenges confronting the schools in today's world. It is undeniable that one serious problem confronting public education today is the presence of weapons in our schools.

While it is clear that students do not shed their constitutional rights at the schoolhouse door, it is also all too clear that a large number of students do not shed their weapons at the schoolhouse door, sometimes with catastrophic results. A report published by the National Center for Education Statistics and the Bureau of Justice Statistics entitled "Indicators of School Crime and Safety 2001"[3] confirms the presence of violence and the use of weapons in our nation's schools. Considering nonfatal crimes, including violent crimes and theft, in 1999 students were victims of about 2.5 million crimes while they were at school. Report at p. 4. Also in that year, students ages 12 through 18 were victims of approximately

[3] See Bureau Of Justice Statistics, U.S. Dept. of Justice; National Center for Education Statistics, U.S. Dept. of Educ., *Indicators of School Crime and Safety* (2001). (Hereafter the "Report").

186,000 serious violent crimes at school. *Id.* at Executive Summary, pp. v, vii-viii. In just one year, from July 1, 1998 through June 30, 1999, there were 47 school-associated violent deaths in the United States, 38 of which were homicides. *Id.* at Executive Summary, p. vii; 2. The Report found that in 1996-1997, ten percent of all public schools reported to a law enforcement representative at least one serious violent crime, including murder, rape, sexual battery, suicide, physical attack or fight with a weapon, or robbery. *Id.* Students ages 12 through 18 living in urban and suburban areas were "equally vulnerable to serious violent crime at school." *Id.* at Executive Summary, p. viii, 4. In 1999, eight percent of students in grades 9 through 12 reported being threatened or injured with a weapon on school property.[4] *Id.* at p. 9.

Obviously concerned about violence and the presence of weapons at school, Congress enacted the Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §§ 7101, *et seq.*, including the Gun Free Schools Act, 20 U.S.C. §§ 7151. School boards are encouraged to develop drug and violence prevention programs which include "a clear and consistent message that acts of violence . . . are wrong and harmful." 20 U.S.C. § 7162. Federal funding to public schools is tied to the

[4] The schools in Albemarle County are not immune to the presence of weapons. For example, the assistant principal related at least one incident in which a student brought a gun to a school picnic. *See* JA at 224.

adoption of discipline policies that prohibit the possession of illegal weapons. *See* 20 U.S.C. § 7114(d)(7)(A). In addition, every state receiving federal funds must enact a law requiring expulsion for at least one calendar year of any student who brings a firearm to school. *See* 20 U.S.C. § 7151(b)(1).

The General Assembly of Virginia has also enacted legislation, both in recognition of the problem and in fulfillment of its obligation under federal law. The Virginia School Crime and Violence Prevention Act[5] was passed in 1993 in response to increasing violence in the Commonwealth's communities and schools. That Act required, among other things, that the Virginia Board of Education establish guidelines for student conduct policies. Those guidelines identify the problem facing public education very succinctly. "Protecting the right of every child to a free, public education has become increasingly challenging for educators in recent years," and "[t]he number of violent young people coming to school is increasing, and students and school personnel live with an ominous threat of danger. No one has the answers, because complex situations never have simple solutions." Virginia Dep't of Educ., Student Conduct Policy Guidelines (1994), at v.

[5] Ch. 889, 1993 Va. Acts of Assembly.

Among the measures adopted by the General Assembly to address violence and weapons are criminal sanctions for bringing a wide array of weapons onto school property, including firearms, *see* Va. Code Ann. § 18.2-308.1; a requirement that students who bring firearms onto school property or to a school-sponsored event be expelled for a minimum of one calendar year, *see* Va. Code Ann. § 22.1-277.07; enabling schools boards to require students charged with or found to have violated policies relating to weapons to attend an alternative education program, *see* Va. Code Ann. § 22.1-277.2:1; and a requirement that local school boards develop programs to prevent violence and crime on school property. *See* Va. Code Ann. § 22.1-279.9. All of these measures supplement the general authority of a Virginia school board to adopt discipline policies. *See* Va. Code Ann. § 22.1-78.

Adopting a policy which prohibits student clothing that depicts weapons is entirely consistent with Jouett Middle School's legally required mission to prohibit weapons and prevent violence in the school. This part of the policy is no different from the part that would prohibit students from wearing clothing with images of a beer can or a cigarette. Just as those parts of the policy prevent students from promoting alcohol and tobacco in the school, so too does the weapons provision prevent students from promoting weapons in school. It would be incongruous to require schools to allocate their precious resources to teach students about the

perils of weapons in school and to impose substantial penalties on students who bring weapons to school, on the one hand, and then require the schools to allow students to wear clothing to school depicting those weapons on the other. At the very least, it would send a confusing message to the students. As stated by the assistant principal, the images of sharpshooters on the shirt "could reasonably be interpreted by other middle school students as promoting the use of guns and [she] felt that the imagery conflicted with [her] obligation to discourage and prevent gun-related violence in schools. JA at 224. The shirt "invoked in [the assistant principal's] mind images associated with events at Columbine High School and at other public schools which had suffered gun-related violence among students and staff." *Id.*

In short, both the reality of the world in which we live and the requirements of federal and state laws make the eradication of weapons and violence in our schools a significant mission of our local school boards. In this case, Jouett Middle School has decided that a policy banning clothing depicting weapons is appropriate to fulfill that mission. "[E]ducational policy [is an] area in which [federal courts'] lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42

(1973). Experience counsels here that the Court uphold the constitutionality of the clothing policy as a reasonable step in fulfilling its mission.

III.

THE POLICY AT ISSUE ALSO PASSES THE *O'BRIEN* TEST.

Jouett Middle School's policy can also be upheld under the analytical framework set forth in *United States v. O'Brien,* 391 U.S. 367 (1968). In *O'Brien,* the Court held that "government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

In *Littlefield v. Forney Independent School Dist., supra*, the Court upheld a school uniform policy requiring students to wear "solid color polo-type shirts with collars, oxford-type shirts, or blouses with collars in one of four colors." *Id.* at 280. The uniform policy was enacted in part "to increase student safety by reducing gang and drug related activity as well as the likelihood of students bringing weapons to school undetected." *Id.* The Court "had little difficulty" concluding that the uniform policy "passes constitutional scrutiny under the *O'Brien* standard," finding, that the school board had the authority under state law to pass a mandatory school uniform policy; that "improving the educational

process is undoubtedly an important and substantial interest of . . . the school board;" that the school board's "interests in the health, safety, and order of public schools are sufficient government interests under *O'Brien;"* and, finally, that the students failed to produce any evidence that the school board's interest in enacting the uniform policy was to suppress expression. *Id.* at 286. Rather, the court found that the record demonstrated that the uniform policy "was adopted for other legitimate reasons unrelated to the suppression of student expression." *Id.* at 287. These reasons included reducing the likelihood that students could bring weapons onto school property undetected. *Id.* The Court found that the school board implemented the policy to "increase safety . . . [and] reduce . . . the likelihood of students bringing weapons to school undetected," and that the incidental restrictions on student expression are "no more than is necessary to facilitate [the school board's] interest." *Id.*

Although the lower court did not hinge its decision on the *O'Brien* test, the *O'Brien* analysis is applicable to the facts of this case. First, the school clearly had the authority to adopt the policy under state law. *See* Va. Code § 22.1-78 (authorizing school boards to "adopt bylaws and regulations, not inconsistent with state statutes and regulations of the Board of Education, for its own government, for the management of its official business and for the supervision of schools,

including but not limited to the proper discipline of students, including their conduct going to and returning from school.")

Second, as discussed above, the policy clearly furthers an important or substantial interest in keeping weapons and images of weapons out of the public schools. Third, the school's interest in keeping violence and weapons out of the schools is undisputedly without relation to suppression of student expression. Rather, the policy is aimed at the "form," not the substance, of the message. Finally, the school did not implement the policy in such a way as to restrict Newsom's ability to express his beliefs in the NRA. *See* JA at 225 ("My request that Newsom change his shirt was directed solely to the graphic images portrayed on the back of the shirt and not to the written . . . initials 'NRA.'") and JA at 226 ("Since the beginning of the 2002-2003 school year, Newsom . . . [has worn] different shirts bearing the initials 'NRA,' and NRA logo, or other written messages referencing the NRA. . . . The school has not . . . taken any measures to prohibit him from wearing these shirts and he has continued to do so."). Importantly, Appellees' restrictions on a student's wearing images of weapons "pertain only to student attire during school hours and do not affect other means of communication." *Littlefield*, 268 F.3d at 287; *see also Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) ("Although students are restricted from wearing clothing of their choice at school, students remain free to wear what they

want after school hours. Students may still express their views through other mediums during the school day. The [dress code] requirement does not bar the important 'personal intercommunications among students' necessary to an effective educational process.") (*quoting Tinker*, *supra*, 393 U.S. at 512).

For these reasons, this Court should apply the *O'Brien* test to determine that the policy was not a constitutional infringement on Newsom's First Amendment rights.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request this Court to uphold the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief of Amici Curiae has been prepared using:

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_____

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 18th day of April, 2003, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required number of copies of this Brief of *Amici Curiae*, and I further certify that I served by first class U. S. mail, the required copies upon:

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