United States Court of Appeals
for the Ninth Circuit

No. 12-15403

MARY FRUDDEN and JON E. FRUDDEN,

Plaintiffs-Appellants,

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

APPELLANTS' REPLY BRIEF

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

The Fruddens' opening brief argued that *Wooley v. Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), bar schools from requiring that students display a motto on their shirts.[1] The appellees' proposals for avoiding the force of these precedents are not sound.

A. That the Frudden Children Avoided Disciplinary Sanctions Does Not Affect the First Amendment Analysis

Appellees (whom we will refer to as "the school defendants") argue that "[t]he Frudden children were never actually disciplined," School Def. Br. 15, for refusing to wear the shirts that bear the motto, while the respondent in *Wooley* had been arrested. But the Uniform Policy clearly mandates the wearing of the shirts, and specifies that students who violate the policy will be disciplined. Frudden Br. 3–4. The Fruddens allege that one of their children was threatened with discipline when he tried to obscure the school motto by wearing his shirt inside out. Frudden Br. 4.

The motto requirement in the Uniform Policy, like the *Wooley* motto requirement, is therefore a government-imposed speech compulsion, even if so

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[1] Appellants apologize for erroneously referring to the shirts as "T-shirts" rather than "polo shirts" in the opening brief, and appreciate appellees' pointing out the error, School Def. Br. 11.

far the Frudden children have not been punished for failing to abide by that compulsion. And the First Amendment applies the same way to pre-enforcement challenges as to postenforcement challenges (assuming the challengers have standing, something the school defendants do not dispute, *see Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (concluding that plaintiffs had standing to mount a preenforcement challenge, when it appeared likely that the law would be enforced against them)). Indeed, several of the Supreme Court's most recent free speech cases held various government-imposed speech restrictions unconstitutional even though the challengers had not yet been punished for violating those restrictions. *See, e.g.*, *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam); *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

B. The Lack of Criminal Penalties for Violating the Uniform Policy Does Not Affect the First Amendment Analysis

The school defendants try to distinguish *Barnette* on the grounds that failure to say the Pledge could lead to expulsion and to a criminal conviction for the parents. School Def. Br. 22. But the First Amendment applies to disciplinary actions and civil liability even when those are not backed by the threat of criminal punishment. *See, e.g.*, *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

C. First Amendment Law Does Not Distinguish Between Compulsions to Display Something "Each Day" and Compulsions to Display Something "180 Days per Year"

The school defendants aim to distinguish *Wooley* on the grounds that "the Maynards had to drive around each day displaying of the state's ideological message/motto on their license plate for hundreds of people to see," School Def. Br. 17, while the Frudden children "are required to attend school for a minimum of 180 days per year," and "are also not out in the general public for hundreds of people to see, each day."

Yet no First Amendment case draws a distinction between speech compelled "each day" and speech compelled "180 days per year." Indeed, *Barnette* struck down as an unconstitutional speech compulsion the requirement that schoolchildren say the Pledge of Allegiance every school day, not every day of the year. And *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986), struck down the requirement that a company include another organization's message in its mailers just four times a year. *Id.* at 6 (plurality opinion) .

Indeed, if one is to count time, it makes more sense to count total hours rather than days; Roy Gomm students are expected to be in school 6 hours

per day,[2] for at least 180 days, which is to say over 1000 hours per year, and it is doubtful that the Maynards had to be on the road that long. Compelled speech doctrine requires no such timekeeping, but forbids compelling speech even for a brief time. *Pacific Gas & Elec. Co.*, 475 U.S. at 6, 12 (plurality). Likewise, no case suggests that there is a constitutionally significant difference between the "hundreds of people" who see a car on the street and the dozens of students who see the Fruddens each day in class, or likely the hundreds who see them on the playground. (The Roy Gomm Elementary School has over 450 students.[3])

The school defendants cite *Lowry v. Watson Chapel School District*, 508 F. Supp. 2d 713 (E.D. Ark. 2007), to support their argument that a 180-day-a-year speech compulsion is somehow different from a 365-day-a-year speech compulsion. But *Lowry* was not a compelled speech case, never dis-

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[2] *Roy Gomm Elementary School Daily Schedule*, http://www.washoe.k12.nv.us/gomm/Dailyschedule.html.

[3] *Student Enrollment Counts*, http://nde.doe.nv.gov/Resources/Nevada2011-2012_StudentEnrollment.xls (2011–12 data, spreadsheet line 541).

cussed *Wooley* or *Barnette*, and did not involve a school uniform policy that required students to display a school motto.[4]

In *Lowry*, the district court distinguished school uniform policies from school hairstyle regulations. An earlier Eighth Circuit decision had held that a school hairstyle regulation violated students' "unenumerated" "freedom to govern [their] personal appearance." *Id.* at 718. *Lowry* distinguished that decision on the grounds that a short hair requirement affected this freedom both in school and outside it, *id.* at 719, while a school uniform policy only affected a student at school.

The Fruddens agree that the Roy Gomm School Uniform Policy only affects students at school and in certain school-sponsored activities. But the right to be free from compelled speech—recognized as part of the constitutionally enumerated "freedom of speech"—applies in school as well as outside it. *See Barnette*.

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[4] *Lowry v. Watson Chapel Sch. Dist.*, No. 5:06-CV-00262, at 17–22 (E.D. Ark. Aug. 22, 2007) (Apps. A & B), http://ia600408.us.archive.org/0/items/gov.uscourts.ared.66280/gov.uscourts.ared.66280.50.2.pdf. The Appendices that contain the challenged versions of the uniform policy are available on PACER, but were not reproduced in F. Supp.

D. The Possibility of Criticizing a Speech Compulsion Does Not Make the Speech Compulsion Permissible

The school defendants argue that "the Fruddens' children" have various "channels of expression open to them" to protest the policy. School Def. Br. at 20. But so did the Maynards in *Wooley*; indeed, the Maynards were even free to protest the compelled display of the motto right next to the motto itself, on a bumper sticker—something the Frudden children may not do, given the prohibition on altering the uniform. First Amended Complaint at 18 (ER 45); School Def. Br. at 18. Yet *Wooley* nonetheless struck down the speech compulsion, thus concluding that the Maynards' ability to protest the compulsion could not make the compulsion permissible. *See also Pacific Gas & Elec. Co.*, 475 U.S. at 15–16 (plurality opinion) (likewise striking down a requirement that a company include a certain message in its mailings, even though the company was able to respond in a way that made clear it disagreed with that message).

E. The Compelled Speech Doctrine, Including *Wooley v. Maynard*, Applies to Public Elementary Schools

The school defendants argue that *Wooley* does not apply to public schools. School Def. Br. at 20–22. Yet the foundational case of the compelled speech doctrine, *Barnette*, itself involved a speech compulsion in pub-

lic school—indeed, in a public elementary school.[5] And *Wooley* began its compelled speech discussion by relying on *Barnette*:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943).

430 U.S. at 714.

The freedom not to display a motto on one's car thus stems from the "right of freedom of thought" that schoolchildren as well as adults enjoy, *Barnette*. It follows that the freedom not to display a motto on one's shirt likewise stems from the same "right of freedom of thought" that is applicable to schoolchildren as well as adults. And none of the cases that the appellees cite suggest the contrary.

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[5] *Morgan v. Swanson*, 659 F.3d 359, 386 (5th Cir. 2011) (en banc) (noting that *Barnette* involved elementary school students); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag.") (citing *Barnette*); Brief for *Amici Curiae* Gathie Barnett Edmonds and Marie Barnett Snodgrass in Support of Petitioners, *Morgan v. Swanson*, No. 11-804, at 13 (U.S. Jan. 26, 2012) (noting that the children in the case "were only 9 and 11 respectively," attending a school with "four rooms for students ranging from grades one through six"), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/11-804-Edmonds-Cert-Amicus.pdf; *Barnette*, 319 U.S. at 644 (describing the law as affecting "little children").

Judges in other circuits have expressed some uncertainty about the degree to which elementary school students are protected against speech *restrictions.*[6] Yet there is no need for this Court to resolve that dispute now, or to decide whether it makes sense to draw a constitutionally significant line between sixth graders—the Roy Gomm Elementary School goes up to the

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[6] On one side, one Seventh Circuit judge has stated that "it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool students)." *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (7th Cir. 1996) (Manion, J., writing for himself)*; cf. id.* at 1545 (Eschbach, J., concurring) (expressly declining to join that part of Judge Manion's opinion); *id.* at 1546, 1547 (Rovner, J., concurring in part and concurring in the judgment) (expressly joining only other parts of Judge Manion's opinion).

On the other, Judge Manion himself acknowledged that some speech restrictions may be unconstitutional even in elementary schools. *Id.* at 1538 ("we have held that religious speech cannot be suppressed solely because it is religious (as opposed to religious and disruptive or hurtful, etc.), a principle that makes sense in the elementary school environment"). The Third Circuit has stated, "That age is a crucial factor in [the *Tinker*] calculus does not necessary mean that third graders do not have First Amendment rights under *Tinker*," and that, "elementary school students' freedom of conscience has been constitutionally protected for decades," though it concluded that the *Tinker* analysis should take the children's age into account. *Walker-Serrano ex rel. Walker*, 325 F.3d at 417–18. And the Fifth Circuit, sitting en banc, expressly applied *Tinker* to elementary student speech, in a case where school officials argued that *Tinker* did not apply. *Morgan*, 659 F.3d at 412; *id.* at 386 (Benavides, J.) (expressly stating what the majority implicitly accepted, which is that "the student-speech rights announced in *Tinker* inhere in the elementary-school context").

sixth grade[7]—and the eighth grader who was held to be protected in *Tinker*, 393 U.S. at 504. Whatever the status of freedom from speech restrictions, *Barnette*, which involved elementary school students, made clear that the freedom from speech *compulsions* does apply in elementary schools.

And this protection for freedom from speech compulsions in all grades makes sense. Wearing one's own chosen inscription on a T-shirt may often be disruptive or vulgar, so restricting such speech—especially in the lower grades—may often be particularly important. Some might thus argue that this justifies a per se rule of not protecting elementary school students from speech restrictions. But declining to wear the school motto, like declining to say the pledge, will rarely be materially disruptive or vulgar, regardless of the age of the student.

Any such rare instances of speech compulsions that are necessary to prevent disruption can be handled using *Tinker* (and of course speech compulsions that are part of the school's academic curriculum, such as class assignments, would remain constitutional in all grades under *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268 (1988)). But appellees do not even try to show that obscuring a school motto on one's shirt is necessarily disrup-

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[7] *Student Enrollment Counts*, http://nde.doe.nv.gov/Resources/Nevada2011-2012_StudentEnrollment.xls (2011–12 data, spreadsheet line 541)

tive, nor is the motto part of the curriculum. Under *Barnette*, the motto requirement is therefore unconstitutional.

F. The Fruddens' Complaint Alleged that the Compulsion to Display the Motto Was Unconstitutional

The school defendants appear to suggest that the Fruddens' challenge to the motto is improper because the First Amended Complaint "focus[ed] on 'One Team, One Community'"—what the Uniform Policy describes as the "purpose" of the uniform policy—and not on the "Tomorrow's Leaders" motto. School Def. Br. 14–15. But the Fruddens' claim is that the Uniform Policy, "to establish a culture of 'one team, one community,'" requires students to wear shirts that display the motto "Tomorrow's Leaders." The Fruddens mentioned the motto in their First Amended Complaint, at 26 (ER 53), and stated, in their second claim for relief, that the policy unconstitutionally "[c]ompels the Doe Plaintiff students to wear the Roy Gomm logo and printed message." First Amended Complaint, at 31 (Fruddens' Supplemental Excerpts of Record 7). Mary Frudden also objected to the motto at the hearing on the motion to dismiss. Transcript of Hearing on Motion to Dismiss, at 26–27 (Fruddens' Supplemental Excerpts of Record 1–2).That is precisely the argument that is now before this Court.

G. Requiring that People "Be an Instrument" for Displaying the Motto is as Unconstitutional in This Case as It Was in *Wooley v. Maynard*

The school defendants argue that the requirement that children display the motto on their shirts is permissible "because under the circumstances, it is unlikely that anyone viewing a uniform-clad student would understand the student to be communicating a particularized message, especially in this elementary school context." School Def. Br. 11.

To the extent that appellees are arguing that there is no First Amendment violation because viewers would see the message as government-prescribed rather than as voluntarily displayed by the wearer, exactly the same argument was foreclosed by the Court in *Wooley*. The *Wooley* 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 be considered to be advocating political or ideological views." 430 U.S. at 721 (Rehnquist, J., dissenting). But the majority rejected this argument, concluding that it is impermissible to make each driver "be an instrument" for distributing a message that he or she disapproved of, regardless of whether the public would perceive the driver as endorsing the message. *Id.* at 715.

Nor is there any reason for the analysis to be different in an elementary school. The Frudden children are being required to "be an instrument" for displaying the motto just as the adults in *Wooley* were.

To be sure, some restrictions are permitted in schools but not elsewhere: The government acting as public school educator has more power to restrict disruptive, vulgar, or pro-drug speech than the government acting as sovereign has. *Tinker*, 393 U.S. at 506, 513; *Fraser*, 478 U.S. at 682; *Morse*, 551 U.S. at 396–97. But the government's power to compel the recitation of a pledge is as limited in the school context as elsewhere. *Barnette*, 319 U.S. at 633–34. And neither the Supreme Court nor this Court has ever suggested that the teaching of *Barnette* applies only to pledges and not to (as in *Wooley*) mottoes.

The school defendants' main argument must therefore be that the motto here does not involve an "ideological message." School Def. Br. 12–13. But, as the Fruddens' brief argues, Frudden Br. 7–9, the motto "Tomorrow's Leaders" conveys at least two viewpoints: that leadership is to be celebrated, and that this school is likely to produce tomorrow's leaders. This is not partisan ideology, but it is ideology nonetheless. Mottoes, unsurprisingly, are often used to express a message, a message that the majority approves of but that some dissenters may not wish to endorse.

The appellees' brief does not rebut the Fruddens' analysis of the motto. The brief does fault the structure of the Fruddens' argument, claiming that it represents counsel's "own personal views of the meaning of 'leadership' and the 'point of mottoes,'" School Def. Br. 23, and unduly rests on references to the views that some students or other people may take, School Def. Br. 25. But the point of the discussion in the Fruddens' opening brief, Frudden Br. 7–9, is simply to explain how the motto *is* "ideological"—how it expresses a particular view that some might disagree with, rather than just being a banal generality that should be seen as lacking any viewpoint.

If people can reasonably perceive the motto as expressing a particular viewpoint that they may not wish to "be an instrument" for distributing, *Wooley*, then that helps draw the analogy to *Wooley*. And the Frudden brief's explanation of the variety of attitudes towards the question of leadership—and the variety of possible attitudes towards whether the Roy Gomm School promotes leadership well—thus helps show that the motto indeed expresses a contestable viewpoint rather than being empty verbiage. (By way of analogy to the question whether compelled speech is sufficiently ideological to violate the Free Speech Clause, consider the determination of whether government speech is sufficiently religious to violate the Establishment Clause: That inquiry asks whether "a 'reasonable observer' might . . .

perceive" the government speech "to be a positive endorsement of religion." *Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996).)

Moreover, as the Fruddens' opening brief also argues (in the alternative), Frudden Br. 9–10, "even if the motto is seen as a purely unideological banality, compelling its display remains unconstitutional." The brief then cites cases that support the view that even "[w]holly neutral futilities" are constitutionally protected "as fully" as other speech. Frudden Br. 10. The school defendants' only response is that "both descriptions [ideological and banal] are wholly unrealistic in the actual *context* of this case, which involves young elementary school children, not adults," School Def. Br. 28, and that therefore all the precedents that the Fruddens cited are inapplicable.

Yet *Barnette* held that elementary school children have the right to be free from speech compulsions. *See supra* p. 6. Of necessity, school authorities must have some authority to restrict some speech in school, such as disruptive or vulgar speech. *Tinker*, 393 U.S. at 506, 513; *Fraser*, 478 U.S. at 682. But, as *Barnette* made clear, schools have no such authority to compel students to convey the school's preferred message.

Nor do the school defendants point to cases repudiating, in the school context, the general rule that the First Amendment draws no line between government action dealing with speech about great controversies and gov-

ernment action dealing with "wholly neutral futilities." *United States v. Stevens*, 130 S. Ct. 1577, 1581 (2010) (internal quotation marks omitted); *Cohen v. California*, 403 U.S. 15, 25 (1971) (internal quotation marks omitted). Indeed, in *Hatter v. Los Angeles City High School District*, 452 F.2d 673 (9th Cir. 1971), this Court expressly rejected a proposal to limit *Tinker* to "issues of 'great national concern,'" and to exclude from protection speech that is "'without weight or substance and . . . raises no question of constitutional proportions.'" *Id.* at 675 (citations omitted).

"It is not for this or any other court," this Court held, "to distinguish between issues and to select for constitutional protection only those which it feels are of sufficient social importance." *Id.* And what is true of speech restrictions should be equally true of speech compulsions. *See 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."); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796–97 (1988) ("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.").

And indeed the dangers of trying to draw a constitutionally sound and administrable distinction between "ideological speech" and banal speech are just as substantial when it comes to adult speech, *see Stevens* and *Cohen*, high-school student speech, *see Hatter*, and elementary school student speech. Though indeed elementary schools are in large part "about learning, including learning to sit still and be polite," School Def. Br. 30, this offers no justification for requiring students to display the school's message, whether the school authorities believe it to be banal or ideological.

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

The school defendants argue, quoting *Jacobs v. Clark County School District*, 526 F.3d 419, 432 n.30 (9th Cir. 2008), that "the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech **because of** agreement or disagreement with the message it conveys," School Def. Br. 32–33, and that "the detailed allegations in this record reveal that the purpose of the Roy Gomm uniform policy was to further the stated goals, *not* to suppress the expression of particular ideas." *Id.* at 33.

But as the *Jacobs* quote makes clear, a regulation may be impermissibly content-based when the government has adopted it because of *agreement*

with a favored message. Moreover, a regulation may be impermissibly content-based when the government enforces or interprets it in a way that favors a particular content of speech, because of agreement with that speech. And a regulation may be impermissibly content-based because it contains content-based exceptions. *See, e.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 226, 229–30 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984); *Carey v. Brown*, 447 U.S. 455, 460–61 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94–95 (1972); *Corales v. Bennett*, 567 F.3d 554, 567 (9th Cir. 2009).

The school defendants argue that the exception for the Boy Scouts, the Girl Scouts, and unnamed other "nationally recognized youth organizations" was adopted merely as a convenience "for parents who do not have to worry about getting children home to change before a meeting." School Def. Br. 37. But it is not implausible that an exception that lists two highly popular associations—including the Boy Scouts, which, as the Supreme Court has noted, is a group that conveys an identifiable set of messages, *Boy Scouts of America v. Dale*, 530 U.S. 640, 648–49 (2000)—might indeed have been enacted at least partly "because of agreement . . . with the message [of the groups]," School Def. Br. 32–33. The Fruddens are entitled to an opportunity to gather evidence that shows this indeed happened. *See, e.g.*, *Cornelius v.*

NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 812–13 (1985) (remanding for a determination whether a government agency policy regulating speaker access to an internal program was impermissibly motivated by the viewpoint of certain speakers).

Moreover, the Uniform Policy exemption is on its face limited to "nationally recognized youth organizations." Parents who want to not have to worry about getting children home to change before a meeting of a merely local organization are not accommodated. That too suggests that the school may have been motivated by agreement with the messages of the most prominent (and specifically named) nationally recognized youth organizations. And, as the Appellants' Opening Brief discussed in more detail, the vagueness of the "nationally recognized youth organization" exception increases the risk that the policy will be applied in a viewpoint-based way—itself a First Amendment problem. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 621–22 (1976), and *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132–33 (1992), which are discussed at Frudden Br. 16–18.

If the exception indeed makes the Uniform Policy content-based—or if the compelled motto display is treated as a speech compulsion under *Wooley*—then the Policy must be evaluated under strict scrutiny, which it cannot pass. The school defendants argue that "Fruddens' failure to develop

their 'strict scrutiny' arguments should result in their appropriate rejection," School Def. Br. 38, but "strict scrutiny" is not some separate legal theory that the Fruddens are raising and thus need to develop in detail. Rather, the familiar First Amendment rule is that both content-based speech restrictions and speech compulsions are generally unconstitutional unless they can be justified under strict scrutiny, or unless some First Amendment exception applies. *Wooley*, 430 U.S. at 716; *Riley*, 487 U.S. at 800–01; *Arkansas Writers' Project*, 481 U.S. at 231.

And strict scrutiny in these fields is an extraordinarily demanding test, which is almost never satisfied. *See United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring in the judgment) (noting that in free speech cases "'strict scrutiny' implies" "near-automatic condemnation" by the Court). The school defendants have not argued, either in district court or before this Court, that it can be satisfied. Their theory has been that the Uniform Policy is not content-based and is not a speech compulsion, and therefore need not pass strict scrutiny. *See* Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, at 16–17 (Fruddens' Supplemental Excerpts of Record 3–4) (briefly mentioning "strict scrutiny analysis" as an "inapplicable subject" in this case).

And the Policy cannot pass 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, Frudden Br. 13, and no compelling interest in distinguishing some outside group uniforms from others, Frudden Br. 19. No more detailed analysis of this appears to be necessary, absent an argument from the school defendants that their speech compulsion and the accompanying exception does indeed pass strict scrutiny.

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"—both the evidence about the school district's purpose in enacting the Uniform Policy and the evidence about whether the Policy is indeed likely to materially serve the government interests. Yet in this case, the district court's grant of a motion to dismiss precluded the Fruddens from introducing any evidence. Frudden Br. 19–22. At the least, this case should be remanded to the district court so that more evidence can be uncovered and presented to the court, first at a hearing on a motion for summary judgment following discovery, and then, if contested facts exist, at a trial.

The school defendants suggest that the Fruddens' lack of opportunity to uncover and present the evidence was their own fault, for three reasons.

First, appellees fault the Fruddens for not moving for summary judgment. School Def. Br. 40. But the appellees never even filed an Answer to the Fruddens' First Amended Complaint; instead, they proceeded to file a Motion to Dismiss. *See* Docket, ER 56–57. It makes little sense for plaintiffs to move for summary judgment before they even see the defendants' initial answer to the Complaint.

Second, appellees fault the Fruddens for not moving for a preliminary injunction and introducing evidence in that context. School Def. Br. 41. But a preliminary injunction is an "'extraordinary remedy.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Plaintiffs bear an especially "heavy burden" in showing their entitlement to such a remedy. *Id.* (internal quotation marks omitted). And because of the time-sensitive nature of a preliminary injunction request, a motion for a preliminary injunction imposes a substantial burden on the district court's docket.

Plaintiffs who do not need immediate relief therefore act properly in not seeking a preliminary injunction, and instead proceeding through the ordinary course of litigation—a Complaint, followed by an Answer, followed by

discovery, followed by a motion for summary judgment and a trial if that motion is denied. That is the path that the Fruddens chose to try to present their evidence. As they have argued, Frudden Br. 19–22, the district court erred in shutting off that path by granting a motion to dismiss.

Third, appellees fault the plaintiffs for not appealing the district court's denial of their motion seeking judicial notice of certain matters. School Def. Br. 42. But most of the evidence that *Jacobs* holds is relevant to evaluating the constitutionality of a student uniform policy is not judicially noticeable; it requires discovery and possibly cross-examination and factfinder judgments about credibility.

In upholding the Clark County Uniform Policy, *Jacobs* specifically stressed the significance of "the record evidence"—evidence about the government's "purpose" in enacting the policy, evidence "that the recited harms are real, not merely conjectural," and evidence "that the regulation will in fact alleviate these harms in a direct and material way," 526 F.3d at 432, 435 (internal quotation marks omitted)—to determining the constitutionality of uniform policies. The Fruddens are entitled to an opportunity to discover and introduce such evidence, an opportunity that the grant of the motion to dismiss erroneously foreclosed.

CONCLUSION

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

July 20, 2012

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 4,946 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: July 20, 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 July 20, 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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