No. 21-1959

In the United States Court of Appeals for the Seventh Circuit

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N.J., by next friend, KELLY JACOB and
A.L., by next friend, TARA LLOYD,

Plaintiff-Appellant,

v.

DAVID SONNABEND and BETH KAMINSKI,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Wisconsin
Nos. 20-cv-227, 20-cv-276
Hon. William S. Griebach, District Judge

Brief of Firearms Policy Coalition and Firearms Policy Foundation as *Amici Curiae* in Support of Defendants-Appellees

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Eugene Volokh
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Rule 26.1 Disclosure Statement

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Interest of *Amici Curiae*[1]

Amici Firearms Policy Coalition and Firearms Policy Foundation are nonprofit organizations whose mission is to protect and defend constitutional rights, including freedom of speech and the right to keep and bear arms.

Summary of Argument

Mahanoy Area School Dist. v. B.L., 141 S. Ct. 2038 (2021), makes clear that students retain the right to free speech—including, as in *Tinker* itself, via their own clothing—with a few narrow exceptions, none of which applies here. Nor does *Mahanoy* authorize any general exception for viewpoint-neutral speech restrictions.

This Court's cases that allow viewpoint-neutral restrictions on the distribution of leaflets in a nonpublic forum do not apply to cases such as this, in which students wear their messages on their own bodies. Indeed, this Court recognized in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668 (7th Cir. 2008), that even viewpoint-neutral restrictions on T-shirts are presumptively unconstitutional. And to the extent any of those cases suggest that such viewpoint-neutral restrictions may be permissible, they are in any event inconsistent with the more recent precedent in *Mahanoy*.

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[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici* has contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

Argument

I. Bans on clothing that depicts firearms are inconsistent with the Supreme Court's recent decision in *Mahanoy Area School Dist. v. B.L.*

In *Mahanoy*, the Court made clear what content-based restrictions on student speech are permissible:

> We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." . . .
>
> This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see [*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)]; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse* v. *Frederick*, 551 U.S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, [*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)].
>
> Finally, in [*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969)], we said schools [(4)] have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

141 S. Ct. at __, slip op. at 4-5, https://www.supremecourt.gov/opinions/20pdf/20-255_g3bi.pdf (citation omitted).

T-shirts that depict firearms fit within none of these four exceptions. They are not indecent, lewd, or vulgar. They do not promote illegal drug use or any other illegal conduct; instead, they "can plausibly be interpreted as commenting on [a] political or social issue," *Morse*, 551 U.S. at 422 (Alito, J., concurring), and are thus outside the *Morse* exception. *See also id.* at 406 n.2 (majority opin.) (stressing that "there is no serious argument that Frederick's banner is political speech"); *id.* at 403 ("not even

Frederick argues that the banner conveys any sort of political or religious message"); *id.* ("this is plainly not a case about political debate over the criminalization of drug use or possession"). They do not bear the imprimatur of the school. And there is no evidence that the T-shirts caused "material" or "substantial" disruption.

The District Court upheld the restriction on the grounds that, "Because the schools' ban on clothing bearing images of firearms is viewpoint neutral and because the schools are non-public forums, *Tinker*'s substantial disruption test does not apply." Dist. Ct. Op. at 17 (in App. to Brief of Appellants). But, as *Mahanoy* makes clear, that rationale does not fit within any of the exceptions that the Supreme Court has recognized. In *Mahanoy*'s formulation, *Tinker* applies whenever a school rejects the message displayed on a student's clothing, unless the speech falls within exceptions (1) through (3).

It may be true that the restriction here left plaintiffs free to "express their support for the Second Amendment in other ways," Dist. Ct. Op. at 22, but that is not an adequate justification for banning plaintiffs from expressing themselves this particular way. For instance, in *Spence v. Washington*, the Supreme Court was reviewing a state ban on contemptuous display of the American flag; the lower court had "found the inhibition on appellant's freedom of expression 'minuscule and trifling' because there are 'thousands of other means available to [him] for the dissemination of his personal views . . . .'" 418 U.S. 405, 411 n.4 (1974). This argument, the high court held, "must be rejected summarily": "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other

place,'" *id.* (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)), and the Court took the same view as to the plea that the liberty of expression may be exercised using some other words or symbols. Likewise, plaintiffs are entitled to use the particular symbolism they have chosen to express their pro-gun-rights views, rather than being relegated to other forms of expression that school authorities would prefer that they use.

II. This Court's cases recognize that content-based restrictions on student clothing are presumptively unconstitutional

This Court has recognized that even restrictions on student clothing that do not "discriminat[e] against a particular point of view" are presumptively unconstitutional, unless "the school . . . present[s] facts which might reasonably lead school officials to forecast substantial disruption." *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008) (cleaned up). And these have to be "facts," not mere "speculation"—"speculation" is "too thin a reed on which to hang a prohibition of the exercise of a student's free speech," even for ostensibly viewpoint-neutral restrictions, *id.* at 676, which this Court recognized in ordering that Nuxoll be allowed to wear a "Be Happy Not Gay" T-shirt, *id.*

The District Court concluded that "the restriction at issue in *Nuxoll* was not viewpoint neutral." Dist. Ct. Op. 15. But that is contrary to the reasoning of *Nuxoll* itself, which specifically concluded that "*Tinker* . . . was a quite different case from [Nuxoll's]," because "[t]he school [in *Tinker*] was discriminating against a particular point of view." 523 F.3d at 673. *Nuxoll* thus concluded that even viewpoint-neutral student

clothing restrictions presumptively violate the First Amendment—though it concluded that, for viewpoint-neutral restrictions, "It is enough for the school to present facts which might reasonably lead school officials to *forecast* substantial disruption," rather than having to show that the speech "*would* materially and substantially disrupt the work and discipline of the school." *Id.* (cleaned up, emphases added).

Indeed, *Nuxoll* never applied the "limited public forum" or "nonpublic forum" reasoning that the district court used, Dist. Ct. Op. 12-13, 17-18, and that was applied to leafleting on school grounds by *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) (a case on which the district court heavily relied). The "sequel" to *Nuxoll*, *Zamecnik v. Indian Prairie School Dist. No. 204*, 636 F.3d 874, 875 (7th Cir. 2011), which likewise involved T-shirts, did not apply "limited public forum" or "nonpublic forum" reasoning, either. Whatever may be the proper rule as to student leafleting, restrictions on students' speech worn on their own bodies—the very speech involved in *Tinker*—must be judged under the *Tinker* standard.

Nor can such speech be restricted simply on the grounds that it "can be a reminder of the school violence that lies at the heart of the schools' concerns," or that it supposedly "can prime or activate aggressive thoughts in memory, which could interfere with school learning," Dist. Ct. Op. at 20, 23. That is the very sort of speculation about potential harm that *Nuxoll* condemned. And indeed, to the district court's credit, that court only engaged in such speculation after concluding that the *Tinker* substantial

disruption test did not apply, Dist. Ct. Op. at 17, and turned instead to a mere rational basis analysis (which, when applicable, might indeed permissibly turn on speculation).

III. The Fourth Circuit has recognized that students have a right to wear T-shirts depicting firearms

The correct approach to this case is that taken by the Fourth Circuit in *Newsom v. Albemarle County School Bd.*, 354 F.3d 249 (4th Cir. 2003). There too a school banned all "messages on clothing, jewelry, and personal belongings that relate to . . . weapons," *id.* at 252. The court analyzed the case just as *Mahanoy* specifies. It noted the *Fraser* exception, and acknowledged that the school could ban "lewd, vulgar, indecent, or plainly offensive images and messages related to weapons under . . . *Fraser*." *Id.* at 256. It asked whether the restriction could be justified under *Kulhmeier*, and concluded that it could not be. *Id.* at 257. (The court did not discuss *Morse*, which had not yet been decided.)

The court therefore concluded that, "As a result, *Tinker* is the most relevant of the three Supreme Court cases concerning school speech." *Id.* at 257. And it applied *Tinker*, concluding that "that there simply is no evidence in the record . . . demonstrating that clothing worn by students . . . containing messages related to weapons . . . ever substantially disrupted school operations or interfered with the rights of others." *Id.* at 259.

The *Newsom* court treated the school board's facially viewpoint-neutral no-pictures-of-weapons policy the same as the ban on anti-war black armbands in *Tinker*.

Just like the Court in *Mahanoy*, the *Newsom* court did not suggest that subject-matter-based restrictions on the messages that students communicate to each other are any different from viewpoint-based restrictions.

Indeed, even *Jacobs v. Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008), which the district court relied on for the proposition that viewpoint-neutral restrictions on student clothing are generally unconstitutional, acknowledged that "a slightly more expansive reading of *Tinker* suggests that its mode of analysis should also be used when a school's regulation is content-based (not only when it is viewpoint-based)." *Id.* at 431. *Jacobs* likewise noted that, "As Supreme Court jurisprudence since *Tinker* has made clear, viewpoint-based and content-based restrictions on speech are, for the most part, equally pernicious and, thus, restrictions of either variety must ordinarily be subjected to the same degree of scrutiny." *Id.* at 431 n.26. The holding of *Jacobs* was simply about "how viewpoint- and content-neutral restrictions on student speech should be analyzed," *id.* at 431-32—which matches the Court's recognition that content-neutral speech restrictions are generally more defensible than content-based ones, even when they are imposed not by a school but by the government as sovereign restricting speech on private property. *See, e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

IV. Restrictions on images of weapons should be treated as analogous to viewpoint-based restrictions

The Supreme Court has "recognized that . . . subject-matter restrictions, even though viewpoint-neutral on their face, may 'suggest[] an attempt to give one side of

a debatable public question an advantage in expressing its views to the people.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) (Kagan, J., concurring in the judgment) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978)). "Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others." *Id.* In particular, "[l]imiting speech based on its 'topic' or 'subject' favors those who do not want to disturb the status quo." *Id.* at 174 (Alito, J., concurring).

Indeed, *Tinker* itself involved what seemed on its face like a general restriction on wearing one particular item: "a policy that any student wearing an armband to school would be asked to remove it." 393 U.S. at 504; *see also Tinker v. Des Moines Indep. School Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966) (describing policy as "forbidding the wearing of arm bands on school facilities"). The policy was facially viewpoint-neutral, but its intent and effect to restrict speech critical of the war were clear. In late 1965, when the Tinkers wore their armbands, the Vietnam War was official government policy, and apparently quite popular. *See* Hazel Erskine, *The Polls: Is War A Mistake?*, 34 Pub. Opinion Q. 141 (1970), https://www.jstor.org/stable/2747894 (quoting poll reporting that, in March 1966, only 21% of 21-to-29-year-olds, 23% of 30-to-49-year-olds, and 50% of those 50 and older "consider[ed] the Vietnam War a mistake"; opposition would not cross the 50% mark until 1969). Even facially viewpoint-neutral restrictions on speech *about* the war, rather than just speech *opposed to* the war, would have indeed helped entrench the pro-war status quo.

Professor Geoffrey Stone put this well, in *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 109, 111 (1978):

> [Some] subject-matter restrictions [are] defined in terms of speech about a specific issue or, perhaps, about a relatively narrow cluster of issues. . . . [T]hese relatively circumscribed restrictions appear on their face to be viewpoint-neutral. In practice, however, these restrictions will often disadvantage one "side" of an issue more than the other, depending upon which "side" is more likely to be affected by the restriction. . . . [F]or instance, [a] restriction [on street demonstrations concerning the propriety of the Vietnam war], although viewpoint-neutral on its face, would in fact have had a more severe impact upon critics of the Vietnam war than upon its supporters, for critics relied more heavily upon this mode of communication. . . .
>
> Given the relatively high likelihood of a viewpoint-differential effect when the restriction is narrowly drawn, the application of strict standards in such cases, rather than an attempt to treat the issue on a case-by-case basis, seems most consistent with the general presumption in favor of clarity and ease of administration in the first amendment area.

And courts have recognized the validity of this argument, in rejecting various ostensibly viewpoint-neutral subject-matter restrictions. *See, e.g.*, *Goward v. City of Minneapolis*, 456 N.W.2d 460, 465 (Minn. Ct. App. 1990) (refusing to treat a restriction on political speech as a permissible viewpoint-neutral restriction, because "Regulations that distinguish between subjects of speech on their face often have a viewpoint discriminatory effect. This is true because political speech in some forums is most often critical of the status quo. An impartial ban thus has the effect of suppressing viewpoints critical of the government.") (citing Stone, *supra*); *USSW Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 768-69 (D.C. Cir. 1983) (taking a similar view, likewise citing Stone).

T-shirts such as the ones that plaintiffs wore vividly convey a powerful message—to borrow from the gay rights movement,[2] "we're here, we're gun rights supporters, get used to it." In particular, shirts such as the Smith & Wesson shirt, Dist. Ct. Op. 3, convey the message that firearms are legitimate tools (though, like many tools, dangerous if misused), and an important part of American culture ("Smith & Wesson Firearms—Made in the USA Since 1852").

Banning firearms images on student clothing limits this important symbolic tool for expressing that viewpoint, just as banning black armbands in *Tinker* limited an important symbolic tool for expressing an anti-war viewpoint. And the Court has recognized that visual expression is often an especially effective form of expression. *See, e.g.*, *Zauderer v. Office of Discip. Counsel*, 471 U.S. 626, 647 (1985) (so recognizing even as to less-protected commercial speech).

This may be why the Court has never recognized any exception to *Tinker* for viewpoint-neutral restrictions that affect political messages, and in particular why *Mahanoy*'s articulation of the doctrine says nothing that authorizes such viewpoint-neutral restrictions. Outside the narrow exceptions that *Mahanoy* did recognize (such as for vulgarity), students—like other speakers—are entitled to express their views using whatever words and images they choose.

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[2] *See* Brent Pickett, *Historical Dictionary of Homosexuality* 157 (2009) (noting the slogan, popularized by the group Queer Nation, "We're here, we're queer, get used to it!").

Conclusion

Public high schools and junior high schools may not restrict the messages that their students choose to express on their clothing, unless those messages fall within a narrow range of exceptions. That is true for viewpoint-neutral restrictions and not just for viewpoint-based ones, as the articulation of the First Amendment doctrine in *Mahanoy* makes clear, and as this Court recognized in *Nuxoll*. For these reasons, the decision below should be reversed.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*
July 15, 2021

Certificate of Compliance with Rule 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32 because this brief contains 2,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Certificate of Service

I certify that on July 15, 2021, I electronically filed and served this Brief using the Seventh Circuit CM/ECF system; all participants in the case are registered CM/ECF users.

s/ Eugene Volokh

Attorney for *Amici Curiae*