United States Court of Appeals
for the Ninth Circuit

No. 12-15403

MARY FRUDDEN AND JON E. FRUDDEN,

Plaintiff-Appellant,

vs.

KAYANN PILLING, ROY GOMM UNIFORM COMMITTEE, HEATH MORRISON, LYNN RAUH, WASHOE COUNTY SCHOOL DISTRICT, and DEBRA BIERSDORFF,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
No. 3:11-cv-00474-RCJ-VPC
The Honorable Robert C. Jones

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this matter under 28 U.S.C. § 1331, because this case involves a federal question: whether defendants' school uniform requirement violates the First and Fourteenth Amendments. This Court has jurisdiction under 28 U.S.C. § 1291, because the appeal is from a final order—the Jan. 31, 2012 grant of defendants' motion to dismiss—that disposes of all parties' claims. The appeal is timely because the Notice of Appeal was filed Feb. 27, 2012, ER 1.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a public school uniform policy that (1) generally mandates that schoolchildren display a motto on their clothes, and (2) gives children the option of wearing the uniforms of "nationally recognized youth organizations, such as Boy Scouts and Girl Scouts on regular meeting days" is unconstitutional, is certainly constitutional, or may or may not be unconstitutional depending on the evidence that plaintiffs can introduce.

STATEMENT OF THE CASE

Mary and Jon Frudden sued in district court, claiming that the mandatory uniform policy of the public school to which their children were assigned—the Roy Gomm Elementary School—violated the First Amendment, as incorporated against the states by the Fourteenth Amendment. The district

court granted defendants' motion to dismiss, concluding that under no set of facts could plaintiffs prevail.

STATEMENT OF FACTS

In Fall 2011, the Roy Gomm Elementary School adopted a uniform policy, which states, in relevant part,

> The main purpose of the Roy Gomm School Uniform Policy is to establish a culture of 'one team, one community' at Roy Gomm Elementary School. . . .
>
> . . .
>
> Uniform shirts are polo style shirts that are available in red and navy blue. These shirts have the Roy Gomm logo on the front.
>
> Uniform shirts are available for purchase through Roy Gomm Elementary.
>
> Uniform bottoms must be khaki or tan in color. . . .
>
> . . .
>
> The uniform may not be altered in any way. . . .
>
> . . .
>
> Roy Gomm Elementary School strives to achieve full compliance with the uniform policy. The administration will resort to disciplinary action when students are non-compliant with the written uniform policy. All students enrolled at Roy Gomm Elementary School are required to wear the school uniform. Uniforms must be worn during Roy Gomm's official school hours (designated by the Washoe County School District). . . .
>
> Exemptions to the Uniform Policy apply only in the following instances:

> 1) When a student wears a uniform of a nationally recognized youth organization such as Boy Scouts or Girl Scouts on regular meeting days;
>
> 2) On days designated as "free dress/spirit wear" days on the school calendar included in the Roy Gomm Parent Handbook and Calendar;
>
> 3) Field trips that are designated by specific teachers as "free dress" field trips;
>
> 4) When a student is on campus outside of normal school hours. . . .

First Amended Complaint at 16–19 (ER 43–46). What the policy calls the "logo" actually consists of a picture of gopher coupled with the name of the school and the school motto, "Tomorrow's Leaders," First Amended Complaint at 25–26 (ER 52–53). (The district court opinion describes the T-shirts as containing the motto "One Team, One Community," Dist. Ct. Op. at 10, ER 18, but that is a mistake: "One Team, One Community" is the School's description of the "culture" that "[t]he main purpose of the Roy Gomm School Uniform Policy is to establish." First Amended Complaint at 16, ER 43.)

If students do not comply with the policy, they must change their clothes, and are also disciplined: they receive detention for the first offense, in-school suspension for the second offense, and out-of-school suspension for the third offense. First Amended Complaint at 19–20 (ER 46–47). The

Fruddens intend to prove that, when their children came to school wearing an American Youth Soccer Organization uniform, the School treated this as a violation of the policy. First Amended Complaint at 24–25 (ER 51–52). Likewise, the Fruddens intend to prove that, when the Fruddens' son "wore the mandatory uniform shirt inside out so that the logo [and the motto] was not visible," that too was treated as a violation of the policy, and the child "was requested to and did turn the uniform shirt right side out so that the logo and written words could be viewed." First Amended Complaint at 27 (ER 54).

SUMMARY OF ARGUMENT

The Roy Gomm Elementary School uniform policy is markedly different from the dress policy upheld by *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008). First, the Gomm policy, unlike the dress policy in *Jacobs*, requires students to wear T-shirts that contain a school motto. This is unconstitutional under *Wooley v. Maynard*, 430 U.S. 705 (1977), which struck down a requirement that drivers display a state motto on their car license plates.

Second, the Gomm policy is not a content-neutral dress policy, but instead provides an exemption for uniforms of "nationally recognized youth organizations such as Boy Scouts and Girl Scouts." The policy is thus both

content-based, because it exempts speech of a particular content from a content-neutral prohibition, and impermissibly discretionary, because it leaves school officials no guidance about what organizations are "nationally recognized." The policy must therefore be evaluated under strict scrutiny, which it cannot pass.

Beyond these differences in the policies, the procedural posture of this case is also dispositively different from the procedural posture of *Jacobs*. *Jacobs* upheld the grant of a motion for summary judgment, and concluded that the policy passed the *United States v. O'Brien* test because, "[i]n the absence of any *evidence* from Plaintiffs that the uniform policies fail to advance the important government interests of increasing student achievement, enhancing safety, and creating a positive school environment, we conclude that the first prong of the intermediate scrutiny test is satisfied," 526 F.3d at 436 (emphasis added). But in this case, the district court granted a motion to dismiss, without giving plaintiffs the opportunity to introduce "evidence" "that the uniform policies fail to advance the important government interests of increasing student achievement, enhancing safety, and creating a positive school environment." Plaintiffs are at least entitled to have such an opportunity.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's order granting a motion to dismiss under Rule 12(b)(6)." *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011).

ARGUMENT

I. Requiring Students to Wear a School Motto on Their T-Shirts Is an Unconstitutional Speech Compulsion

In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court held that drivers cannot be required to display a state motto on their license plates. Such a requirement, the Court held, unconstitutionally "forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715.

The requirement in this case is even more clearly unconstitutional. First, the School requires that the motto be displayed on a child's clothing, which is even more closely associated with one's person than one's car would be.

Second, as Justice Rehnquist pointed out, at least in *Wooley* the driver had the opportunity to disclaim any endorsement of the motto, by just attaching a bumper sticker repudiating the sentiments that the license plate motto expresses. *Id.* at 722 (Rehnquist, J., dissenting). Here, the Uniform Policy provides that "The uniform may not be altered in any way," First Amended

Complaint 18 (ER 49); the Fruddens expect to prove that this means students may not display any messages on their clothing, so students lack any ability to disassociate themselves from the motto.

Wooley, of course, applies fully to the school environment. Indeed, *Wooley* relied on the Supreme Court's first compelled speech case, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), which struck down a speech restriction imposed by public schools.

And *Wooley* applies to the motto in this case. The motto "Tomorrow's Leaders" conveys at least two viewpoints.

First, it conveys the view that leadership should be celebrated, and should be valued above being a follower, and above charting one's own path separate from others and thus being neither a leader nor a follower. Indeed, the purpose of mottoes is generally to affirm some viewpoint about what people should do, believe, or support.

Yet some students might not share this viewpoint, and might not want to express it on their own bodies. *See, e.g.*, Mark Galli, *The Leadership Cult: Why Are We Fascinated with the Very Thing Jesus Warned Us Against?*, Christianity Today, Nov. 13, 2008, 9:33 am, http://www.christianitytoday.com/ct/2008/novemberweb-only/146-44.0.html ("In our culture, leadership has become a 'cult'—in the sense of an obsessive or faddish devotion. . . .

Christian colleges are all about 'developing future leaders.' . . . [But] a lot of servant leadership talk seems like an attempt to help us feel better about wielding authority."). Requiring students who are skeptical of the celebration of leadership to endorse such a viewpoint "'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642).

Of course, many people do share the view that leadership is valuable. But

> The fact that most individuals agree with the thrust of [the] motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable.

Id. at 715.

Second, "Tomorrow's Leaders" conveys the view that this particular school is likely to produce tomorrow's leaders. This too is a view that others might not share. Some students might think the school does not foster leadership well. Others might be unsure, and might not want to endorse an assertion in which they lack confidence.

Alexander Solzhenitsyn, for instance, admonished his fellow Russians to "live not by lies"—to refuse to endorse government propaganda that they believe to be false. Alexander Solzhenitsyn, *Live Not by Lies*, *in* THE DEMO-

CRACY READER 207 (Diane Ravitch & Abigail M. Thernstrom eds. 1992). Each person, he argued, must resolve to never "write, sign or print in any way a single phrase which in his opinion distorts the truth," and to never "take into hand nor raise into the air a poster or slogan which he does not completely accept." *Id.* at 209. This path is not for everyone, and perhaps Americans do not need such uncompromising insistence on truth as much as Soviet-era Russians did. But *Wooley v. Maynard* protects Americans' rights to follow this path if they choose, by protecting "an individual's First Amendment right to avoid becoming the courier," 430 U.S. at 717, for beliefs that they see as false.

So the School's motto, which the uniform policy requires students to display, expresses an ideology with which students may disagree. And this is unsurprising: The point of mottoes is to express a viewpoint about what is true or worthy, and for any viewpoint there will be some dissenters.

But even if the motto is seen as a purely unideological banality, compelling its display remains unconstitutional. As the Tenth Circuit held,

> In general, First Amendment protection does not hinge on the ideological nature of the speech involved. Likewise, the First Amendment's proscription of compelled speech does not turn on the ideological content of the message that the speaker is being forced to carry. The constitutional harm—and what the First Amendment prohibits—is being forced to speak rather than to remain silent.

Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004).

And this conclusion in *Axson-Flynn* follows directly from Supreme Court precedent. Even "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)). Banal slogans therefore may not be prohibited—and they likewise may not be compelled. As the Court has held, the First Amendment prohibits compulsions of slogans to the same extent as it prohibits restrictions on slogans. "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 796–97 (1988); *Barnette*, 319 U.S. at 633 ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.").

As this Court noted in *Jerry Beeman & Pharmacy Services, Inc. v. Anthem Prescription Management LLC*, 652 F.3d 1085 (9th Cir. 2011), some compulsions to report "purely objective" "facts" may be constitutional. *Id.* at 1100. But, as the *Beeman* decision likewise made clear, compelling people

to display a "'Government-mandated . . . motto,'" *id.* at 1099 (quoting *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006)), is far removed from compelling them merely to disclose objective facts. And that is true whether the motto is strident or is seen by some as banal and "neutral," *Stevens*.

Indeed, *Jacobs*' explanation for why the dress policy in that case *did not* amount to a speech compulsion helps show why the motto display requirement in this case *does* amount to such a compulsion. *Jacobs* reasoned that "[the school] does not force Dresser to communicate any message whatsoever—much less one expressing support for conformity or community affiliation—simply by requiring him to wear the solid-colored tops and bottoms mandated by its uniform policy," 526 F.3d at 438, and that "[t]he stated purpose of the dress code was *not* simply to promote school spirit," *id.* at 435 n.37 (internal quotation marks omitted). Likewise, *Jacobs* noted that "[w]earing a uniform does not involve written or verbal expression of any kind," where the "uniform . . . consists of nothing more than plain-colored tops and bottoms." *Id.* at 438.

But wearing a uniform with a motto on it does involve "written or verbal expression," and Roy Gomm School does force students "to communicate [a] message," by requiring them to display specific words on their T-shirts (rather than just wearing plain-colored tops). This message may indeed be

seen as a message "expressing support for conformity or community affiliation," because, according to the School itself, the "main purpose of the Roy Gomm School Uniform Policy is to establish a culture of 'one team, one community' at Roy Gomm Elementary School," First Amended Complaint 16 (ER 43)—indeed, a form of "school spirit" center around the notion that the school "community" will produce "Tomorrow's Leaders." And, in any event, even if the School's stated purpose for the Uniform Policy is ignored, the motto at the very least forces students "to communicate [the] message" embodied in the "written . . . expression" "Tomorrow's Leaders."

The district court rejected the compelled speech argument, reasoning, "There is no meaningful risk that a bystander would think any of the hundreds of identically dressed young children on the grounds of an elementary school individually chose the motto and/or mascot appearing on their uniforms." Dist. Ct. Op. at 10 (ER 14). But the First Amendment prohibits speech compulsions even when all listeners would recognize that the speech was compelled by the government, rather than being individually chosen by the speakers.

Indeed, the district court's argument is much the same as what was argued by the *Wooley* dissent. That dissent argued that the compelled display of the state motto on license plates was constitutional because people who

are "required to [display] state license tags, the format of which is known to all as having been prescribed by the State" would not be seen by observers "to be advocating political or ideological views." 430 U.S. at 721 (Rehnquist, J., dissenting).

The *Wooley* majority, though, rejected this argument. To the majority, the compulsion to display a motto was presumptively unconstitutional simply because it required each driver "to be an instrument" for distributing a message he or she condemned, *id.* at 715, regardless of whether the public would perceive the driver as endorsing the message. Likewise, the compulsion to display a motto in this case is presumptively unconstitutional because it requires each student "to be an instrument" for distributing a message he or she condemns, regardless of whether viewers would perceive the student as endorsing the message.

The Roy Gomm School Uniform Policy is therefore a speech compulsion that must be judged under strict scrutiny, *id.* at 716, and it cannot pass this strict scrutiny. Whatever the government interest might be in imposing a simple dress policy, as in *Jacobs*, there is no *compelling* government interest in requiring students to display a motto.

II. The Exception for "Uniform[s] of Nationally Recognized Youth Organization Such as Boy Scouts or Girl Scouts on Regular Meeting Days" Renders the Uniform Policy Unconstitutionally Content-Based

An otherwise content-neutral policy becomes content-based—and presumptively unconstitutional—when it contains content-based exclusions. Thus, for instance, a general ban on picketing near a school was rendered unconstitutionally content-based by the presence of an exclusion for labor picketing. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972). A general ban on residential picketing was rendered unconstitutionally content-based by the presence of a similar labor picketing exclusion. *Carey v. Brown*, 447 U.S. 455, 460–61 (1980). A general ban on photographic reproductions of American currency was rendered unconstitutionally content-based by the presence of an exclusion for "newsworthy or educational" purposes. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984). A general sales tax was rendered unconstitutionally content-based by the presence of an exemption for "religious, professional, trade, or sports periodical[s]." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 226, 229–30 (1987).

This Court's conclusion in *Jacobs* upholding a dress policy rested on the policy's content-neutrality. Indeed, the *Jacobs* policy originally contained an exception for Scouting uniforms, but the district court in that case expressed "strong reservations" about the exception, because the "content-specific" na-

ture of the exception kept the policy from being "content-neutral." Order, *Jacobs v. Clark County School District*, 2:04-cv-01490-RLH-LRL, PACER doc. no. 12, at 9, http://ia601202.us.archive.org/22/items/gov.uscourts.nvd.19398/gov.uscourts.nvd.19398.12.0.pdf (D. Nev. Nov. 10, 2004). After the district court decision, the school district eliminated the Scouting uniform exclusion, and this Court considered only the exclusionless, content-neutral policy. 526 F.3d at 424.

Jacobs did uphold a dress policy that had one narrow exception: for "student clothing [that] contain[s] the school logo." *Id.* at 432. This Court acknowledged that there was a "colorable" argument that this "reflects an impermissible content-based (and, indeed, viewpoint-based) preference for expressions of school pride," but stressed that this was only a "narrow exception" for "an item"—the logo—"expressing little, if any, genuine communicative message." *Id.* at 433.

Youth organization uniforms, on the other hand, communicate powerful messages. The Boy Scouts, for instance, is a justly popular and generally worthy organization, but it is associated with a particular set of beliefs. Its task is to "instill values in young people," and those values—according to the Scouts' Oath—include doing one's "duty to God," doing one's "duty to . . . [one's] country," and "keep[ing one]self . . . morally straight," which has

been interpreted as embodying traditional sexual morality and rejecting homosexuality. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649 (2000).

The wearing of the Boy Scouts uniform communicates membership in the group, and allegiance to the values represented in the Oath. Both those observers who applaud the Boy Scouts and those who disapprove of its policies would recognize the wearing of the uniform as conveying this message. And "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan*, 468 U.S. at 648–49.

To be sure, the School's Uniform Policy lists the Boy Scouts and Girl Scouts as examples of "nationally recognized youth organizations," and is thus presumably open to other such organizations. But this vague phrase offers school authorities vast discretion to decide which organizations are "nationally recognized" and which are not, and thus only reinforces the conclusion that the "youth organizations" exclusion makes the policy unconstitutional.

The term "nationally recognized youth organization" is comparable in its vagueness to the terms "[r]ecognized charitable cause" and "Federal, State, County or Municipal . . . cause," which the Supreme Court held to be unconstitutionally vague, partly because they do not "provide explicit standards for

those who apply" those phrases. *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 621–22 (1976). And, as the Supreme Court held in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), when a rule lacks "'narrowly drawn, reasonable and definite standards' guiding the hand of the . . . administrator" and a "decision" under the rule "is left to the whim of the administrator," with "[n]othing in the [rule] or its application prevent[ing] the official from encouraging some views and discouraging others through the arbitrary application [of the rule]," "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." *Id.* at 132–33.

The same principles apply to school uniform policies. As the district court held in *Jacobs v. Clark County School District*, 373 F. Supp. 2d 1162 (D. Nev. 2005)—in a part of the opinion that was not challenged on appeal—the First Amendment is violated when school authorities have the discretion to provide "unlimited exception to the mandatory uniform requirement without insuring that such exceptions would not be viewpoint specific." *Id.* at 1185. The *Jacobs* district court said this about a policy that gave school authorities the power to suspend a dress policy "for designated spirit days, special occasions, or special conditions," *id.* at 1184, but it is at least as true when school authorities have the power to decide which student organi-

zations' uniforms may be worn, based on a discretionary judgment about whether the organization is sufficiently "nationally recognized."

Indeed, plaintiffs are prepared to produce evidence that the school refused to treat even the American Youth Soccer Organization as a "nationally recognized youth organization" for purposes of this exception. First Amended Complaint at 24–25 (ER 51–52). Given this exclusion of even the popular and respected AYSO, there is no assurance that uniforms related to more controversial or ideological groups (for instance, the neo-Pagan SpiralScouts[1] or the Young People's Socialist League[2]) will get the same preferential treatment that Boy Scouts and Girl Scouts uniforms receive. The exception for the uniforms of "nationally recognized youth organizations" therefore makes the policy impermissibly content-based, and impermissibly susceptible to viewpoint discrimination.

More broadly, the "nationally recognized youth organizations" exception represents a preference for widely held views—those views that are popular enough to be endorsed not just by any youth organizations, but by "nationally recognized" ones—and against idiosyncratic or marginal views. Such a

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[1] *See* SpiralScouts, http://www.spiralscouts.org/; Kathleen Richards, *Raising Pagans; When Daddy Is Catholic and Mommy Is a Witch, What's a Couple to Teach Their Children?*, EAST BAY EXPRESS, Mar. 28, 2007.

[2] Young People's Socialist League, http://socialistparty-usa.org/ypsl/.

preference is itself unconstitutional viewpoint discrimination. *See, e.g.*, *Hopper v. City of Pasco*, 241 F.3d 1067, 1079 & n.12 (9th Cir. 2001) (concluding that exclusion of "controversial" speech from a limited public forum was unconstitutional viewpoint discrimination, partly because "[w]idely accepted views will be much less likely to spark controversy than expressions of the opposing (minority) view"). And again such discrimination was not present in *Jacobs*, where the dress policy permitted *no* messages of support for outside organizations.

The Roy Gomm School Uniform Policy is therefore content-based, and must be judged under strict scrutiny, which again it cannot pass. Whatever the government interest might be in imposing a uniformly applied dress policy, as in *Jacobs*, there is no compelling government interest in discriminating in favor of the expression embodied in Boy Scouts and Girl Scouts uniforms (and uniforms of other "nationally recognized youth organizations") and against other student expression.

III. *Jacobs* Calls for Decisions About the Constitutionality of Uniform Policies to Be Decided Based on the "Evidence," Not at the Motion to Dismiss Stage

Jacobs several times stressed that the constitutionality of uniform policies turns on the "evidence." Yet in this case, the district court's grant of a motion to dismiss precluded the challengers from introducing any evidence.

In deciding whether the dress policy was content-neutral or content-based, *Jacobs* noted that "the record evidence unambiguously indicates that the District's purpose in enacting the Regulation was to further the Regulation's stated goals, not to suppress the expression of particular ideas." 526 F.3d at 432. *Jacobs* likewise reasoned that "Plaintiffs put forth no evidence that the Regulation's logo allowance was an attempt by the District to inundate the marketplace of ideas with pro-school messages or to starve that marketplace of contrary opinions." *Id.* at 433. Instead, according to *Jacobs*, "all evidence suggests that the District considered the logo to be an identifying mark, not a communicative device." *Id.*

Similarly, in applying the intermediate scrutiny applicable to content-neutral restrictions, *Jacobs* noted that the state of the evidence was important, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994), for the proposition that "the court must determine whether the government's evidence 'demonstrate[s] that the recited harms are real, not merely conjectural and that the regulation will in fact alleviate these harms in a direct and material way.'" 526 F.3d at 435. Likewise, in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), this Court stressed that even scrutiny of content-neutral speech restrictions requires a well-developed record:

> [T]he First Amendment interests advanced by the developed time, place, and manner jurisprudence do[] require that we apply . . .

> mid-level scrutiny with care, paying attention to the details of the regulation at issue, *the state of the record*, and the fit between the regulation and the governmental interest asserted.

Id. at 1059 (emphasis added); *see also, e.g.*, *id.* at 1046 (noting that "[t]he City has not provided any evidence" that the regulated speech undermined government interests to the point that a permit requirement could be imposed); *id.* at 1049 (noting that "[t]he City submitted evidence, which Berger does not dispute, that, before the introduction of the location restriction, it received weekly complaints" about speakers' misbehavior, and that "[t]he City's evidence also indicates that [the regulated speakers] regularly engaged in disruptive and volatile territorial disputes"); *id.* at 1050 (noting that plaintiff had an opportunity to "supply additional evidence that would preclude us from drawing an inference in favor of the City").

In this case, the district court granted defendants' motion to dismiss, without giving the Fruddens an opportunity to introduce evidence at trial or accompanying a motion for summary judgment. If the Fruddens are given a chance to conduct discovery, and to introduce further evidence, they may obtain evidence that "the District's purpose" is indeed to "suppress[] . . . particular ideas," or that the Uniform Policy will not "in fact alleviate [any asserted] harms in a direct and material way." The factual premise for this Court's decision in *Jacobs*—that plaintiffs had an opportunity to introduce

evidence that would show the unconstitutionality of the dress policy, but did not do so—is absent in this case.

CONCLUSION

The School's Uniform Policy unconstitutionally requires students to display a motto that they may not wish to endorse. The Policy is unconstitutionally content-based, given its preference for certain speech (such as Boy Scouts uniforms) over other speech. And even if the Policy is not, as a matter of law, an unconstitutional speech compulsion or content-based speech restriction, the Fruddens are entitled to an opportunity to develop the factual record that would show that the Policy was motivated by a desire to suppress certain ideas, or that it is unconstitutional even if it is content-neutral. For these reasons, the district court's decision should be reversed.

Respectfully submitted,

s/ Eugene Volokh

Counsel for Plaintiffs-Appellants Mary Frudden and Jon E. Frudden

June 6, 2012

STATEMENT OF RELATED CASES

The Fruddens state that there are no cases pending in this Circuit that satisfy the definition of "related case" under Ninth Circuit Rule 28–2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because the brief contains 4,758 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman typeface.

Dated: June 6, 2012

s/ Eugene Volokh

Counsel for Plaintiffs-Appellants Mary Frudden and Jon E. Frudden

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 6, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by first-class mail, postage prepaid, to the following non-CM/ECF participants:

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Dated: June 6, 2012

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