Court of Appeal Docket No. 12-15403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEVADA
DISTRICT JUDGE ROBERT C. JONES
District Court Case No. 3:11-cv-00474-RCJ-VPC

APPELLEES' ANSWERING BRIEF

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APPELLEES' CORPORATE DISCLOSURE STATEMENT [Fed.R.App.P. 26.1]

Fed.R.App.P. 26.1 requires non-governmental corporate parties to identify any and all parent corporations and all publicly held corporations that own 10% or more of its stock, to enable judges to determine whether or not they need to recuse themselves by reason of a financial interest in the subject matter of the case.

The above parameters of Fed.R.App.P. 26.1 do not apply to Defendant-Appellee WASHOE COUNTY SCHOOL DISTRICT, inasmuch as it is a political subdivision of the State of Nevada. NRS 386.010(2).

Appellee "Roy Gomm Uniform Committee" is not a private or publicly held corporation, but is an informal committee of the Roy Gomm Elementary School Parent-Faculty Association, a Nevada non-profit corporation. The Roy Gomm Elementary School Parent-Faculty Association does not issue stock.

Dated: July 6, 2012.

MAUPIN, COX & LeGOY

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Debra O. Waggoner, Esq.
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Appellees WASHOE COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada ("WCSD"), KAYANN PILLING, ROY GOMM UNIFORM COMMITTEE, HEATH MORRISON, LYNN RAUH, and DEBRA BIERSDORFF (collectively, the "WCSD Parties") submit the following Answering Brief for Appellees pursuant to Fed.R.App.P. 28(b) and Circuit Rule 28-1, in response to the Appellants' Opening Brief ("AOB") filed by Appellants MARY FRUDDEN and JON E. FRUDDEN (collectively the "Fruddens").

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction in the proceedings below in the United States District Court for the District of Nevada ("District Court") was premised on 28 U.S.C. §1331 and 28 U.S.C. §1367. This Court has jurisdiction over the final decision of the District Court below in Dkt. #s 17 and 18, ER 4-5, 13-14, and 27, pursuant to 28 U.S.C. §1291.[1] The WCSD Parties agree with the last sentence of the Fruddens' Jurisdictional Statement at p. 1 of the AOB about the timeliness of the appeal.

[1] Pursuant to Ninth Circuit Rules 30-1.7, and 30-1.5, the WCSD Parties submit their Supplemental Excerpts of Record ("SER"). The SER consists of a few pages from the First Amended Complaint that the Fruddens did not include with their Excerpts of Record ("ER") and excerpts from Fruddens' opposition to the Motion to Dismiss filed below. These SERs are necessary to resolve the appeal.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When an elementary school uniform policy adopted by parental vote includes a requirement that students wear a shirt with a benign school logo consisting of the name of the school, a little gopher, and the words "Tomorrow's Leaders," and one of the policy's exceptions allows a student to wear uniforms of boy or girl scouts or uniforms of a nationally recognized youth organization on regular meeting days, and in school speech cases the younger the students, the more control a school may exercise, should the District Court's dismissal of the young childrens' First Amendment challenge be upheld when the uniform policy is not content-based, it exists in spite of, not because of, its impact on speech, and there are ample alternative outlets for the children to express themselves?

2. When Fruddens had several means below to present evidence, including under Rules 65 and 56 of the Federal Rules of Civil Procedure, but simply failed to do so, and they did not appeal the adverse ruling on their judicial notice motion, should waiver and bar preclude their belated request?

III. STATEMENT OF THE CASE

A. Nature of the Case.

This case presents a First Amendment challenge to Roy Gomm Elementary School's mandatory uniform policy by two young students who attend the school,

and their parents. The Fruddens' First Amendment objections center around the logo on the shirt, the ideology behind the policy, and an exception in the policy. The District Court, which had the benefit of very detailed allegations in the First Amended Complaint, dismissed it pursuant to Fed.R.Civ.P. 12(b)(6), in an Order replete with careful references to the record, and thoughtful analysis.

B. Course of the Proceedings Below and Disposition in District Court.

On July 6, 2011, the Fruddens alleged eighteen claims in a complaint filed against Dina Hunsberger, Heath Morrison, KayAnn Pilling, Lynn Rauh, and Chris Reich in their individual and official capacities, the Roy Gomm Uniform Committee, and the WCSD, arising out of the adoption of a school uniform policy at an elementary school. *See* ER 56 at Dkt. #1; ER 8 at lines 4-5; ER 5 at line 14; ER 6. Even though Fruddens purportedly sought "injunctive relief," Fruddens did not move for a preliminary injunction or a temporary restraining order, and they did nothing to move the case along until about three and a half months later. ER 56 at Dkt. # 3; ER 26 at lines 7-9; ER 8 at line 19.

On October 18, 2011, Fruddens filed their First Amended Complaint ("FAC"). ER 28. This time, there were sixteen claims for relief, the FAC omitted Mr. Reich as a defendant, and Debra Biersdorff was in the body of the FAC but not in the caption. ER 8 at lines 5-20; ER 28; ER 30 at lines 16-19.

On November 8, 2011, the WCSD Parties filed their Motion to Dismiss all of the Fruddens' claims. ER56-57 at Dkt. #7. Fruddens opposed the Motion on November 23, 2011, and Defendants replied on November 30, 2011. ER 57 at Dkt. #s 10, 11. Several days after the briefing had closed, Fruddens filed a motion for "judicial notice" ("JNM") on December 9, 2011, with attachments which were described by the District Court as "rather garden-variety documentary and photographic evidence" that fell outside the grounds for granting such a motion. ER 57 at Dkt. # 12; ER 26 at lines 10-13. The WCSD Parties opposed the JNM, and Fruddens replied. ER57 at Dkt. #s14, 15.

The District Court set oral argument to address both motions, and the Court heard arguments of counsel on January 17, 2012. ER 57 at Dkt. #s 13, 16. The District Court granted the WCSD Parties' Motion to Dismiss and denied Fruddens' JNM in an Order filed January 31, 2012, which dismissed the action. ER 5, 27; ER 57 at Dkt. # 17. Following entry of judgment in favor of the WCSD Parties, ER 4, the Fruddens filed their notice of appeal on February 27, 2012. ER 1-3.

IV. STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Fruddens are parents and guardians of their young children, who are described by the pseudonyms "John Doe" and "Jane Doe" in the litigation below.

ER 28 at lines 8-10; ER 29 at lines 1-3. The children are enrolled at Roy Gomm Elementary School in Reno, Washoe County, Nevada ("Roy Gomm"). ER 29 at ¶5; see ER 54 at ¶¶124-125 (during the 2011-2012 school year, John Doe was in Fifth grade; Jane Doe was in Third grade).

In April and May 2010, the Roy Gomm Elementary School Parent Faculty Association, a private non-profit fund raising organization ("Roy Gomm PFA"), attempted to implement a mandatory uniform policy at Roy Gomm by parental vote, which failed. ER 34-35 at ¶¶37-39.

The following school year, on or about February 11, 2011, during a meeting of the Roy Gomm PFA, Roy Gomm Principal Pilling appointed a Uniform Committee ("Committee") to gather information and educate parents about the research supporting uniforms. ER 35 at ¶¶40-41. The work of the Committee throughout the Spring of 2011 was announced in the April 2011 issue of the Roy Gomm PFA newsletter, the Gopher Gazette. ER 35 at ¶¶42-48. The notice indicated that an informational meeting and fashion show would be held at Roy Gomm on April 26, 2011, to discuss the possibility of implementing uniforms in the Fall of 2011. ER 35-36 at ¶¶48-49.

The meeting was held as scheduled and was led by the Roy Gomm PFA, the Committee, and Principal Pilling. ER 36 at ¶50. Numerous reasons were stated in

support of a uniform policy, many of which were repeats from the year before. ER36-37 at ¶¶51-55. These included, *inter alia*, helping to create an academic atmosphere, greater sense of belonging at school, school pride/spirit, simplification of parents' lives, increased attendance, increased test scores, fewer discipline referrals, fewer truancies, and increased student respect (valuing who a student is, rather than what he or she wears), etc. ER 36 at ¶51, ER 37 at ¶54.

The balloting and voting procedures commenced as school-uniform-opponent Mary Frudden sought and received additional information about the proposed uniform policy. ER 38-39. Principal Pilling announced via "connect-ed" on May 8, 2011 that the school uniform measure had passed and that Roy Gomm students would be wearing uniforms for the next school year. ER 40 at ¶69. Mary Frudden continued to oppose and criticize the uniform policy and accompanying procedures. ER 40-43, 48-49.

In the written uniform policy, the Roy Gomm culture of "one team, one community" is expressed. ER 43-44 at ¶89. The policy also indicates that the "uniforms serve to foster school spirit and unity" to promote a disciplined and safe learning environment, and that "students will feel like they are part of a 'team' working toward the goal of academic excellence." Id. The written policy also has provisions describing the Committee, the uniform itself (red or navy blue polo style

shirts with the Roy Gomm logo on the front), financial hardship, compliance, disciplinary action,[2] and procedures to rescind or amend the uniform policy. ER 44-48; *see also* ER 52-53 at ¶116 (logo consists of a gopher and the words "Roy Gomm Elementary School," with the words "Tomorrow's Leaders" above logo).

When the 2011-2012 school year began on August 29, 2011, banners with the theme of "one team, one community" purchased by the Roy Gomm PFA were featured at the front and back of the school. ER 50 at ¶101. The same theme from the banners and uniform policy was expressed by Principal Pilling at Roy Gomm Parent Night, and it was featured on the Roy Gomm PFA website and in a display cabinet outside the Roy Gomm administrative offices. ER 50-51 at ¶¶102-105.

On September 12, 2011, following a grace period at the beginning of the school year, John and Jane Doe wore the uniform of a nationally recognized youth organization, the American Youth Soccer Organization ("AYSO") to school. ER 51 at ¶107; ER 52 at ¶116. This was instigated by Mary Frudden. ER 51 at ¶108, ER 52 at ¶114. The uniform featured the AYSO logo on the upper right side of the front of the shirt, and black shorts. ER 51 at ¶107.

After Mary Frudden informed Principal Pilling about the attire of Jane and

[2] Under the "Disciplinary Action" section of the Roy Gomm uniform policy, "insubordination" and the "sequential and progressive discipline" that would follow only occurs when the student "refus[es] to change clothes." ER 47 at lines 2-7.

John Doe and the "written exemption" for the AYSO uniforms, Fruddens allege that both students were called "out of class for insubordination and failure to comply with the policy." ER 51 at ¶¶108-110. Thereafter, both John and Jane Doe changed into the school uniforms. ER 52 at ¶116 (when John Doe was asked if he would change, "[h]e stated yes."); ER 53 at ¶¶118-119 (both students changed their clothes and returned to their classrooms).

On September 13, 2011, John and Jane Doe again wore their AYSO uniforms. ER 54 at ¶¶124-125. Both students asked the consequences of not changing, which Principal Pilling explained would be insubordination or "breaking a rule," and 15 minutes detention at lunch for a first offense. Id. John Doe stated he did not want to change, but he would, and Jane Doe stated she would change. Id.

On September 14, 2011, John Doe was sent to the principal's office for wearing the uniform shirt inside out so the logo was not visible. ER 54 at ¶126. John Doe "was requested to, and did," turn the shirt right side out. Id.

V. STANDARDS OF REVIEW

A dismissal under Fed.R.Civ.P. 12(b)(6) is reviewable *de novo*. North Star Intern. v. Ariz. Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983). This Court may affirm on any basis supported by the record, even if the District Court did not rely

on that basis. United States v. State of Washington, 969 F.2d 752, 755 (9th Cir. 1992), *citing* Shaw v. Calif. Dep't of Alcoholic Beverage Control, 788 F.2d 600, 603 (9th Cir. 1986) (reviewing a dismissal for failure to state a claim), cert. denied, 507 U.S. 1051 (1993); Myers v. United States Parole Comm'n, 813 F.2d 957, 959 (9th Cir. 1987) (the decision of the District Court may be affirmed on any ground finding support in the record).

VI. SUMMARY OF THE ARGUMENTS

Throughout the AOB, Fruddens' numerous adult-speech cases are wholly inapt, and/or they ignore the *context* of this case. In particular, Wooley v. Maynard, 430 U.S. 705 (1977) is readily distinguishable on several fronts.

Fruddens' challenge to an elementary school uniform policy on First Amendment grounds is appropriately put to rest once and for all, because Roy Gomm's uniform policy passes Constitutional muster. The policy is grounded in legitimate regulatory goals in this elementary school context, and these goals were explained in detail prior to the parental vote. Moreover, in the elementary school context, the age of students bears an important inverse relationship to the degree and kind of control a school may exercise.

The uniforms are not compelled speech, because wearing a uniform is passive rather than active and if it conveys a message at all, that message is

innocuous and imprecise rather than particularized. There is no indication that the benign Roy Gomm logo is an attempt to inundate the "marketplace of ideas" with pro-school messages or to starve that marketplace of contrary opinions, particularly in the elementary school setting. In addition, other communication methods are available throughout the day, and the children may wear their clothing-of-choice during the majority of time they are not in school. The uniforms are content-neutral because the logo expresses little, if any genuine communicative messages in this elementary school context. Whatever marginal expression wearing an elementary school logo implicates, it does not rise to the level of being viewpoint-based. Fruddens' focus below on the uniform policy ideology of "one team, one community," which is based on their own allegations, does not appear on the uniform shirts, and is at odds with position on appeal attacking the logo on the shirt which includes "Tomorrow's Leaders."

Fruddens' "content-based" argument about Boy and Girl Scout uniforms and those of nationally recognized youth groups does not mesh with the facts below.

The "strict scrutiny" arguments are undeveloped and should not be considered. Fruddens do not need the opportunity to present "evidence." Fruddens' First Amended Complaint has such detail that, when taken as true under Fed.R.Civ. P. 12(b)(6), the District Court had ample allegations before it to decide the case.

The decision below should be affirmed for Fruddens' failure to provide this Court with any cogent bases for reversal.

VII. ARGUMENT

A. The Roy Gomm uniform shirt with a logo consisting of the school name, a little gopher, and "Tomorrow's Leaders" is not "speech compulsion" when worn by Fruddens' children, 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.

Fruddens' initial challenge to the District Court's ruling is an argument that the requirement to wear a school motto "on their T-Shirts" is an unconstitutional speech compulsion. AOB at p. 6. The uniform shirt at Roy Gomm is not a "T-Shirt," as inaccurately described by Fruddens. AOB at pp. 3, 4, 6, and 11. The school uniform shirt is a polo style shirt. ER 44 at lines 25-26. Fruddens' misstep is followed by another curious feature of the AOB: the conspicuous absence of any acknowledgment or recognition of the *context* in which this case occurs.

The *context* of this case involves children of tender years in an elementary school. See ER 29 at ¶5; ER 54 at lines 7, 12. The Fruddens' eagerness to distance themselves from this *context* is illustrated by the paucity in the AOB of school uniform cases, cases involving elementary schools, or school cases in general, favoring instead a number of adult speech cases. See AOB at pp. ii-iii (table of

authorities). In the elementary school setting, age and context are key. Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 96 (3rd Cir. 2009), cert. denied, 130 S.Ct. 1137 (2010); Walz v. Egg Harbor Township Bd. of Educ., 342 F.3d 271, 275 (3rd Cir. 2003), cert. denied, 541 U.S. 936 (2004). The age of the student bears an important inverse relationship to the degree and kind of control a school may exercise. Id. Age *is* a relevant factor in assessing the *extent* of a student's free speech rights in school. Walker-Serrano v. Leonard, 325 F.3d 412, 416 (3rd Cir. 2003) (italics in original; citation and quotation marks omitted).

Fruddens' initial salvo in the AOB at pp. 6-7 reflects their futile effort to ignore *context* by their reliance on Wooley v. Maynard, 430 U.S. 705 (1977). Wooley is a case about an adult married couple of the Jehovah's Witness faith who objected to a New Hampshire state statute requiring them to display the State's motto of "Live Free or Die" on their car's license plate. AOB 6, *citing* Wooley, 430 U.S. at 715. Fruddens' multi-faceted use of Wooley includes an argument that a motto displayed on a child's clothing "is even more closely associated with one's person than one's car would be." AOB at p. 6. In so doing, Fruddens eschewed any discussion of the oft cited "mobile billboard" comment from Wooley:

> New Hampshire's statute in effect requires that [Mr. and Mrs. Maynard] use their private property [their automobile] as a "mobile billboard" for the State's **ideological message** [of "Live Free or Die"]

> or suffer a penalty, as [Mr.] Maynard already has. As a condition to driving an automobile, a virtual necessity for most Americans, the Maynards must display "Live Free or Die" to hundreds of people each day.

430 U.S. at 715 (bracketed material and commas added for clarity; bold emphasis added). Wooley does not help Fruddens, however. Fruddens' case, and their arguments, are distinguishable from Wooley on a number of fronts.

1. Wooley is distinguishable, because the printed message was on the license plate in that case, but the Roy Gomm uniform policy's "**ideological message**" is not on the school uniform.

The supposed "**ideological message**" from the Roy Gomm uniform policy is "one team, one community." ER 43 at lines 25-26. But unlike Wooley, in which the **ideological message** and the motto printed on the license plate were identical, the Roy Gomm **ideological message** of "one team, one community" is **not** printed on the Roy Gomm school uniform. ER 52 at line 27, ER 53 at lines 1-2. Therefore, the Fruddens' children are **not** "billboards," mobile or otherwise, for the school uniform policy's "**ideological message**."

Fruddens' First Amendment claim alleges, *inter alia*, that the uniform policy requires students at Roy Gomm "to participate in the dissemination of an **ideological message** by displaying on their private property and in a manner and for the express purpose that it be observed and read by the public;" that the policy

"[c]ompels the Doe Plaintiff students and other students to speak the **ideological message** that they are a part of, affiliated with and/or a member of "**one team, one community**;" that the policy "compels students to identify themselves as associated and/or affiliated with "**one team, one community** that of Roy Gomm Elementary School, ...". (bold emphasis added).[3] SER 1-2 at ¶148.a.i-ii, ¶148.b; SER 3 at ¶154.c. (mandatory uniform policy compels them to speak a content-based and viewpoint-based message of, *inter alia*, "**one team, one community**"). See also AOB at p. 13.

The allegations in Fruddens' second claim for relief focus on "One Team, One Community." SER 2-4. By contrast, Fruddens' claim is devoid of any *express* mention of "Tomorrow's Leaders," and the single, likely intentionally, oblique reference to it is an allegation about being compelled to "wear the Roy Gomm logo and printed message." SER 2 at ¶148.a.iii at lines 5-6. Fruddens' factual allegations about "Tomorrow's Leaders" are similarly scanty, with a single statement in ER 53, ¶116 at lines 1-2, describing a polo shirt with "Tomorrow's

[3] Fruddens' second claim for relief under the First Amendment and 42 U.S.C. §1983 is entitled "Deprivation of Students' Rights and Privileges" re: "their constitutional rights of freedom of speech and freedom of expression while at school," and it encompasses paragraphs 146-175 of the FAC. See SER 1-6. That is the claim giving rise to issues in this appeal.

Leaders" above the logo. Since "Tomorrow's Leaders" was an afterthought in the FAC, the focus on it in the AOB is a departure from the facts of this case.[4] The District Court ruled on the facts presented in the FAC, not Fruddens' newly minted and inapplicable arguments. The latter are properly rejected.

2. Wooley is distinguishable, because there were actual and multiple prosecutions in that case, but the Fruddens' children were not disciplined under the Roy Gomm uniform policy.

The Frudden children were never actually disciplined for wearing other clothing in violation of the Roy Gomm uniform policy. ER 51 at ¶¶107-111; ER 52 at ¶¶115-116; ER 53 at ¶¶117-121; and ER 54 at ¶¶123-126. That readily distinguishes this case from the multiple prosecutions of Mr. Maynard for violating the state statute in Wooley. In Wooley, Mr. Maynard was charged on three separate occasions for violating the state statute. 430 U.S. at 708. He represented himself in court on the first charge, and explained his religious objections to the first judge about the motto. Id. The judge was sympathetic, but bound by state law to hold Maynard guilty. Id. Mr. Maynard was fined $25, which was suspended during

[4] In one of the rare instances in which Fruddens mention the District Court's ruling, they claim that the District Court made a "mistake" when it described the shirt motto as "One Team, One Community." AOB at p. 3, *citing* "Dist. Ct. Op. at 10, ER 18" (sic, it is ER 14). Fruddens' muddled phraseology in their FAC is responsible for that. See ER 51 lines 1-3 (FAC allegation suggesting that "one team, one community" *is* the printed message on the uniform shirt).

"good behavior." Id. (quotation marks in original).

In a second court appearance that included the other two charged offenses, Mr. Maynard was found guilty, fined $50, and sentenced to six months in jail. Id. The jail sentence was suspended but the judge told Mr. Maynard he had to pay both fines, which he refused to do as a matter of conscience. Id. The court there-upon sentenced Mr. Maynard to 15 days in jail, which Mr. Maynard served, and the third conviction was "continued for sentence" so that Mr. Maynard received no further punishment in addition to the 15 days in jail. Id.

Here, by stark contrast, there was only *talk* of disciplining the Frudden children, but nothing actually happened. ER 51 at ¶¶107-111; ER 52 at ¶¶115-116; ER 53 at ¶¶117-121; and ER 54 at ¶¶123-126. According to the plain language of the Roy Gomm uniform policy, the discipline of "insubordination," and any "sequential and progressive discipline" to follow, would occur *only* if the student "refus[es] to change clothes." ER 47 at lines 3-7. On the three occasions John Doe wore something else, and the two occasions when Jane Doe wore the AYSO uniform, they each changed clothes.[5] ER53 at ¶119; ER 54 at ¶¶124-126. *Ergo*, there was no discipline. Wooley does not fit the *context* of this case.

[5] Given the detail in the FAC, had there been any discipline at all, it would have been described in immense detail.

3. Wooley is distinguishable, because the Maynards were required to display the state's message each day in their car to hundreds of people, but the Fruddens' children do not wear the school uniform **each day**, given the substantial period of their lives they are not in school, and because they are not in public view for hundreds to see **each day**.

Another distinguishing feature of Wooley is 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**. 430 U.S. at 715 (emphasis added). Here, the Frudden's children are **not** required to wear the school uniform shirt (with only a school logo, not an ideological message) **each day** for **hundreds of people to see**. Under Nevada law, school children are required to attend school for a minimum of 180 days per year. NRS 388.090(1). The Frudden children spend less than half of the 365 days per year in school, and they are in a closed environment of an elementary school when they do wear the school uniforms. ER 5 at lines 18-19; ER 29 at ¶5; ER 46 lines 8-9. They are also not out in the general public for **hundreds of people to see, each day**, unlike the "mobile billboard" in Wooley.

In Lowry v. Watson Chapel Sch. Dist., 508 F.Supp.2d 713, 719 (E.D. Ark. 2007), a school uniform case, the court discussed the issue of the amount of time a uniform was worn. The policy in Lowry provided that the uniform must be worn at school approximately seven hours per day, five days per week for approximately

nine months of the year. The Lowry court correctly reasoned that during the remaining seventeen hours of the day, on weekends, during holidays, and during summers – whenever the student is away from school – the student is absolutely free of the school uniform policy. Id. Thus, the Fruddens' argument in the AOB at p. 6, mentioned above, about clothing being "more closely associated with one's person than one's car would be," fails as a Wooley construct, because that clothing is not worn **each day** for **hundreds of people to see**.

4. Fruddens' use of a remark from the Wooley dissent, about a person being able to disclaim endorsement of the state's motto by using a bumper sticker to repudiate that motto, does not help them, because the Fruddens' children also have ample and adequate means to disclaim endorsement of the school motto.

Fruddens point to a snippet of Justice Rehnquist's Wooley dissent. AOB at p. 6. Justice Rehnquist argued in favor of upholding the state statute, because he found that the Maynards had the opportunity to disclaim their endorsement of the state's motto by simply attaching a bumper sticker repudiating the sentiments of the license plate motto. AOB at p. 6, *citing* 430 U.S. at 722. In other words, the Maynards had alternative means of communication.

The Rehnquist dissent is used to argue that one of the provisions in the Roy Gomm uniform policy ("the uniform may not be altered in any way") *prevents* the Fruddens' children from displaying messages on their clothing, which means they

cannot "dissociate them selves from the motto." See AOB at pp. 6-7, *citing* First Amended Complaint at 18 (ER 49) (sic, should be ER 45, lines 23-24). This, they declare, they "expect to prove." AOB at p. 7.

This case involved the District Court's ruling on a Rule 12(b)(6) motion, so it accepted the truth of Fruddens' material allegations. See ER 9 at lines 6-8 (in considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff). As such, Fruddens' prolix FAC already alleges precisely what they say they "expect to prove."

A number of these "expect-to-prove" allegations are featured in the FAC at ¶148.b. (the uniform policy "compels the Doe Plaintiff students and other students to wear clothing containing only sanctioned express speech"); ¶148.d. (the uniform policy prohibits Doe Plaintiff students from asserting messages regarding any other team or social class association or affiliation); ¶148.e. (the uniform policy works to foreclose to Plaintiff students an entire medium of speech and expression). SER 2; see also p. 42, *infra* at section VII.G (more about "evidence," including Fruddens' specific allegations about what the evidence was or was not).

Moreover, as the District Court correctly noted below at ER 13, lines 17-20, when it cited Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 437 (9th Cir. 2008),

the Clark County School District uniform policy did not restrict more speech than was necessary because it left open ample alternative channels of expression, *i.e.*, students were still free to socialize, publish articles in the school newspaper, and participate in extra-curricular activities.

Here, too, the Fruddens' children have similar channels of expression open to them. They may voice their objections about school uniforms to teachers and administrators. See Lowry, *supra*, 508 F.Supp.2d at 720 (school uniform policy did not prohibit students from speaking to one another, to teachers, and to administrators, before and after classes, in the hallways, during classroom discussions, during extra-curricular activities, and the like). Fruddens' children may create a website, send text messages to their friends, write letters to the editor, or have their parents assist them to post online comments about their objections. These multiple avenues of communication debunk Fruddens' arguments about Justice Rehnquist's Wooley dissent.

5. Wooley is distinguishable, because it does not always, as Fruddens argue, "apply fully to the school environment," since this case does not have the facts to support that argument.

Another unsuccessful attempt to link Wooley to this case consists of Fruddens' contention that Wooley "applies fully to the school environment." AOB at p. 7. This is so, Fruddens say, because Wooley relied on "the first compelled

speech case" of West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), "which struck down a speech restriction imposed by public schools." AOB at p. 7. That argument lacks merit, for a number of reasons.

First, simply because one case is cited in another does not automatically place it on "all fours," so to speak, with the other case, or make it fully applicable in the other case. Wooley also relied on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974). See 430 U.S. at 714. According to Fruddens, then, that would necessarily mean that Wooley applies fully to every newspaper case. The illogic in Fruddens' argument is apparent.

Second, the facts in Barnette are so far afield from those in this case that Barnette is readily distinguishable. Barnette involved a West Virginia statute requiring schools to, *inter alia*, instruct students in history, civics, and the Constitution. Id., 319 U.S. at 625. The board of education thereafter adopted a resolution ordering the salute to the American flag to become a regular part of the program and activities of the public schools. Id. at 625-626. The "salute" to the flag was a stiff-arm salute, in which the saluter was required to keep the right hand raised with the palm turned up, while reciting the Pledge of Allegiance. Id. at 628. Not only were there objections to the salute as "being too much like Hitler's" (World War II was in progress), the penalties for non-compliance were severe. Id.

at 627-629 (brackets added). Failure to conform was insubordination, dealt with by expulsion, and readmission was denied until compliance. Id. at 629. An expelled child was deemed unlawfully absent and could be proceeded against as a delinquent, and the child's parents/guardians were liable to prosecution, convic-tion of which carried a fine of $50 and a jail term not to exceed thirty days. Id.

The facts of this case described at pp. 5-8 herein make Barnette inapt. Moreover, when Barnette was decided, the "clear and present danger" test was the only one mentioned. Id. at 633-634. In the ensuing years, First Amendment jurisprudence in the school setting has expanded greatly. Compare Id. at 633-634, with Jacobs, *supra*, 526 F.3d at 427-438 (detailed analysis of First Amendment school law in general, and in the context of a district-wide uniform policy).

History does show that Wooley has been cited in the school uniform context. Jacobs v. Clark County Sch. Dist., 373 F.Supp.2d 1162, 1173 (D. Nev. 2005), aff'd, 526 F.3d 419 (9th Cir. 2008). But that was about a middle school student's religious and moral objections to a uniform requirement as expressive speech, 373 F.Supp.2d at 1173, facts which are distinctly absent in *this* case. Thus, Wooley does not always apply to the school environment, as Fruddens argue, and it does not apply to the facts of *this* case, as shown above.

B. Fruddens' arguments on appeal about "leadership" do not reflect their

> arguments below, and since the District Court's ruling below was not premised on "Tomorrow's Leaders," Fruddens' anecdotal contentions and arguments have no force.

The focus of Fruddens' First Amendment claim below was **not** about "tomorrow's leaders." The allegation about the logo simply refers to "the Roy Gomm logo and printed message," SER 2 at ¶148.a.iii, without further elaboration.[6] Moreover, the District Court's ruling below is not based on a discussion of "leadership." See ER 13-14 (no such discussion).

Although "leadership" was only an afterthought to Fruddens below, their counsel on appeal is now inappropriately injecting himself into the mix by arguing his own personal views of the meaning of "leadership" and the "point of mottoes." AOB at pp. 7-9. Another similar intrusion by an attorney was rejected in a First Amendment/defamation case in which this Court affirmed the trial court's dismissal of the case on a Rule 12(b)(6) motion to dismiss: Knievel v. ESPN, 393 F.3d 1068, 1078 (9th Cir. 2005).

In Knievel, famed motorcycle stuntman Evel Knievel and his wife Krystal

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[6] In Fruddens' opposition to the WCSD Parties' Motion to Dismiss, Plaintiff Mary Frudden wrote that Fruddens had "no qualms with the Plaintiff students becoming "tomorrow's leaders,'. . ." but they do object to the "invalid, illegal and unconstitutional" manner in which the WCSD Parties expressed it. SER 10 at lines 18-25. In other words, she has no objection to her children being tomorrow's leaders, but she says it is a First Amendment violation for the school uniform to reflect that sentiment.

were photographed when they attended an ESPN awards show in 2001. Id. at 1070. The photograph depicted Evel in his motorcycle jacket and rose-tinted sunglasses with his right arm around his wife and his left arm around another young woman. Id. ESPN published the photo on its "extreme sports" website with a caption that read "Evel Knievel proves that you're never too old to be a pimp." Id. In defense of his good name and excellent reputation, Evel and Krystal sued ESPN in state court, contending that the photo and caption were defamatory because they accused Evel of soliciting prostitution, and implied that Krystal was a prostitute. Id. ESPN removed the case to federal court and filed a Rule 12(b)(6) motion to dismiss. Id. at 1071. The federal district court granted ESPN's motion, and this Court affirmed, in spite of Evel's arguments that he and his wife were entitled to a jury trial. Id. at 1072-1073. In support of one of Evel's arguments on appeal that even if ESPN's caption was an attempt at humor (which does not immunize a speaker from liability for defamation), the word "pimp" is, by its very nature, insulting. Id. at 1078. This is where the attorney injected himself into the argument:

> The writer of this appellate brief graduated from a pool hall he attended every day during his high school years and he most certainly did not lead a sheltered life across the tracks on the north side of his city. "Pimp" was an insult then and always has been in a proper law-abiding society.

Id. at 1078. The Court was not persuaded:

> But that argument, based entirely on the anecdotal childhood experience of the Knievels' lawyer, utterly fails to address the context in which the word appeared, and context can be dispositive as to whether or not a statement is actionable under the First Amendment.

Id. Here, too, counsel's anecdotal experience with "leadership" and "mottoes," his experiences with a religious website that labels leadership as a "cult," and his apparent affinity for Alexander Solzhenitsyn's advice to "his fellow Russians," AOB at pp. 7-9, should be disregarded because they utterly fail to address the *context* of *this* case.

To be sure, reasoned argument is a foundation of appellate briefing. But when arguments are presented that have no bearing on a case, which is the category into which counsel's arguments in the AOB at pp. 7-9 fall, they should be jettisoned.

C. Fruddens' arguments about "others" should be disregarded because even though the overbreadth doctrine permits school uniform opponents to invoke the rights of others in an attempt to invalidate a uniform policy, Fruddens could only do so if they can show the policy suppresses a *substantial amount* of protected conduct engaged in by others, facts which are wholly absent in *this* case.

Fruddens' abstract arguments continue with their nebulous references to unidentified "students," or "others," or "many people." AOB at pp. 7-9. The first reference is to "some students" who might not share "this viewpoint" and "might not want to express it on their own bodies." AOB at p. 7, last ¶. That is followed

by arguments about (i) "students" who "are skeptical of the celebration of leadership"; (ii) "many people" who "do share the view that leadership is valuable"; (iii) "others" who "might not share" the view that "this particular school is likely to produce tomorrow's leaders"; (iv) "some students" who "might think the school does not foster leadership well"; (v) "others" who "might be unsure" and "might not want to endorse an assertion in which they lack confidence"; (vi) individuals who do not want to become a courier "for beliefs they see as false"; and (vii) some students who are required to wear the uniform might disagree with the ideology. AOB at pp. 8-9.

Because Fruddens do not *expressly* state a facial or as-applied overbreadth challenge in this appeal, those references above from the AOB should be viewed as meaningless. "[T]his court must deal with the case in hand, and not with imaginary ones." Yazoo & Miss. Valley R.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219 (1912). "[T]he general rule [is] that a person to whom a statute may be constitutionally applied cannot challenge the statute on the grounds that it may be unconstitutionally applied to others." Osborne v. Ohio, 495 U.S. 103, 112 n. 8 (1990), reh'g denied, 496 U.S. 913 (1990) (brackets added). See also Jacobs, 373 F.Supp.2d at 1189 (refusing to consider assertions about an unidentified child attending an elementary school who was not a party to the suit – "the Court will

disregard the Dresser Plaintiffs' assertions respecting a non-party who is not mentioned, explicitly or implicitly, in the Complaint on record").

The exception to the rule, of course, is the substantial overbreadth doctrine. Osborne, *supra*. However, as noted in Blau v. Fort Thomas Public Sch. Dist., 401 F.3d 381, 391-393 (6th Cir. 2005) (cited with approval in Jacobs, *supra*, 526 F.3d at 435), an overbreadth challenge is easier said than done, because it cannot be sustained unless the policy regarding uniforms suppresses a "substantial" amount of protected First Amendment conduct engaged in by others under United States v. O'Brien, 391 U.S. 367, 377 (1968), reh'g denied, 393 U.S. 900 (1968). The District Court analyzed the O'Brien test in detail below, ER13-14, which Fruddens have not traversed with their generalized arguments about "others." [7] Moreover, as in Blau, 401 F.3d at 391, the record in this case reflects that the uniform policy exists in spite of, not because of, its impact on speech or expressive conduct.

D. Fruddens' adult speech cases, cited for the proposition that even "banal" speech cannot be compelled, should be disregarded because they are not helpful in the *context* of *this* case.

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[7] If the plan is to refine vaguely stated arguments in an optional reply brief, which effectively precludes the WCSD Parties from responding to specifics, that should not meet with success. It is a well established general rule in this Circuit that appellants cannot raise a new issue for the first time in their reply briefs. Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 924 (9th Cir. 1988) (punctuation and other citations omitted).

After citing Wooley for the proposition that requiring a driver to display a state motto with which he disagrees is unconstitutional because it forces him to be "an instrument for fostering public adherence to an **ideological point of view** he finds unacceptable," AOB at p. 6, Fruddens switch to the notion that even "**banal slogans**" cannot be compelled. AOB at pp. 9-10.

Presumably, "Tomorrow's Leaders" is the "banal slogan" to which Fruddens refer, although it is not specified. See Id. But whether the "slogan" is considered ideological or banal, both descriptions are wholly unrealistic in the actual *context* of this case, which involves young elementary school children, not adults.

To advance their "banal slogan" argument, Fruddens cite a series of adult-speech cases, beginning with Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 n. 4 (10th Cir. 2004) to argue that even if a motto is "a purely unideological banality, compelling its display remains unconstitutional." AOB at pp. 9-10. Axson-Flynn involved an *adult* student in a theater program at a university who refused to read scripts with profanities in them. 356 F.3d at 1281-1283.

Fruddens also cite United States v. Stevens, 130 S.Ct. 1577 (2010) in further support of its arguments about "banal slogans." AOB at p. 10. Stevens involved an overbreadth challenge to a statute that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. Id. The statute was

invalidated on First Amendment grounds, and Fruddens make reference to some poems and sermons that were mentioned in a citation of another citation from a dissent. AOB at p. 10.[8]

Next is Riley v. Nat'l Fed'n for the Blind, 487 U.S. 781, 796-97 (1988). AOB at p. 10. There, the Court struck down a North Carolina statute (the Charitable Solicitations Act, which had a three-tiered schedule about what professional fundraisers could charge), because it unconstitutionally infringed on freedom of speech. Riley at 784, 803. The commonality between Axson-Flynn, Stevens, and Riley is how readily distinguishable those fact patterns are from the *context* of this elementary school uniform policy case.

In an elementary school First Amendment case involving a fourth grade student, Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1538 (7th Cir. 1996), cert. denied, 520 U.S. 1156 (1997), the Court noted that *Tinker* [Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)] and its progeny dealt principally with older students for whom adulthood and full citizenship were fast

[8] The reference to poems and sermons invites another metaphor or implicit comparison to the story of Hansel and Gretel. Grimm's Fairy Tales, *Snow White and Other Stories*, retold by Shirley Goulden at pp. 29-30 (Grosset & Dunlap 1963). The AOB should provide greater elucidation in their case citations and arguments, instead of a proverbial "breadcrumb trail" that disappears and therefore does not achieve the objective.

approaching. The "marketplace of ideas," an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire means of expression. Id.

Grammar schools are more about learning, including learning to sit still and be polite, than about robust debate. Id. Thus, the tender years of the Fruddens' children do not make the adult-school-speech case of Axson-Flynn, the poems-and-sermons citations in Stevens, or the charitable-donations circumstance in Riley are not persuasive in this *context*.

Fruddens' next argument is about Jacobs. AOB at pp. 11-12. In citing only the portion of the case involving school uniforms with solid colored tops and pants, AOB at p. 11, Fruddens ignore the portion of the opinion dealing with logos on uniforms, 526 F.3d at 432-433, which is relevant to *this* case. Fruddens' weak arguments about Roy Gomm "forc[ing]" students to communicate a message is not without irony, inasmuch as they equivocate about the exact nature of the Roy Gomm uniform shirt's "message." AOB at p. 11.

We are also told about plain shirts, versus shirts with messages. AOB at pp. 11-12. In fact, we are told that the purpose in the Roy Gomm written uniform policy of establishing "one team, one community," a message that is *not* on the shirt itself, is a message that is somehow communicated to others. See Id. As Fruddens

fail to explain how their contrived clairvoyance works in reality, this frivolous argument should be disregarded.

E. The Roy Gomm uniform policy is constitutional because it is content-neutral.

Fruddens' multi-page discourse in the AOB at pp. 14-19 about the First Amendment concepts of content-neutral versus content-based policies is prefaced by the heading "The Exception for '[U]niform[s] of Nationally recognized Youth Organization (sic) Such as Boy Scouts or Girl Scouts on Regular Meeting Days' Renders the Uniform Policy Unconstitutionally Content-Based." AOB at p. 14. This heading is followed by a string of cases about a general ban on picketing near a school, a general ban on residential picketing, a general ban on photographic reproductions of American currency, and a general sales tax, all of which were rendered constitutionally infirm by the insertion of some exception that sent the challenged provisions into the realm of unconstitutional content-based restrictions. AOB at p. 14.

Next is a discussion about the Jacobs case in this Court and at the trial court level, youth organizations such as the Boy Scouts and Girl Scouts, and the supposed dangers of allowing school authorities to interpret the exceptions in a school uniform policy. AOB at pp. 15-17. Then there is an oh-so-brief discussion

about Fruddens being prepared to produce evidence that Roy Gomm school refused to treat the AYSO as a "nationally recognized youth organization," and (finally!), a citation to the record. AOB at p. 18.

Fruddens continue their discourse about uniforms of controversial or ideological groups such as socialists, and a case about a city inviting and then disinviting a couple of artists to display their controversial art in a city hall gallery. AOB at pp. 18-19. Fruddens conclude that the uniform policy is content-based and must be judged under "strict scrutiny," absent any analysis pertaining to the allegations and facts in *this* case. AOB at p. 19. The problem is that the facts to support these arguments are lacking. Fruddens certainly utilized the appropriate "buzz words," so to speak, SER 1-4, 9-10, but this Court will not review an issue not raised below unless necessary to prevent manifest injustice. Int'l Union of Bricklayers & Allied Craftsman Local No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985); *accord* Morgan v. Swanson, 659 F.3d 359, 405 (5th Cir. 2011), cert. denied, ___ U.S. ___, 2012 WL 2076355 (June 11, 2012) (in context of a Rule 12(b)(6) case, arguments not raised before the district court were waived and would not be considered on appeal).

As noted in Jacobs, 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. 526 F.3d at 432 n. 30 (bold emphasis added; citation and internal punctuation omitted). The record evidence in Jacobs unambiguously indicated that the school district's purpose in enacting the regulation was to further the regulation's stated goals, *not* to suppress the expression of particular ideas. Id. at 432.

Here, too, 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. The Roy Gomm uniform policy was put up for a parental vote in 2010, but it failed. ER 34-35 at ¶¶38-39. In February 2011, Roy Gomm began the process anew "to gather information and educate parents about research supporting uniforms." ER 35 at ¶40. An informational meeting and fashion show was scheduled and held at the end of April 2011. ER 35-37 at ¶¶48-51. Most of the stated reasons were identical to those from the prior year. ER 37 at ¶52 (help to create an academic atmosphere, increased peer respect, greater sense of belonging at school, dressing for school is different than dressing for play, school pride/school spirit, decreased expenses on wardrobe, simplify parents' lives). Roy Gomm's research about school uniforms indicated that uniforms are correlated with increased test scores, fewer discipline referrals, increased attendance and fewer truancies, resistance to peer pressure to buy trendy clothes, better identification of

intruders, and lower incidence of violence/gang-related incidents. ER 37 at ¶54; see also ER 38-39 at ¶61 (e-mail message to Mary Frudden about proposed uniform policy).

The Blau court considered similar rationale for the adoption of a dress code and it found that the dress code existed in spite of, not because of, its impact on speech or expressive conduct. 401 F.3d at 391. After listing the stated purposes (which are similar to those at Roy Gomm stated above), the Blau court found that although the Blaus had not complained about one seemingly content-based component, "[c]onsistent with the First-Amendment-benign objectives, the dress code does not regulate any particular viewpoint but merely regulates the types of clothes that students may wear." Id. The same reasoning applies to the facts of *this* case.

A portion of the Jacobs case involved "a colorable" content-based claim because of the provision in the uniform policy allowing for clothing to contain school logos. Id., 526 F.3d at 432-433. The plaintiffs in that case argued that content-neutrality did not apply because the logo sanctioned the school's message, but not messages relating to any other topic or viewpoint. Id. at 432. As part of its analysis, the Court noted that the plaintiff's argument had "first blush" appeal, because the logo could have reflected "an impermissible content-based (and indeed

viewpoint-based) preference for expressions of school pride." Id. at 433. While noting that the school district could have "steered far clear of First Amendment boundaries" by foregoing the logo provision entirely, the Court nevertheless concluded that allowing students' otherwise solid-colored clothing to contain a school logo – an item expressing little, if any, genuine communicative message – does not convert a content-neutral school uniform policy into a content-based policy. Id. The same analysis is applicable here based on the facts of *this* case.

Fruddens' arguments below about the AYSO uniform were centered around a Tinker "pure speech" argument.[9] The contrived appellate arguments in the AOB bear no resemblance to their position below, which included the following:

> Contrary to Defendants' assertions, Plaintiffs' FAC does not "admit" Plaintiffs wore the soccer uniform "**merely** because they fell within an 'exemption' to the policy." Motion, 8:14-15; FAC ¶108-114. By consciously choosing the "uniform" of another "team" – – AYSO – – Plaintiff students were protesting the Written Uniform Policy and were saying, via the AYSO uniform, they did not want to be part of the Roy Gomm One Team, One Community, a message, at the very least, "akin" to pure speech. In addition, Plaintiff students were proclaiming with pure speech their affiliation with the AYSO "team." Likewise, by turning his Roy Gomm shirt inside-out, John Doe was saying with conduct akin to pure speech, that he did not want to be compelled to wear the message of "Roy Gomm One Team, One

[9] As noted by this Court in Jacobs, not only has the U.S. Department of Education acknowledged the efficacy of school uniforms, 526 F.3d at 436, but Tinker did not consider the regulation of the length of skirts, types of clothing, hair style, or deportment. Id. at 430, *citing* Tinker, 393 U.S. at 507-508.

> Community," and "Tomorrow's Leaders." Given these particular activities, combined with the factual context and environment in which it was undertaken, it is clear Plaintiff students were sending their *continued* message of protest and their outward support of, and affiliation with, another "team."

SER 9 at lines 9-20 (quotation marks and emphasis in original).

The District Court's analysis indicated that the Roy Gomm school logo presented a slightly more complex question of compelled speech, and whether the Roy Gomm uniform policy is viewpoint- and content-neutral, it found the distinction was not substantial enough to indicate a First Amendment violation. ER 14 at lines 8-11. The District Court went on to rule that "the impingement on the students' First Amendment rights in Jacobs was significantly greater than that alleged in this case, which consists of being forced to wear a uniform with an innocuous school motto and a picture of a gopher. ER 14 at lines 14-19. There is no meaningful risk that a bystander would think any of the hundreds of identically dressed children on the grounds of an elementary school individually chose the motto and/or mascot appearing on their uniforms." Id. There is no error in this analysis.

Fruddens read far too much into the exception in the policy for Boy and Girl Scouts and nationally recognized youth organizations. Compare ER 46 at lines 17-19, with AOB at pp. 15-18. The exception applies on "regular meeting days" of

such organizations, which by its plain language is nothing more than a convenience for parents who do not have to worry about getting children home to change before a meeting. ER 46 at lines 18-19 (it only applies on "regular meeting days"). Fruddens' allegations reveal that the children were not wearing the AYSO uniforms because it was the regular meeting day, ER 52 at lines 17-18, so they were properly asked to change.

In line with that, there are no allegations in the FAC that the wearing of non-uniform clothing, etc. by the Fruddens' children was *their* idea or expression. Compare SER 3 at ¶154 (alleging "Plaintiffs' choice," not the student Plaintiffs' choice), with, SER at 1-6 at ¶ 147-149, 153-153, 155, 170 (allegations specific to the children). This is not the only example of a "parent-driven" case, so to speak. See Walz, *supra*, 342 F.3d at 275 (pre-kindergartner plaintiff's mother appeared to have driven her son's activity and the First Amendment litigation); Blau, 401 F.3d at 386 (attorney-father filed federal lawsuit on his and his daughter's behalf, challenging dress code on First Amendment and other grounds); Brandt v. Bd. of Educ. of City of Chicago, 480 F.3d 460, 462 (7th Cir. 2007) (in a class T-shirt contest between two groups of eighth graders, the "gifties" and the "tards," in which the "gifties" charged that the voting was "rigged" after they lost the ballot count, and which morphed into a First Amendment class action lawsuit, the mother

of the lead student-plaintiff was plaintiffs' lead counsel), cert. denied, 552 U.S. 976 (2007). Those cases did not go anywhere, and neither should this case.

F. Fruddens' off-hand reference to "strict scrutiny" in two sections of their brief should be disregarded, because they made no effort to develop it in the AOB.

Two sections of Fruddens' brief, the "compelled speech" section, and the "content-based" section, make a perfunctory and superficial argument about "strict scrutiny." See AOB at p. 13 (uniform policy is speech compulsion that must be judged under strict scrutiny, which it cannot pass); AOB at p. 19 (Roy Gomm uniform policy is content-based and must be judged on strict scrutiny, which it cannot pass). Fruddens' failure to develop their "strict scrutiny" arguments should result in their appropriate rejection. In Int'l Union of Bricklayers, *supra*, 752 F.2d at 1404-1405, a dispute involving a collective bargaining agreement that was decided on cross-motions for summary judgment, this Court declined to address the merits of the Union's third-party beneficiary contentions, because the Union appellant had failed to make any argument or specific designation of error regarding any of the trial court's legal conclusions. Part of its analysis included the following:

> In the same vein [as declining to review an issue not raised below unless necessary to prevent manifest injustice], we will not ordinarily consider matters on appeal that are not specifically and distinctly

raised and argued in the appellant's opening brief.

752 F.2d at 1404 (bracketed material added for clarity).

In Fiore v. Walden, 657 F.3d 838, 847 (9th Cir. 2011), a case discussing personal jurisdiction and what other circuits have done in drawing inferences from facts alleged in a complaint, this Court noted that the federal courts are not required to draw unreasonable or far-fetched inferences in favor of complainants. The Fiore court at 657 F.3d at 847 n.16 cited with approval a First Circuit case, Massachusetts Sch. of Law at Andover, Inc. v. Amer. Bar Ass'n, 142 F.3d 26, 43 (1st Cir. 1998). There, the court did "not linger long" over undeveloped arguments made in a portion of the opinion about a Fed.R.Civ.P. 12(b)(6) dismissal:

> Our review is swift because we have steadfastly deemed waived issues raised on appeal in a perfunctory manner, and not accompanied by developed argumentation. (citation omitted). An issue lacks developed argumentation if the appellant merely mentions it as a possible argument in the most skeletal way, leaving the court to do counsel's work. (citation omitted).

142 F.3d at 43 (internal punctuation also omitted). Here, too, Fruddens' arguments that this Court needs to apply "strict scrutiny" should steadfastly be rejected, since that argument has been waived. When, as here, Fruddens have mustered no more than a skeletal and perfunctory presentation, it is unworthy of attention.

G. Fruddens not only fail to elucidate how evidence "they may obtain" would change the District Court's analysis under Fed.R.Civ. P.

> 12(b)(6), they ignore their own detailed allegations below, they failed to take opportunities they had below to present "evidence," and they failed to appeal the District Court's ruling on their judicial notice evidence, all of which act as a waiver or bar to the argument on appeal that they were "precluded from introducing any evidence."

In an attempt to minimize or deflect the shortcomings of their case, Fruddens complain that the District Court granted the WCSD Parties' Motion to Dismiss "without giving the Fruddens an opportunity to introduce evidence at trial or accompanying a motion for summary judgment." AOB at p. 21. Fruddens' arguments are unavailing because there were a number of avenues Fruddens could have taken, but did not.

Under the rules, Fruddens *had* ample opportunity to file a motion for summary judgment. Fruddens filed their original action on July 6, 2011, ER 56 at Dkt. #1, and their FAC on October 18, 2011. ER 28. Rule 56(b) of the Federal Rules of Civil Procedure provides that unless a different time is set by local rule, or the court orders otherwise, a party may file a motion for summary judgment ***at any time*** until 30 days after the close of discovery. Id. (emphasis added). There is no local rule varying the time frames specified in Fed.R.Civ.P. 56(b), and the record is devoid of the District Court ordering a different time. See LR 56-1 (no provision changing time frames in Fed.R.Civ.P. 56); ER 56-59 (docket entries in District Court). Fruddens cannot fault the District Court for their own failures.

Fruddens also had the benefit of the published trial court opinion in Jacobs, *supra*, 373 F.Supp.2d at 1172. A preliminary injunction hearing had been held in that case, which Fruddens referenced in their table of authorities. See AOB at p. ii; see also 373 F.Supp.2d at 1166-1167 (lead plaintiffs filed suit and immediately moved for injunctive relief to bar enforcement of the dress code during the litigation). Evidence is regularly presented in preliminary injunction hearings under Fed.R.Civ.P. 65, so Fruddens had a template to follow about the presentation of "evidence" in a school uniform case. Yet, they did *nothing*. Their complaints at this juncture about not having been able to present "evidence" should fail.

Fruddens' allegations in their First Amendment claim in the District Court below also undermine their arguments to this Court. Fruddens alleged plenty of "evidence" in the FAC, which was credited by the District Court. See ER at pp. 28-55; SER 1-10. The District Court appropriately viewed the Frudden's Rule 12(b)(6) motion using the proper standards. ER 8, lines 21-25; ER 9; ER 10 at lines 1-2.

In addition, in a portion of the lower court record omitted by Fruddens, they even specifically labeled some of their allegations as "evidence," so the District Court already knew what their "evidence" was. See SER 4-5 at ¶162 (there is no evidence that non-uniform clothing causes an undisciplined environment at Roy

Gomm); ¶163 (there is no evidence that non-uniform clothing causes an unsafe learning environment); ¶167 (evidence shows there is either no correlation or a negative correlation with mandatory school uniforms to achievement and behavioral outcomes); ¶168 (evidence shows mandatory school uniforms have insignificant effect on test scores, attendance, or disciplinary actions for elementary students in grades 1-5).

Finally, Fruddens' "evidence" argument is wholly undermined by their failure to challenge the District Court's denial of their motion seeking judicial notice of their "evidence." ER 26 at lines 10-13 and ER 27 at lines 7-8. Fruddens' AOB is devoid of any reference to that ruling. See AOB at pp. 1-22 (no mention of ruling). This court will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief. See Hernandez v. City of Los Angeles, 624 F.2d 935, 937 n. 2 (9th Cir. 1980) (by not raising the issue in his brief, Hernandez has not perfected his appeal as to that part of the judgment, *citing* Fed.R.App.P. 28(a)(2)). Nor may Fruddens do so in the optional reply brief. See Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981) (statement in appellee's brief, that appellant had not contested the propriety of one of lower courts' ruling, was not raising an issue for rebuttal in a reply – rather, it was putting it to rest), *superseded by statute on other grounds*,

PAE Gov't Servs., Inc. v. MPRI, Inc., 514 F.3d 856, 859 n. 3 (9th Cir. 2007).

Fruddens also argue that because the Jacobs court "several times stressed that the constitutionality of uniform policies turns on the 'evidence,'" AOB at p. 19, this case cannot possibly be decided on a motion to dismiss. See also AOB at p. 20 (citing passages from Jacobs). In making this argument, Fruddens focus not on *this* case, but on a couple of lengthy cases about First Amendment challenges to federal cable TV statutes that had nationwide reach (cited in Jacobs), and First Amendment challenges to city ordinances requiring street performers to get permits at Seattle Center. See AOB pp. 20-21.

In Jacobs, the Court "largely conclude[d] that public school mandatory dress policies survive constitutional scrutiny." 526 F.3d at 422. Other courts reviewing First Amendment and other constitutional challenges to school uniform policies or dress codes have ruled in favor of the schools. *E.g.*, Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286-287 (5th Cir. 2001) (uniform policy passed constitutional muster under O'Brien standard for multiple reasons, including limited nature of restrictions, and that policy was adopted for reasons unrelated to suppression of free speech); Blau, *supra*, 401 F.3d at 389 (since student's desire to wear clothes of her choice did not express any particularized message, Blaus did not meet their burden of showing that the First Amendment protected her conduct

under dress code).

Fruddens did not provide any specifics about how "evidence" would change anything, see AOB at p. 21, given the excruciating detail in their allegations which are taken as true. Fruddens' arguments would also essentially nullify Fed.R.Civ.P. 12(b)(6), a notion that has been soundly rejected in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50, (2009).[10]

Examples of school cases decided under Fed.R.Civ.P. 12(b)(6) include Parker v. Hurley, 474 F.Supp.2d 261, 263 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008), cert. denied, 555 U.S. 815 (2008), and a divided opinion in Morgan v. Swanson, *supra*, 659 F.3d at 370, 386-388.

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[10] Cases dismissed by a trial court under Fed.R.Civ.P. 12(b)(6) and affirmed by this Court have occurred in a variety of cases, both before and after Twombly. See, *e.g.*, Gibson v. Office of Attorney Gen. of Cal., 561 F.3d 920, 923 (9th Cir. 2009) (First Amendment retaliation claim in employment case properly dismissed under Rule 12(b)(6)); Knievel, *supra*, 393 F.3d at 1071-1075 (affirming trial court's Rule 12(b)(6) dismissal of defamation/First Amendment case, *citing, inter alia*, Dodds v. Am. Broad. Co., 145 F.3d 1053, 1065-68 (9th Cir. 1998) (dismissing action for failure to state a claim because statements were nonactionable opinion)), cert. denied, 525 U.S. 1102 (1999); Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296-1298 (9th Cir. 1998) (affirm-ing dismissal of securities case for failure to state a claim under pertinent statute and regulations), cert. denied, 525 U.S. 1102 (1999); Keams v. Tempe Technical Inst., Inc., 110 F.3d 44, 46-47 (9th Cir. 1997) (affirming dismissal of negligence and negligent misrepresentation claims under Rule 12(b)(6) in connection with alleged faulty accreditation of the Tempe Technical Institute brought by Native American students attending the institute).

Blau was decided on summary judgment, and the Littlefield and Jacobs summary judgments were conversions from Rule 12(b)(6) motions to dismiss. See 401 F.3d at 387, 268 F.3d at 282, and 526 F.3d at 425, respectively. There is no indication that the parties in those three cases filed complaints that can match the painstaking and meticulous detail set forth in *this* FAC. See ER 8 at lines 4-20 (District Court's summary of Fruddens' numerous claims for relief); ER 28-55 (portion of FAC in Fruddens' excerpts of record); SER 1-7 (Fruddens' second claim for relief, and last page of FAC showing that it is 66 pages). Fed.R.Civ.P. 8(a)(2) only requires a short and plain statement of the claim. Because *this* FAC so exceeds the minimal requirements of Rule 8(a)(2), the particularity in it is virtually synonymous with evidence. Based on the foregoing, no more "evidence" is needed in *this* case, and as such, there is no need to disturb the District Court's ruling.

VIII. CONCLUSION

The District Court did not err in dismissing Fruddens' action as shown above. The District Court's Order and Judgment in favor of the WCSD Parties should therefore be affirmed.

Dated the 6th day of July, 2012.

MAUPIN, COX & LeGOY

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IX. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) and (C) because this brief contains 11,035 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. 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 the WordPerfect 12 program in 14-point, Times New Roman.

Dated the 6th day of July, 2012.

MAUPIN, COX & LeGOY

By:s/ Debra O. Waggoner
Debra O. Waggoner, Esq.

X. STATEMENT OF RELATED CASES

To the WCSD Parties' knowledge, and pursuant to Ninth Circuit Rule 28-2.6, there are no related cases to the above-entitled appeal currently pending in this Court.

XI. STATEMENT REGARDING ORAL ARGUMENT

As shown in the WCSD Parties' Brief above, and pursuant to Fed.R.App.P. 34(a)(2)©, the facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of MAUPIN, COX & LEGOY, Attorneys at Law, and that on July 6, 2012, I electronically filed the foregoing Answering Brief of Appellees with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Unregistered users are my law partners, Michael E. Malloy and Kim G. Rowe, so I do not need to mail a copy of our brief to them.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. Appellants' counsel are registered users who are among those served by the appellate CM/ECF system:

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