Case No. 21-1959

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

DAVID SONNABEND, Individually and in his official capacity as Associate Principal of Shattuck Middle School, and
BETH KAMINSKI, Individually and in her official capacity as Principal of Kettle Moraine High School,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin
Case No. 20-CV-227
Case No. 20-CV-276
The Honorable Judge William C. Griesbach

BRIEF OF THE DEFENDANT-APPELLEES, DAVID SONNABEND AND BETH KAMINSKI

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
JURISDICTIONAL STATEMENT 1
STATEMENT OF THE ISSUES 1
STATEMENT OF THE CASE 2
I. NATURE OF THE CASE 2
A. N.J. and Shattuck Middle School 2
B. A.L. and Kettle Moraine High School 8
II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW 12
SUMMARY OF ARGUMENT 13
ARGUMENT 14
I. STANDARD OF REVIEW 14
II. THE DISTRICT COURT CORRECTLY FOUND THAT IT WAS REQUIRED TO DETERMINE IF DEFENDANTS' MINOR RESTRICTION OF PLAINTIFFS' FIRST AMENDMENT RIGHTS WAS REASONABLY RELATED TO LEGITIMATE PEDAGOGICAL CONCERNS 15
A. The District Court Correctly Held That The Speech In This Case Was Subject To The Standard Articulated By This Court In *Mueller* 15
B. The District Court Correctly Concluded That Shattuck Middle School And Kettle Moraine High School Are Non-public Forums 22
C. The Restriction On Images Of Guns Is Viewpoint Neutral 23
D. The Restrictions On Images Of Firearms Are Reasonably Related To The Legitimate Pedagogical Concerns Of Student Fear And Anxiety And Reducing Student Aggression 28
1. Promoting And Maintaining An Effective Learning Environment By Alleviating The Fear And Anxiety Caused By Images Of Firearms Is A Legitimate Pedagogical Concern 30
2. Reducing Student Aggression Is A Legitimate Pedagogical Goal 32

III. ALTERNATIVELY, DEFENDANTS' RESTRICTION ON IMAGES OF GUNS DOES NOT VIOLATE THE FIRST AMENDMENT UNDER *TINKER* AS THEY REASONABLY FORECASTED A SUBSTANTIAL DISRUPTION. 34

A. Under *Tinker* A School District Only Needs To Reasonably Forecast A Substantial Disruption 35

B. The Gun Images On N.J.'s Shirts Led Mr. Sonnabend To Reasonably Forecast A Substantial Disruption In Light Of N.J.'s Troubling Behavioral History 39

C. Ms. Kaminski Could Reasonably Predict That A.L.'s Shirt Depicting A Gun Would Cause A Substantial Disruption 42

IV. PLAINTIFFS' SHIRTS DID NOT CONSTITUTE PROTECTED SPEECH UNDER THE FIRST AMENDMENT 44

A. The Gun Image On A.L.'s Shirt Is Not Protected Speech 46

B. The Images On N.J.'s Shirts Were Not Protected Speech 48

V. PLAINTIFFS' WAIVED THEIR FOURTEENTH AMENDMENT CLAIMS 49

CONCLUSION 50

TABLE OF AUTHORITIES

Cases

A. M. v. Cash,
585 F.3d 214 (5th Cir. 2009) 41
A.S. v. Lincoln Cty. R-III Sch. Dist.,
429 F. Supp. 3d 659 (E.D. Mo. 2019) 36
Anderson v. Gutschenritter,
836 F.2d 346 (7th Cir. 1988) 34
Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) 16, 20
Blau v. Fort Thomas Pub. Sch. Dist.,
401 F.3d 381 (6th Cir. 2005) 47, 48
Boim v. Fulton Cty. Sch. Dist.,
Nos. 1:05-CV-2836-MHS, 1:05-CV-3219-MHS, 2006 U.S. Dist. LEXIS 53129
(N.D. Ga. Aug. 1, 2006) 37
Brandt v. Bd. of Educ. of Chi.,
480 F.3d 460 (7th Cir. 2007) 45
Brown v. Cabell Cty. Bd. of Educ.,
714 F. Supp. 2d 587 (S.D. W. Va. 2010 ..... 37, 44
Choose Life Ill., Inc. v. White,
547 F.3d 853 (7th Cir. 2008) 25
Citizens for Appropriate Rural Roads v. Foxx,
815 F.3d 1068 (7th Cir. 2016) 49
Cohn v. New Paltz Cent. Sch. Dist.,
363 F. Supp. 2d 421 (N.D.N.Y. 2005) 29
Coker v. TWA,
165 F.3d 579 (7th Cir. 1999) 23
Cont'l Cos. Co. v. Nw. Nat'l Ins. Co.,
427 F.3d 1038 (7th Cir. 2005) 14
Cuff v. Valley Cent. Sch. Dist.,
677 F.3d 109 (2d Cir. 2012) 37, 38, 39, 40
C.W. v. Textron, Inc.,
807 F.3d 827 (7th Cir. 2015) 33
Defoe v. Spiva,
625 F.3d 324 (6th Cir. 2010) 37
Dodd v. Rambis,
535 F. Supp. 23 (S.D. Ind. 1981) 35
E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. Law Appeals,
169 F. Supp. 3d 221, 248 (D. Mass. 2016) 35, 37, 40
Feine v. Parkland Coll.-Board of Trs.,
No. 09-2246, 2010 U.S. Dist. LEXIS 36913 (C.D. Ill. Feb. 25, 2010) 19
Griggs v. Fort Wayne Sch. Bd,

359 F. Supp. 2d 731 (N.D. Ind. 2005) 18, 19, 45, 46, 48
Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 37, 43
Hamer v. Neighborhood Hous. Servs.,
897 F.3d 835 (7th Cir. 2018) 45
Hardwick v. Heyward, 674 F. Supp. 2d 725 (D.S.C. 2009) 43
Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) 29, 38
Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) 16, 17, 18, 19
Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118,
9 F.3d 1295 (7th Cir. 1993) 23
Hentosh v. Herman M. Finch Univ. of Health Scis./The Chi. Med. Sch.,
167 F.3d 1170 (7th Cir. 1999) 23, 28, 33
Hickethier v. Sch. Dist. of Cornell,
No. 17-cv-506-jdp, 2018 U.S. Dist. LEXIS 125599 (W.D. Wis. July 27, 2018) 25
Jacobs v. Clark Cty. Sch. Dist.,
526 F.3d 419 (9th Cir. 2008) 20, 28, 33
Jenkins v. Nelson,
157 F.3d 485 (7th Cir. 1998) 49
Kuerbitz v. Meisner,
No. 16-12736, 2017 U.S. Dist. LEXIS 152767 (E.D. Mich. Sep. 20, 2017). 48
Lavine v. Blaine Sch. Dist.,
257 F.3d 981 (9th Cir. 2001) 36, 37, 38, 40
Locke v. Haessig,
788 F.3d 662 (7th Cir. 2015) 15
Lowery v. Euverard,
497 F.3d 584 (6th Cir. 2007); 36
Mahanoy Area Sch. Dist. v. B.L.,
141 S. Ct. 2038 (2021), ... 21, 22
May v. Evansville—Vanderburgh Sch. Corp.,
787 F.2d 1105 (7th Cir. 1986) 24
Miller v. Penn Manor Sch. Dist.,
588 F. Supp, 2d 606 (E.D. Pa. 2008) 48
Morse v. Frederick,
551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), ... 16
Muller v. Jefferson Lighthouse Sch.,
98 F.3d 1530 (7th Cir. 1996) ..... passim
N.J. v. Sonnabend,
No. 20-C-227, 2021 U.S. Dist. LEXIS 86185
(E.D. Wis. May 3, 2021) ..... passim
Nuxoll v. Indian Prairie School District # 204,
523 F.3d 668 (7th Cir. 2008) 20, 35, 36, 45
Poling v. Murphy,
872 F.2d 757 (6th Cir. 1989) 28, 29, 32, 33

Reed v. Marion Superior Court,
No. 1:13-cv-01174-SEB-DML,2014 U.S. Dist. LEXIS 149426
(S.D. Ind. Oct. 20, 2014) 25
Richards v. United States Steel,
869 F.3d 557 (7th Cir. 2017)..... 14, 15, 34
Schoenecker v. Koopman,
349 F. Supp. 3d 745 (E.D. Wis. 2018).....21
SEC v. Bauer,
723 F.3d 758 (7th Cir. 2013)..... 38
Spence v. Washington,
418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974)..... 47
Texas v. Johnson,
491 U.S. 397, 404, 109 S. Ct. 2533, 105 L.Ed. 2d 342 (1989))..... 45
Tinker v. Des Moines Independent School District,
393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)..... passim
United States v. Foster,
652 F.3d 776, 793 (7th Cir. 2011)..... 34
Weinstein v. Schwartz,
422 F.3d 476 (7th Cir. 2005)..... 28, 33
Wesolowski v. United States,
No. 1:17-cv-00749-JMS-MPB, 2017 U.S. Dist. LEXIS 138345
(S.D. Ind. Aug. 28, 2017) 34
Zamecnik v. Indian Prairie School District # 204,
636 F.3d 874 (7th Cir. 2011)..... 20, 38, 42, 45

Statutes

28 U.S.C. § 1291 1
28 U.S.C. § 1331 1

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 because the claims arise under the Constitution.

Plaintiffs-Appellants, N.J. and A.L.'s ("Plaintiffs") appeal is taken from an order of the U.S. District Court for the Eastern District of Wisconsin entered on May 3, 2021 by the Honorable William C. Griesbach (Consolidated Cases No. 20-CV-227 and No. 20-CV-276). *N.J. v. Sonnabend*, No. 20-C-227, 2021 U.S. Dist. LEXIS 86185 (E.D. Wis. May 3, 2021). This Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 1291. The Notice of Appeal was filed with the District Court on May 21, 2021 (ECF 55).

STATEMENT OF THE ISSUES

1. Whether Defendants, David Sonnabend and Beth Kaminski's ("Defendants") prohibition of Plaintiffs' shirts is viewpoint neutral? The District Court correctly found that the Defendants' ban on clothing bearing images of firearms was viewpoint neutral and that schools are non-public forums, and accordingly, the standard utilized is the "reasonably related to legitimate pedagogical concerns" test articulated by this Court in *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1537-38 (7th Cir. 1996).

2. Whether the restrictions on Plaintiffs' First Amendment rights are reasonably related to legitimate pedagogical concerns? The District Court correctly found that the restrictions were reasonably related to the legitimate pedagogical

concerns of alleviating anxiety and fear amongst the student body and reducing student aggression.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This case is about Plaintiffs' challenge to their public-school districts' decisions to prohibit them from wearing shirts that contained images of guns while at school and whether the minor impact on their speech violated the Constitution.

Most of the background facts pertaining to this case are set forth in *N.J. v. Sonnabend*, No. 20-C-227, 2021 U.S. Dist. LEXIS 86185 (E.D. Wis. May 3, 2021) (ECF 53). The decision accurately sets forth the undisputed material facts relied upon the Court in granting Defendants' motions for summary judgment. However, as the issues on appeal may require this Court to review more than just the facts deemed material by the District Court, additional facts will be highlighted.

A. N.J. and Shattuck Middle School.

N.J. is a student at Shattuck Middle School, which is operated by the Neenah Joint School District. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *2. David Sonnabend is the Associate Principal at Shattuck Middle School and has been for all times relevant to this case. *Id.* N.J. was a seventh-grade student during the 2019-2020 school year and as of May 2021 was in eighth grade. *Id.*

Shattuck Middle School is organized in different "academies" where groups of students have the same classes and teachers. Defendants' Joint Proposed Findings of Fact (ECF 36) ("*DPFOF*"), ¶ 4. N.J. is in the "At Risk Academy". *Id.* at ⁋ 5. Students assigned to the At Risk Academy have been identified as being at risk of not

graduating from high school. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *6-7. The At Risk Academy offers more individualized attention and utilizes a project-based learning method for students who may not have the same social and emotional skills as other students. *Id.* at *7.

Shattuck Middle School has a dress code. *Id.* at *2. During the 2019-2020 school year, the dress code provided that "[c]lothing must also be appropriate for a professional atmosphere and not disruptive to the learning environment" and included a non-exhaustive list of what is not permitted. *Id.* at *2-3. The dress code was amended for the 2020-2021 school year and now provides:

> The Neenah Joint School District prioritizes a safe learning environment. It is important that your student dress not compromise the safety of our learning environment for any of our students or staff. If a student's attire creates a learning environment that is deemed unsafe for students or staff, the student may be asked to change the clothing that is creating a disruption to the safe learning environment.

Id. at *3.

All teachers are made aware of the dress code at the start of each year; they were informed prior to the start of the 2019-2020 school year that clothing with images of firearms was inappropriate and prohibited under the dress code. *Id.* Students were made aware of the dress code during the registration process, and the dress code is addressed on the first day of school in each core class as part of a Positive Behavioral Interventions and Supports lesson. *Id.* at *3-4. Students were told that they can express individuality if they do not compromise safety with slogans promoting tobacco, alcohol, drug use, or containing suggestive, sexual, or offensive references. *Id.* at *4. They were also advised of safety concerns related to clothing

with weapons images or references creating fear and anxiety in students. *Id.* The prohibition against displaying images of firearms applies equally to all images regardless of whether the message conveyed is in favor of or against firearms and laws controlling their sale and use. *Id.*

On February 11, 2020, N.J. wore a sweatshirt to school "with a gangster looking skeleton holding a loaded pistol with the phrase 'Bad Ass' on it" (the "Bad Ass Shirt"). *DPFOF*, ¶ 19. N.J.'s science teacher, Christopher Jones referred N.J. to Mr. Sonnabend for wearing the "Bad Ass" shirt as it was deemed inappropriate under the dress code because it depicted a firearm. *Id.* at ¶ 20. This was the third time N.J. had worn this sweatshirt to school and each time he had been asked by Mr. Sonnabend to remove it and to not wear it to school again. *Id.* at ¶ 21.

The next day, February 12, 2020, N.J. wore a shirt with the inscription "Smith & Wesson Firearms — Made in the USA Since 1852." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *4. In addition to the inscription, the shirt also had a logo of the Smith & Wesson company which depicted a revolver (the "Smith & Wesson Shirt").[1] *Id.* N.J. visited his English Language Arts teacher, Jennifer Peterson, before class. *Id.* She saw the Smith & Wesson shirt and observed that it contained an image of a handgun. *Id.* Ms. Peterson referred N.J. to Mr. Sonnabend, as N.J. had been warned several times that school year about wearing clothing that depicted firearms. *Id.* Mr. Sonnabend spoke to N.J. that day and asked if N.J. had any clothing with him that he could wear over the Smith & Wesson Shirt. *Id.* at *4-5. N.J. produced a sweatshirt

[1] A photograph of the Smith & Wesson Shirt is reproduced in the District Court's Decision and Order. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *4.

from his backpack and put it on over the shirt and returned to class. *Id.* at *5. Mr. Sonnabend again told N.J. that he could not wear clothing depicting firearms because it was disruptive. *Id.* N.J. was asked why he wore shirts with gun images on them, and he told Mr. Sonnabend that "he wanted to express himself with his clothing." *DPFOF*, ¶ 27; (ECF 33-1, p. 4).

Mr. Sonnabend called N.J.'s home, and N.J.'s mother's boyfriend, Jason Kraayvanger, answered the call. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *5. Mr. Sonnabend informed him that N.J. had worn the Smith & Wesson Shirt to school and that he had asked N.J. to cover the shirt. *Id.* Mr. Kraayvanger went to the school with another shirt. *Id.* Kraayvanger did not bring a shirt for N.J. to change into but brought an example of what N.J. might wear. *Id.* That sweatshirt had the words "I'm a patriot" and "Weapons are part of my religion." *Id.* The sweatshirt, also included the text "2/A" and "17/76" and depicts a medieval helmet alongside two antique rifles (the "Patriot Shirt").[2] *Id.* Mr. Sonnabend interpreted Mr. Kraayvanger's actions as showing the types of clothing that N.J. liked and might wear in the future. *Id.*

N.J. was never disciplined for wearing a shirt depicting a firearm, but he was directed to remove or cover the image each time he wore one. *Id.* at *5-6. It was only the images of the firearms that violated the dress code. *Id.* at *6. N.J. would not have been prohibited from wearing, for example, a shirt that only conveyed a message with words such as "Smith & Wesson," "1776," and "2A." *Id.* Teachers and staff in N.J.'s

[2] A photograph of the Patriot Shirt is reproduced in the District Court's Decision and Order. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *5.

academy have also previously asked N.J. to cover or change his shirt when he wore clothing depicting a firearm. *Id.*

Students at Shattuck Middle School have reported to teachers and counselors that clothing depicting firearms like those worn by N.J. made them feel uncomfortable and that they felt uncomfortable, anxious, and unsafe when N.J. wore shirts with images of guns. *Id.* N.J.'s repeated wearing of shirts depicting weapons caused a disruption to students in Shattuck's "At Risk Academy" because the images of firearms made other students anxious and concerned and created an uncertainty for other students about whether guns would be brought to school. *Id.*; *DPFOF*, ¶ 39.

N.J. displayed other incidents of threatening and violent actions at Shattuck Middle School, including flipping scissors towards others like a switchblade, whittling drumsticks and holding them like a knife or "shanks", and swiping splintered pieces of wood or the whittled drumsticks at people. *DPFOF*, ⁋ 40. Those incidents were handled by the teachers and staff within the academy and reported to Mr. Sonnabend. *Id.* at ⁋ 41.

Additional actions by N.J. caused others to fear him. *See id.* at ⁋⁋ 40-46. Prior to February 2020, N.J. wore multiple long-gun rifle shells as a necklace and on a chain on his pants. *Id.* at ⁋ 42. Students were fearful about N.J. wearing these items because they were not sure if they were live or spent ammunition. *Id.* at ⁋ 43. The students knew enough to recognize that the items were ammunition, but they did not know if they were live ammunition which made them feel unsafe and compelled them to report it to their teachers. *Id.* Mr. Sonnabend determined that wearing the shell

casings violated the dress code and N.J. was asked to not bring them to school in the future. *Id.* at ¶ 44.

N.J.'s behaviors at school were so concerning to his classmates that they told their teachers and staff that if something violent were to happen at school they felt N.J. would be the person to do so. *Id.* at ¶ 47. Students also expressed fear that N.J. could bring a gun to school to commit a shooting. *Id.* at ¶ 48. And, N.J. made threating comments to students, who reported those concerns to their teachers. *Id.* at ¶ 49. Because of these behaviors, students felt threatened by N.J. *Id.* The threatening behavior coupled with repeatedly bringing shell casings to school and the repeated wearing of the "Bad Ass" shirt, made students increasingly uneasy around N.J., to the point where for a couple of weeks, N.J. was not permitted to be in a classroom until a teacher was present in order to quell some of the anxious feelings amongst the other students in his class. *Id.* at ¶¶ 50-51. Mr. Sonnabend and N.J.'s teachers had the overall impression that N.J. tended to seek negative teacher and adult interactions, enjoyed displaying power over other students, and tended to purposely engage in negative, attention seeking behaviors. *Id.* at ¶ 52. The consensus in the school was that other students did not feel safe around N.J. *Id.* at ¶ 53.

In February 2020, students at Shattuck Middle School seemed more sensitive about school violence because of two school shooting incidents that occurred at schools

in nearby Oshkosh[3] and Waukesha[4], and across the country in general. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *7. As a result of the school shootings, Shattuck Middle School tightened up its safety drills. *Id.*

B. A.L. and Kettle Moraine High School.

A.L. is a student at Kettle Moraine High School, a public school in the Kettle Moraine School District. *Id.* Beth Kaminski is the Principal of Kettle Moraine High School. *Id.* On February 19, 2020, A.L. wore a shirt with an image of a gun to school. *Id.* Associate Principal Justin Bestor notified Ms. Kaminski of this, so she had A.L. come to her office to have a conversation with him. *Id.*; *DPFOF*, ¶ 63. The shirt contained the words "Wisconsin Carry, Inc." and the organization's logo, which is a handgun tucked behind the inscription, as if the gun were in a holster and the inscription were a belt (the "WCI Shirt").[5] *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *7. Ms. Kaminski and Mr. Bestor spoke to A.L. about the shirt, told him it violated the dress code, and directed him to zip up his hoodie jacket, which A.L. did. *Id.* at *7-8. When asked in discovery why he wore that shirt, A.L. stated that he wore the WCI shirt because "he wanted to wear it that day." *DPFOF*, ¶ 67; (ECF 33-2, p. 10).

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[3] On December 3, 2019, a school resource officer shot and wounded a student who stabbed him during an altercation at Oshkosh West High School. *DPFOF*, ¶ 54. The Oshkosh school is about 20 minutes away from Shattuck Middle School. *Id.* at ¶ 55.

[4] On December 2, 2019, a school resource officer shot and wounded a student who brought a handgun to school and pointed it at police officers at Waukesha South High School. *DPFOF*, ¶ 56. The Waukesha school is approximately one- and one-half hours away from Shattuck Middle School. *Id.* at ¶ 57.

[5] A photograph of the WCI Shirt is reproduced in the District Court's Decision and Order. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *7.

The holstered gun image is also on the back of the shirt, along with the text of the amendment to the Wisconsin Constitution recognizing the right of the people "to keep and bear arms for security, defense, hunting, recreation, or any other lawful purpose." *Id.* at *8. The back of the shirt, however, was not visible to others because A.L. was wearing a hoodie jacket over the Shirt. *Id.*

Kettle Moraine High School has a dress code. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *8. The dress code provides in relevant part that students at Kettle Moraine should always strive to be neat in appearance, clean, well-groomed, and wearing attire that supports actively engaging in the lessons and project-based learning in the classroom. *Id.* The dress code also provides that clothing styles that do not fit that description include, but are not limited to, articles of clothing with "inappropriate messages — including cartoons, slogans, or advertisements which have more than one meaning, or those which depict or portray conduct or messages which may be illegal or offensive." *Id.*

Ms. Kaminski interprets the dress code's prohibition on inappropriate messages to cover the image of a handgun. *Id.* at *8-9. The prohibition against displaying images of firearms applies equally to all images regardless of whether they are pro-gun or anti-gun. *Id.* at *9. On February 19, 2020, Ms. Kaminski and Mr. Bestor told A.L. he was not permitted to wear clothing that depicted firearms. *Id.* Ms. Kaminski told A.L. that he had to cover up the shirt because the school did not allow any clothing that depicts images of drugs, alcohol, or firearms. *Id.*

The image of the gun violated the Kettle Moraine High School dress code. *DPFOF*, ¶ 68. If A.L. had worn a shirt that only stated "Wisconsin Carry, Inc." he would not have been asked to cover it up. *Id.* at ¶ 9. In fact, A.L. had previously worn a shirt on January 7, 2020 as part of Wisconsin Carry Inc.'s self-proclaimed "Second Amendment Tuesday." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9. That shirt had the words "AR 15" written on it parodying a square on the periodic table of elements. *Id.*; *DPFOF*, ¶ 70. "AR 15" is the abbreviated name for a lightweight semi-automatic rifle that is commonly characterized as an assault rifle in the media. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9. Since the AR 15 shirt did not contain an image of a gun, it did not violate the dress code. *DPFOF*, ¶ 71. A.L. was not disciplined for wearing the AR 15 shirt. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9.

A.L. also had previous incidents regarding the clothing he wore to school. *DPFOF*, ¶ 75. A.L. wore a confederate flag hat to school on previous occasions. *Id.* at ¶ 76. The first time he wore the hat to school, Mr. Bestor had a conversation with A.L. and the second time, he had a conversation with Mr. Bestor and Ms. Kaminski, where he was asked to either remove the confederate flag patch from the hat or remove the hat, which he complied with. *Id.* at ¶ 77. It was known amongst the student body that A.L. had worn a confederate flag hat to school. *Id.* at ¶ 78. This was concerning because there were ongoing racial tensions at the school at the time. *Id.* at ¶¶ 96-99.

Kettle Moraine High School has experienced disruptions when students at the high school reported feeling uncomfortable around other students who were wearing

clothing that depicted or were associated with firearms. *Id.* ¶ 84; *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9. A shooting at nearby Waukesha South High School[6] on December 2, 2019, caused an increased concern about school violence and school shootings. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9. The Kettle Moraine High School Student body became aware of the shooting shortly after it happened through social media and that caused a concern throughout the school. *DPFOF*, ¶ 90. Students sought out adults to talk about it. *Id.* The day after the Waukesha shooting, a Kettle Moraine High School student received an anonymous comment on a video he had posted on YouTube that insinuated that an attack on the school was going to take place between first and second period the next day. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9-10.

Since the beginning of the 2020-2021 school year, A.L. has not been attending school in person. *Id.* at *10. A.L. refused to comply with the school's requirement that all students wear masks to prevent the spread of the COVID-19 virus, and as a result, A.L. participated in distance learning for the 2020-21 school year.[7] *Id.*

[6] A student in a Waukesha classroom brandished a gun, and police were on scene and shot and injured the student. *DPFOF*, ⁋ 86. The shooting in Waukesha had an effect on the students and staff. *Id.* at ¶ 87. Kettle Moraine High School students have connections to individuals at Waukesha South High School because the two schools have co-op athletics, so they have students on the same teams. *Id.* at ¶ 88. Kettle Moraine High School has staff members who have children who attend Waukesha South or spouses or significant others who work there. *Id.* at ¶ 89.

[7] The District Court determined that A.L.'s claim was not moot, *see N.J.*, 2021 U.S. Dist. LEXIS 86185, at *11-12, and Defendants will not challenge that determination.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

N.J. filed his lawsuit against Mr. Sonnabend on February 13, 2020. (20-CV-227 ECF 1). A.L., along with his co-plaintiff, R.N., filed their lawsuit against Ms. Kaminski on February 20, 2020. (20-CV-276 ECF 1). An Amended Complaint was filed in A.L.'s case to add a third plaintiff, K.S., on March 12, 2020. (20-CV-276 ECF 10). Defendants moved to consolidate the cases and that motion was granted on April 24, 2020, and the cases were consolidated under the N.J. case number 20-CV-227 and both matters were assigned to Judge William C. Griesbach.[8] (ECF 12).

Defendants moved for judgment on the pleadings on July 31, 2020 (ECF 14) and that motion was denied on November 6, 2020. (ECF 23). On August 14, 2020, Plaintiffs filed an unopposed motion to dismiss R.N. and K.S. as plaintiffs (ECF 16), and that motion was granted to August 18, 2020. (ECF 17).

Plaintiffs and Defendants both moved for summary judgment on December 18, 2020. (ECF 24, 28). After the cross-motions for summary judgment were fully briefed, the District court granted Defendants' motion for summary judgment on May 3, 2021 and denied Plaintiffs' motion for summary judgment and dismissed the case. (ECF 53); *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *41.

The District Court held that this case was properly analyzed under the standard set forth by this Court in *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), for restrictions on student speech in non-public forums where the restriction is viewpoint neutral. *Id.* at *17. The District Court then found that the

[8] Unless specifically identified by case number, all references to the District Court record refer to the consolidated docket, Case No. 20-CV-227.

schools were non-public forums and that the restrictions on Plaintiffs' speech was viewpoint neutral. *Id.* at *25. The District Court held as a matter of law that the restrictions were reasonably related to legitimate pedagogical concerns—anxiety and fear among students over school violence and reducing student aggression. *Id.* at *22, 38.

The District Court also ruled that Plaintiffs waived their claim that the school dress codes are unconstitutionally overbroad in violation of the Fourteenth Amendment because they failed to respond to Defendants argument regarding this claim.[9] *Id.*at *38-39. The District Court found that even if the claim had not been waived, it failed on the merits as well. *Id.* at *39.

SUMMARY OF ARGUMENT

The District Court correctly held that the restrictions at issue in this case were governed by the test set forth in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996)—whether the restrictions are reasonably related to legitimate pedagogical concerns—because the restrictions are viewpoint neutral and the schools are non-public forums.

The District Court correctly applied this test to the undisputed facts at summary judgment to hold that the restrictions in this case were reasonably related to the legitimate pedological concerns of student fear and anxiety and reducing student aggression.

[9] Plaintiffs have not appealed this determination, so it is not subject to review by this Court. *See* Brief of Appellants ("App's Br.") (App. Dkt. 8), p. 8.

Even if the restrictions should have been reviewed under the *Tinker* substantial disruption test, Defendants reasonably forecasted that permitting N.J. and A.L. to wear their shirts with images of firearms would cause a substantial disruption.

This Court can alternatively uphold dismissal because Plaintiffs' shirts did not not satisfy the threshold requirement of being protected speech: they did not convey a particularized message nor was the likelihood great that the message would be understood by those who viewed it.

Plaintiffs waived their Fourteenth Amendment claims by not responding to Defendants' arguments before the District Court and failing to address this issue on appeal.

ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews a district court's grant of summary judgment *de novo*, construing all facts and reasonable inferences in the non-moving party's favor. *Richards v. United States Steel*, 869 F.3d 557, 562 (7th Cir. 2017). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On cross-motions for summary judgment, each movant must satisfy the requirements of Federal Rule of Civil Procedure 56. *Cont'l Cos. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005). There may be more than one basis to affirm the entry of summary judgment and this Court "can affirm on any ground supported by the record so long as the issue was raised and the non-moving party had a fair

opportunity to contest the issue in the district court." *Richards*, 869 F.3d at 562 (citing *Locke v. Haessig*, 788 F.3d 662, 666 (7th Cir. 2015)).

II. THE DISTRICT COURT CORRECTLY FOUND THAT *IT WAS* REQUIRED TO DETERMINE IF DEFENDANTS' MINOR RESTRICTION OF PLAINTIFFS' FIRST AMENDMENT RIGHTS WAS REASONABLY RELATED TO LEGITIMATE PEDAGOGICAL CONCERNS.

Plaintiffs' only argument on appeal is that the District Court utilized the wrong standard in analyzing the restriction on student speech and that the restrictions were not viewpoint neutral. Their contentions are superficial and barely developed and do nothing to show that that the District Court's analysis was faulty or that this Court should come to a different conclusion. The District Court properly analyzed this case under *Muller* and found that the restrictions were reasonably related to legitimate pedological concerns. Plaintiffs fail to show that this was erroneous.

A. The District Court Correctly Held That The Speech In This Case Was Subject To the Standard Articulated By This Court In *Muller*.

As the District Court correctly observed, student free speech cases generally start with *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *14. In *Tinker*, the Supreme Court held that "in order to justify prohibition of a particular expression of opinion, public school officials would have to show that 'the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Id.* (citing *Tinker*, 393 U.S. at 509).

Plaintiffs believe that *Tinker*'s substantial disruption test is a rigid, default standard that must be adhered to in any circumstance that has not already been addressed by the Supreme Court. This view completely ignores this Court's interpretation of *Tinker* and its progeny. The District Court correctly observed that:

> 'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,' *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), and that the rights of students 'must be 'applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (quoting *Tinker*, 393 U.S. 506).

Id. at *15. The District Court also correctly noted that since *Tinker,* the Supreme Court has not applied the substantial disruption test in a ridged manner, leaving the circuits freedom to interpret its line of cases in light of the different circumstances that come before them.

In *Fraser*, the Supreme Court upheld the authority of school officials to sanction a high school student for giving a lewd and indecent speech. In *Kuhlmeier* the Court held that a high school newspaper was not a public forum and that the principal could constitutionally impose reasonable restrictions on articles that were offered for publication. *Id.* The District Court accurately explained that: "In neither *Fraser* nor *Kuhlmeier* did the Court address the question of whether the prohibited speech was likely to cause a material and substantial disruption of the operation of the school, thus indicating that *Tinker*'s substantial disruption test is not absolute." *Id.* at *15-16.

Subsequent to *Fraser* and *Kuhlmeier*, in *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), the Court rejected a high school student's claim that his First Amendment rights had been violated and held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" without addressing whether the speech substantially disrupted the work of the school. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *16.

Plaintiffs look at this line of cases and conclude that if a case does not involve the exact same conduct—indecent, lewd, or vulgar speech or speech that promotes illegal drug use—then the *Tinker* substantial disruption test must apply. They also allege that "the District Court created a new test determine whether to follow the *Tinker* or *Kuhlmeier* line of cases." App. Br., p. 13. Neither assertion is correct, and both ignore that the District Court concluded that it was bound by this Court's established circuit precedent in *Muller*.

The *Muller* court observed that it was constrained by the holding in *Kuhlmeier* to start with "an initial determination of the type of forum at issue." *Id.* at 1537. This Court explained:

> Speech in nonpublic forums is subject to significantly greater regulation than speech in traditional public forums. Thus, where school facilities have been 'reserved for other intended purposes, 'communicative or otherwise," and no public forum has been created, 'school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.' *Hazelwood,* 484 U.S. at 267(emphasis added); *Perry*, 460 U.S. at 46 n.7. The Court's test now is whether the restrictions are 'reasonably related to legitimate pedagogical concerns.' *Hazelwood*, 484 U.S. at 273.

Id. at 1537-38.

The District Court correctly explained that pursuant to *Muller*, "*Tinker*'s substantial disruption test is not applicable to restrictions on student speech in non-public forums where the restriction is viewpoint neutral. Instead, the test under those circumstances is whether the restriction on student expression is reasonably related to legitimate pedagogical concerns." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *17.

Plaintiffs only mention *Muller* in passing and fail to develop an argument as to why *Muller* should not govern this case. The fact that *Muller* involved a student distributing leaflets at the school does not mean that its holding is limited to that unique circumstance. This is evident by the *Muller* court's analysis of whether a public school is a non-public forum without considering the specific act of handing out leaflets as part of that analysis. *See Muller*, 98 F.3d at 1539-40. Thus, in the Seventh Circuit, the *Muller* test is applicable in all student free speech cases that involve speech in school where the restriction is viewpoint neutral.

Other district courts in this Circuit have analyzed the restriction of shirts with images of guns under the *Muller* analysis. Specifically, in *Griggs v. Fort Wayne Sch. Bd.*, the district court relied on *Muller* in applying the *Kuhlmeier* reasonableness standard to a student's shirt that depicted an M16 rifle. 359 F. Supp. 2d 731, 733, 740-41 (N.D. Ind. 2005). The plaintiff in *Griggs* presented the same argument that Plaintiffs have raised here—that *Tinker's* substantial disruption test is the default rule for school speech cases and that the subsequent Supreme Court student speech

cases provide narrow exceptions to the rule. *See id.* at 739. The *Griggs* court rejected this argument, explaining "Griggs is not alone in viewing the *Tinker-Fraser-Hazelwood* trilogy this way . . . But the Seventh Circuit, whose opinions this Court is bound to apply, has charted a different course." *Id.* at 740.

The *Griggs* court also correctly explained the rule that applies in the Seventh Circuit:

> The majority also put great emphasis on *Hazelwoods* 'initial determination of the type of forum at issue,' and it seemed to imply **that *all* student free-speech cases must now begin with such an analysis**, regardless of whether the speech at issue is school-sponsored as in *Hazelwood Id.* at 1537, 1539 ('*Hazelwood* stressed the importance of determining whether a public or nonpublic forum is at issue. Thus, we begin by analyzing what kind of forum this . . . school is.')
>
> Having laid that foundation, the majority then announced that, **absent a public forum, the *Hazelwood* test ('reasonably related to legitimate pedagogical concerns') applies to *all* student speech**. *Id.* at 1537-38.

Id. (emphasis added). The *Griggs* court refused to use the *Tinker* test because *Muller* "remains the law of this Circuit." *Id.* at 741.

Likewise, the district court in *Feine v. Parkland Coll.-Board of Trs.*, applied *Muller* when evaluating whether student speech in general was "reasonably related to legitimate pedagogical concerns" and viewpoint neutral. *See* No. 09-2246, 2010 U.S. Dist. LEXIS 36913, at *16-18 (C.D. Ill. Feb. 25, 2010). The *Feine* court correctly relied on *Muller* when holding that limits on the manner that student posts on a class discussion board is evaluated under the reasonableness standard. *Id.* at *19-20.

The District Court explained that *Muller* is not inconsistent with *Tinker*. Rather, it explained that "despite efforts to read *Tinker* more broadly, the actual

holding of the case 'extends only to viewpoint-based speech restrictions, and not necessarily to viewpoint-neutral speech restrictions.'" *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *20 (citing *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 430 (9th Cir. 2008)). Thus, "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny than that employed in either [*Fraser*], [*Kuhlmeier*], or *Tinker* when student speech is restricted on a viewpoint- and content-neutral basis." *Id.* at *21 (citing *Jacobs*, 526 F.3d at 431-32).

The District Court also addressed why the cases relied on by Plaintiffs do not change that *Muller* is good law, and binding precedent. The District Court correctly found that *Nuxoll v. Indian Prairie School District # 204*, 523 F.3d 668 (7th Cir. 2008), did not supplant the *Muller* reasonableness standard for viewpoint neutral restrictions. *Id.* at *21. In *Nuxoll* this Court applied a somewhat softened version of the *Tinker* test, but it did so because the restriction was "not viewpoint neutral" and clearly expressed support for one student view over another. *Id.* at *21-22. This Court did not overrule, abrogate, or limit *Muller* in *Nuxoll* [10]. Rather, the *Nuxoll* court acknowledged that different standards are utilized to address student speech restrictions depending on whether they are viewpoint neutral. This is consistent with the Supreme Court's line of cases.

The District Court also appropriately rejected Judge Adelman's reading of *Nuxoll* in *Schoenecker v. Koopman*, 349 F. Supp. 3d 745 (E.D. Wis. 2018). *Id.* at *23-

[10] Or in or *Zamecnik v. Indian Prairie School District # 204*, 636 F.3d 874 (7th Cir. 2011).

25. Specifically, the District Court did not believe that *Nuxoll* mandates application of the *Tinker* substantial disruption standard to cases that involve viewpoint neutral restrictions on speech. *Id.* Plaintiffs provide no analysis as to why the holding in *Schoenecker* should apply other than to state that the cases involved similar facts. The decision in *Schoenecker* does not even mention *Muller* and renders the distinction between viewpoint neutral and non-viewpoint neutral restrictions on speech superfluous.

Finally, the Supreme Court's recent decision in *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021), does nothing to change the results of this case. *Mahanoy* involved a public high school student using and transmitting vulgar language and gestures on Snapchat criticizing both the school and the school's cheerleading team. *Id.* at *5. The student's speech took place outside of school hours and away from the school's campus. *Id.* This case only addressed the narrow question of "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." *Id.* at *10.

The Supreme Court declined to "set forth a broad, highly general First Amendment rule" on whether and how "ordinary First Amendment standards must give way off campus to a school's special need." *Id.* at *13. For example, preventing substantial disruption of learning-related activities or protecting those who make up a school community were only provided as examples of the types of considerations that could be considered in how an off-campus speech case should be analyzed. *Id.*

Mahanoy cannot be read as broadly as Plaintiffs wish. It did not create any mandate that the *Tinker* substantial disruption test must be applied in all circumstances. The Supreme Court made no distinction between viewpoint neutral and non-viewpoint neutral restrictions on speech because the speech in question was not even speech that occurred at school: it was off-campus speech. In sum, *Mahanoy* does not overrule or abrogate *Muller* or create some type of new broad rule for student speech cases. In the Seventh Circuit, viewpoint neutral restrictions for on campus speech must be reviewed under the *Muller* reasonableness standard.

Contrary to Plaintiffs' claim, the District Court did not create a new test. It simply applied the established precedent of *Muller* which asks two questions to determine if the less demanding reasonableness standard applies to restrictions on student expression: (1) is the school a public forum; and (2) if not, is the restriction viewpoint neutral. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *18-19. If the school is a nonpublic forum and the restriction is viewpoint neutral, then a court can move on to determine whether the restriction is reasonably related to a legitimate pedagogical concern. *Id.* at *25. As explained below, the District Court properly determined that Shattuck Middle School and Kettle Moraine High School are non-public forums and that the restriction is viewpoint neutral.

B. The District Court Correctly Concluded That Shattuck Middle School And Kettle Moraine High School Are Non-public Forums.

There is no dispute the Shattuck Middle School and Kettle Moraine High School are non-public forums. School facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for

indiscriminate use by the general public or by some segment of the public, such as student organizations." *Kuhlmeier*, 484 U.S. at 267 (internal citations omitted). For example, this Court explained that a "junior high school is a nonpublic forum, which may forbid or regulate many kinds of speech." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993).

Plaintiffs make no attempt to dispute this fact and never address this portion of the *Muller* test in their appeal. As such, their failure to raise this issue in their brief constitutes a waiver. *See Hentosh v. Herman M. Finch Univ. of Health Scis./The Chi. Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999) ("Arguments not raised in an opening brief are waived."); *Coker v. TWA*, 165 F.3d 579, 586 (7th Cir. 1999) (holding that failure to develop an argument until a reply brief is too late and is a waiver of the issue). Therefore, the first *Muller* factor is satisfied.

C. The Restriction On Images Of Guns Is Viewpoint Neutral.

The second *Muller* factor looks to whether the restriction on speech is viewpoint neutral. This is because schools cannot favor one viewpoint over another on issues that are fairly debatable. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *19. The District Court viewed the undisputed material facts and determined that the prohibition on images of guns was viewpoint neutral:

> The restriction imposed by Defendants in these cases, however, is viewpoint neutral. It is undisputed that the restrictions imposed by Associate Principal Sonnabend and Principal Kaminski only applied to images of firearms. Pls.' Resp. to Defs.' PFOF, ¶¶ 33, 81, Dkt. No. 41. It is also undisputed that 'the prohibition against displaying images of firearms applies equally to all images regardless of whether they are pro-gun or anti-gun.' *Id.* at ¶¶ 18, 83. Images of firearms, regardless of

the message intended by the wearer, are simply not allowed. *Id.* at *25.

Plaintiffs cannot challenge on appeal whether the restrictions were viewpoint neutral because they admitted all of Defendants' proposed facts that established that the restrictions were viewpoint neutral. *See* Plaintiffs' Response to Defendants' Joint Proposed Findings of Fact (ECF 41) ("*Pls.' Resp. to Defs.' PFOF*"), ¶ 18 ("The prohibition against displaying images of firearms applies equally to all images regardless of whether they are pro-gun or anti-gun."); ¶ 33 ("It was only the images of the firearms that violated the dress code and N.J. would not have been prohibited from wearing, for example, a shirt that conveyed a message with words such as 'Smith & Wesson,' '1776,' and '2A'."); ¶ 81 ("Ms. Kaminski interpreted the dress codes prohibition on inappropriate messages to cover the image of a handgun."); ¶ 83 ("The prohibition against displaying images of firearms applies equally to all images regardless of whether they are pro-gun or anti-gun."). Plaintiffs also admitted that A.L. was not disciplined for wearing a shirt that had the words "AR 15" written on it parodying a square on the periodic table as part of an event called Second Amendment Tuesday, which was promoted by Wisconsin Carry, Inc. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9; *Pls.' Resp. to Defs.' PFOF*, ¶ 71.

These undisputed facts clearly demonstrate the restriction on images of guns at both schools are viewpoint neutral. Viewpoint neutral means that that a school has not suppressed or favored a particular viewpoint over another. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *19 (citing *May v. Evansville—Vanderburgh Sch. Corp.*,

787 F.2d 1105, 1113 (7th Cir. 1986)). For example, this Court has explained that a rule that prohibits all positions on a particular topic in a forum is viewpoint neutral:

> Excluding a faith-based publication from a speech forum *because* it is faith based is indeed viewpoint discrimination; where all other perspectives on the issues of the day are permitted, singling out the religious perspective for exclusion is discrimination based on viewpoint, not content. In contrast, here (and in *Stanton*, too), the State has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion. It has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral.

Choose Life Ill., Inc. v. White, 547 F.3d 853, 866 (7th Cir. 2008). Similarly, Defendants have prohibited all images of guns, regardless of the perspective and it is undisputed that no student would have been permitted to wear clothing with the image of a firearm, even if that message was "anti-gun." *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *25.

The fact that Plaintiffs explicitly agreed that the restrictions applied to pro-gun and anti-gun images and that Plaintiffs were not prohibited from wearing shirts that expressed support for firearms without pictures of weapons, is fatal to their claim that the restrictions were not viewpoint neutral. Failing to dispute a proposed fact during summary judgment proceedings conclusively establishes that fact and Plaintiffs cannot back away from that admission on appeal. *See Reed v. Marion Superior Court*, No. 1:13-cv-01174-SEB-DML, 2014 U.S. Dist. LEXIS 149426, at *1-2 (S.D. Ind. Oct. 20, 2014) (explaining that where a plaintiff "did not dispute Defendant's proposed fact, the Court considers that fact to be undisputed"); *Hickethier v. Sch. Dist. of Cornell*, No. 17-cv-506-jdp, 2018 U.S. Dist. LEXIS 125599,

at *2 (W.D. Wis. July 27, 2018) (stating that the court accepts a properly supported proposed fact as undisputed unless the other party disputes it and offers evidence in response).

Plaintiffs' cursory argument that the restrictions are not viewpoint neutral is unpersuasive, ignores that they already admitted to the cited undisputed facts, and relies on overbroad generalizations. Regardless of what Ms. Kaminski's deposition testimony stated, the District Court was permitted to rely on the undisputed facts regarding enforcement of the prohibition in ruling that the restriction at Kettle Moraine High School was viewpoint neutral. Even if Ms. Kaminski believed that the name of the organization was unacceptable, it is undisputed that the prohibition on images of guns would have applied to an anti-gun organization if if contained the image of a firearm. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *25.

Moreover, Plaintiffs' argument that the practical effect of a policy that prohibits all images of guns is "anti-gun" because more pro-gun organizations have logos that contain images of guns than anti-gun organizations is superficial and easily dispelled. While Plaintiffs cite to images of firearms on pro-gun organizations' logos, one cannot think of a clearer symbol of disagreement with that position than an image of a gun with an "X" or line through it. For example, the Coalition to Stop Gun Violence offers a "Ban AR-15 T-shirt" with the image of an assault rifle within a red circle with a line over it for purchase on its website.[11] At least five shirts can be purchased from Amazon.com that contain images of firearms with anti-gun

[11] *See* https://shop.csgv.org/ban-ar-15-t-shirt-ts61380.html (last visited July 16, 2021).

messages.[12] Plaintiffs agreed that Defendants' prohibitions apply to all images of guns. It is undisputed that a student showing support for ending gun violence would be prohibited from wearing a shirt with the image of a gun even if the gun was crossed out. Plaintiffs were welcomed to wear shirts that promoted their views without the image of a gun and A.L. did so without any consequences. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *9; *Pls.' Resp. to Defs.' PFOF*, ¶ 71.

The District Court correctly relied upon the undisputed material facts that were presented to it on the parties' cross motions for summary judgment to find that the the restriction on the images of firearms was viewpoint neutral as a matter of law. Because the schools are non-public forums, and the restrictions are viewpoint neutral, the second *Muller* factor is met and the question "is whether the restriction on student expression is reasonably related to legitimate pedagogical concerns." *N.J.*,

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[12] *See* https://www.amazon.com/Im-Pro-Life-Anti-Gun-Violence/dp/B07WD8WY15/ref=sr_1_6?dchild=1&keywords=anti+gun+shirt&qid=1626450542&sr=8-6 (last visited July 16, 2021); https://www.amazon.com/Gun-Violence-Control-Orange-T-Shirt/dp/B07RMW6788/ref=sr_1_45?dchild=1&keywords=anti+violence+shirts+with+guns&qid=1626451181&sr=8-45 (last visited July 16, 2021); https://www.amazon.com/Gun-Control-National-Violence-Awareness/dp/B07D8GVZ1G/ref=sr_1_1?dchild=1&keywords=Mens+Gun+Control+National+Gun+Violence+Awareness+Day+Orange+Shirt&qid=1626451327&sr=8-1 (last visited July 16, 2021); https://www.amazon.com/Enough-Reform-Anti-Violence-Shirt/dp/B079X1M1W6/ref=a9vs-vusim-pr-dp-v3m1-desktop-t2_27/134-0460350-1346658?pd_rd_w=F6mFW&pf_rd_p=040e5612-0c06-40b5-af85-019ddbeed8f1&pf_rd_r=AZY5VH9E6CH46WYC3G67&pd_rd_r=5acc5345-5597-4318-9a87-3d193a40c9f2&pd_rd_wg=dHPSw&pd_rd_i=B079X1M1W6&psc=1 (last visited July 16, 2021); https://www.amazon.com/Wear-Orange-Gun-Violence-Awareness/dp/B07SXC7T7Y/ref=pd_day0_36/134-0460350-1346658?pd_rd_w=1RavY&pf_rd_p=8ca997d7-1ea0-4c8f-9e14-a6d756b83e30&pf_rd_r=62VW7QQ83WAHF6XZVGZS&pd_rd_r=e0cbdbb5-689d-4d91-bc40-bfbe007a214d&pd_rd_wg=IG8ka&pd_rd_i=B07SXC7T7Y&psc=1 (last visited July 16, 2021).

2021 U.S. Dist. LEXIS 86185, at *25 (citing *Muller*, 98 F.3d at 1530; *Kuhlmeier*, 484 U.S. at 273).

D. The Restrictions On Images Of Firearms Are Reasonably Related To The Legitimate Pedagogical Concerns Of Student Fear And Anxiety and Reducing Student Aggression.

Under *Muller*, a viewpoint neutral restriction in a school must be upheld as long as the restriction is "reasonably related to legitimate pedagogical concerns." 98 F.3d at 1530. Plaintiffs rely exclusively on their argument that the District Court applied the wrong test and provide no argument to substantively address the reasonableness standard utilized by the District Court. Their failure to develop any argument on this issue constitutes a waiver and acknowledgement that the restrictions on images of guns is reasonably related to legitimate pedagogical concerns. *See Hentosh*, 167 F.3d at 1173; *Weinstein v. Schwartz*, 422 F.3d 476, 477 n.1 (7th Cir. 2005) (maintaining that the failure to adequately develop an argument on appeal constitutes waiver).

The Supreme Court has explained that "'pedagogical concerns' include not only the structured transmission of a body of knowledge in an orderly environment, but also the inculcation of civility (including manners) and traditional moral, social, and political norms." *Muller*, 98 F.3d at 1540 (citing *Tinker*, 393 U.S. at 506). The universe of of "legitimate pedagogical concerns" has been broadly construed in the high school setting to cover values like "discipline, courtesy, and respect for authority" and are "by no means confined to the academic." *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989); *see also Jacobs*, 526 F.3d at 435-36 (holding that increasing student

achievement, promoting safety, and enhancing a positive school environment "unquestionably qualify as 'important'" pedological interests); *Cohn v. New Paltz Cent. Sch. Dist.*, 363 F. Supp. 2d 421, 434 (N.D.N.Y. 2005) (explaining that schools "are responsible for providing a safe and stable learning environment free of distraction and fear").

"As long as school officials offer reasonable explanations for viewpoint neutral restrictions in student dress codes, courts should not second guess their decisions" and "school officials should be accorded significant deference in making such decisions." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *26-27. "Because school officials are far more intimately involved with running schools than federal courts are, it is axiomatic that federal courts should not lightly interfere with the day-today operation of schools." *Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013) (internal citations omitted). "Local school officials, better attuned than [the courts] to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted." *Poling*, 872 F.2d at 762.

Even if Plaintiffs did not waive this issue, the District Court correctly found that the Defendants' ban on images of firearms was reasonably related to the legitimate pedagogical concerns of student fear and anxiety and reducing student aggression. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *33, 38.

1. Promoting and maintaining an effective learning environment by alleviating the fear and anxiety caused by images of firearms is a legitimate pedagogical concern.

The District Court aptly explained why "the prohibition of clothing bearing images of firearms is justified because of concern over the emotional trauma that images of firearms on clothing worn by their classmates may cause in some students." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *27. The material facts at summary judgment demonstrated that at both Shattuck Middle School and Kettle Moraine High School students have expressed to administrators and teachers that the images of guns caused them anxiety and fear. *Id.* This fear was not unfounded as there had been two school shootings at nearby schools in Oshkosh and Waukesha in the months prior to Plaintiffs wearing their shirts to school. *Id.* at *27-28. The situation at Kettle Moraine High School was exacerbated when there was a threat of gun violence made the day following the Waukesha shooting. *Id.* at *9.

Defendants presented admissible evidence that students at Shattuck Middle School reported to teachers and guidance counselors that clothing depicting firearms like those worn by N.J. made them uncomfortable, anxious, not safe, and fearful that guns might be brought to school. *See id.* at *28-29; *DPFOF*, ¶¶ 35-39. Likewise, Kettle Moraine High School student have reported feeling uncomfortable around other students because they were wearing clothing that depicted firearms. *Id.*; *DPFOF*, ¶ 84.

The District Court correctly explained why alleviating the fear and anxiety caused by gun violence is a legitimate pedological interest as "the image of a firearm

on a classmate's shirt in the school environment can be a reminder of the school violence that lies at the heart of the schools' concerns." *Id.* at *29. Considering the massive amount of gun violence in schools across the country and in Defendants' own backyards, "Defendants' decision to prohibit students from wearing clothes with images of firearms was not unreasonable." *Id.* at *31. The District Court appropriately observed that:

> Students who wear clothing bearing the image of firearms continually display in the classrooms and hallways of the school throughout the day what some of their classmates and teachers may regard as a frightening reminder of the school violence that many believe has plagued the nation. Unlike those who enjoy hunting, trap shooting, or other forms of marksmanship, or who appreciate the history and importance of firearms as essential tools for personal, family, and national defense, many people today fear guns. That fear may not be entirely rational, but it is no less real. There are also students . . . that might seek to frighten or intimidate students by exposing them to such images. To the extent such fear and anxiety among students or staff arises, whether intentionally provoked or not, it undermines in those students who experience it the sense of safety and bodily security that are essential to promoting and maintaining an effective learning environment.

Id. at *31-32.

The District Court also explained that the restriction placed on Plaintiffs' speech was minor given that it would not prevent them "from debating the value of firearms or the merits of gun control laws" and they "remain free to speak and write on the issue, as appropriate in classroom discussions and essays." *Id.* at *32-33. The restriction has even less of an impact on Plaintiffs' speech rights since "N.J. and A.L. even remain free to wear shirts that express their support for the Second Amendment in other ways." *Id.* at *33. Given the substantial deference to be given to school administrators, these restrictions are certainly reasonable.

For all these reasons, the decision to impose a restriction on images of guns in school was reasonably related to the important goals of addressing student fear and anxiety and promoting effective learning in the classroom.

2. Reducing student aggression is a legitimate pedagogical goal.

The District Court also found that the restriction on images of firearms was reasonably related to the important pedagogical goal of reducing student aggression. *Id.* at *38. In do so, the District Court rejected Plaintiffs *Daubert* challenge to the admissibility of the opinions of Professor Brad J. Bushman regarding the "weapons effect." *Id.* at *35. "The weapons effect is the name given to the theory that the mere presence of guns or images of guns increases aggression in people." *Id.* at *33. The District Court reviewed Dr. Busman's opinions based on the standards set forth in Fed. R. Evid. 702 and *Daubert*, and held that the opinion that the image of guns in school primes aggressive behavior in students was admissible and that Defendants had:

> a reasonable basis for concluding that the relatively minor restriction of students' ability to express their views about firearms in the school setting furthers important pedagogical goals. Reducing student aggression, of course, is such a goal. Given the body of study described by Professor Bushman, the limitation imposed by Defendants was reasonable.

Id. at *38.

As explained above, reducing student aggression falls within the broad universe of legitimate pedological concerns as students who are not primed for aggressiveness would promote discipline, courtesy, respect, safety, and enhance a positive school environment. *See Muller*, 98 F.3d at 1540; *Poling*, 872 F.2d at 762;

Jacobs, 526 F.3d at 435-36. Dr. Bushman published a comprehensive review of weapons effect studies and his meta-analysis revealed significant findings that images of weapons increased aggressive thoughts, hostile appraisals, and aggressive behavior. (ECF 33-4, p. 58). Dr. Bushman than applied the weapons effect data to the specific circumstances of this case and opined that prohibiting students from wearing clothing that depicts weapons, even in a non-threatening, non-violent manner, is consistent with 53 years of research on the weapons effect. *Id.* at pp. 58-59.

Plaintiffs do not mention the weapons effect in their appeal, and they do not attempt to challenge the District Court's decision to admit Dr. Bushman's opinion as evidence or the holding that it supports the reasonableness of Defendants' prohibition on the images of firearms.[13] This failure to address these issues means that Plaintiffs have waived their right to challenge them on appeal. *See Hentosh*, 167 F.3d at 1173; *Weinstein*, 422 F.3d at 477 n.1. Even if Plaintiffs had not waived this issue, they cannot dispute that reducing student aggression is a legitimate pedagogical concern. The relatively minor restriction on Plaintiffs is reasonably related to this goal as a matter of law. *See Poling*, 872 F.2d at 762.

[13] An appellant can specifically appeal the admission of expert testimony. This Court reviews the challenge of a district court's admission or exclusion by employing a two-step standard of review: first, this Court reviews "*de novo* a district court's application of the *Daubert* framework; second, if the district court properly adhered to the *Daubert* framework, then this Courts reviews "its decision to exclude (or not to exclude) expert testimony for abuse of discretion." *C.W. v. Textron, Inc.*, 807 F.3d 827, 835 (7th Cir. 2015) (internal citations omitted). Even if Plaintiffs had not waived this issue, the District Court did not err in admitting the expert opinions of Dr. Bushman.

III. ALTERNATIVELY, DEFENDANTS' RESTRICTION ON IMAGES OF GUNS DOES NOT VIOLATE THE FIRST AMENDMENT UNDER *TINKER* AS THEY REASONABLY FORECASTED A SUBSTANTIAL DISRUPTION.

Even if this Court determines that the District Court did not apply the correct test, the record on summary judgment establishes that the Defendants' restrictions were constitutional under *Tinker*. This Court can affirm the entry of summary judgment on this ground as well since the argument was fully developed before the District Court. *See Richards*, 869 F.3d at 562.

Plaintiffs devote most of their brief to arguing that the District Court should have applied the *Tinker* substantial disruption test. Despite this, Plaintiffs fail to develop any meaningful argument as to why the challenged restrictions would not pass muster under the *Tinker* standard.[14] Rather, they provide block quotes from *Tinker* with no further analysis. This complete failure to develop an argument should be viewed as a concession that Defendants' restriction on images of guns would be constitutional under the Seventh Circuit's *Tinker* standard as well. *See Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988) (noting that "an issue expressly presented for resolution is waived if not developed by argument"); *United States v. Foster*, 652 F.3d 776, 793 (7th Cir. 2011) ("As we have said numerous times, undeveloped arguments are deemed waived on appeal."); *Wesolowski v. United States*, No. 1:17-cv-00749-JMS-MPB, 2017 U.S. Dist. LEXIS 138345, at *16 (S.D. Ind. Aug. 28, 2017) (holding that the plaintiff "waived [an] argument by failing to provide any meaningful legal analysis").

[14] The entirety of Plaintiffs' argument is one conclusory sentence: "[N]either Sonnabend nor Kaminski made any predictions about truancy or test scores." App. Br., p. 12.

A. Under *Tinker* A School District Only Needs To Reasonably Forecast A Substantial Disruption.

This Court has applied *Tinker*'s substantial disruption standard "in a somewhat softened form." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *21. "Rather than proof that substantial disruption would in fact ensue if the forbidden speech is permitted, [this] court held that it was enough if the school presented 'facts which might reasonably lead school officials to forecast substantial disruption.'" *Id.* at *21-22 (citing *Nuxoll*, 523 F.3d at 673). In other words, "school officials may curtail the exercise of First Amendment rights when they can reasonably forecast material interference or substantial disruption." *Dodd v. Rambis*, 535 F. Supp. 23, 30 (S.D. Ind. 1981).

School district's do not need to show that a substantial disruption in fact occurred and a "substantial disruption" is by no means restricted to just a decline in students' test scores or an upsurge in truancy.[15] A school district only needs to show a reasonable probability that substantial disruption will occur: "This test does not require school administrators to prove that actual disruption occurred or that substantial disruption was inevitable. Rather, the question is whether school officials might reasonably portend disruption from the student expression at issue." *E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. Law Appeals*, 169 F. Supp. 3d 221, 248 (D. Mass. 2016).

[15] Plaintiffs have continuously made the argument that these were the exclusive types of disruptions that could be considered by the Court in analyzing the substantial disruption test. *See* App's Br., p. 12.

Any argument that schools are required to prove that an actual disruption occurred is contrary to to the law and would place an unreasonable burden on schools. As explained by the Sixth Circuit:

> This argument is without merit; it is based on the mistaken premise that *Tinker* requires actual disruption to occur before school officials may act. Under Plaintiffs' theory, school officials would be between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation. Such a rule is not required by *Tinker,* and would be disastrous public policy: requiring school officials to wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order.

Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007); *see also A.S. v. Lincoln Cty. R-III Sch. Dist.*, 429 F. Supp. 3d 659, 671 (E.D. Mo. 2019) ("Notably, the reasonable foreseeability test focuses on the risk of disruption; a school need not wait for an actual disturbance or a tragic occurrence before it may act."). Therefore, "*Tinker* does not require school officials to wait until disruption actually occurs before they may act." *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001).

A "substantial disruption" is not narrowly restricted to a decline in students' test scores or an upsurge in truancy as Plaintiffs argue. Those two issues reflect the non-exhaustive examples listed in *Nuxoll* of what could be considered symptoms of a substantial disruption. 523 F.3d at 674. Schools can consider a host of other potential negative consequences in making a determination that student expression may cause a substantial disruption. *See id.* (explaining that a school can limit expression if it "seeks to maintain a civilized school environment conducive to learning"). *Tinker* establishes that a substantial disruption is one that may affect "the work of the school" or "school activities" in general. 393 U.S. at 509.

Many courts have relied upon issues beyond test scores and truancy in finding that there may be a substantial disruption to the learning environment. For example, it has been found that creating an environment of fear and anxiety in the classroom based on a student's expression can lead schools to predict that there may be substantial disruption. *See Cuff v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113-14 (2d Cir. 2012); *Lavine*, 257 F.3d at 989-90; *E.T.*, 169 F. Supp. 3d 221 at 249-50; *see also Boim v. Fulton Cty. Sch. Dist.*, Nos. 1:05-CV-2836-MHS, 1:05-CV-3219-MHS, 2006 U.S. Dist. LEXIS 53129, at *11-12 (N.D. Ga. Aug. 1, 2006) (holding that a school could reasonably predict a substantial disruption of school activities if a student's violent story was read by her classmates). The possibility of distracting from the learning process or intimidating other students can lead schools to predict that there may be substantial disruption. *See Cuff*, 677 F.3d at 114-15; *Brown v. Cabell Cty. Bd. of Educ.*, 714 F. Supp. 2d 587, 597 (S.D. W. Va. 2010) ("Distraction from classes or intimidation from passive displays of support may serve as the basis of a disruption, just like physical acts of violence.") (internal citations omitted). Expression that undermines a school's mission to promote a safe and tolerant atmosphere can lead schools to predict that there may be substantial disruption. *See Guiles v. Marineau*, 461 F.3d 320, 329-30 (2d Cir. 2006). Finally, schools can predict that there may be substantial disruption when a student's expression clashes with the rights of other students to feel safe in the classroom. *See Defoe v. Spiva*, 625 F.3d 324, 334 (6th Cir. 2010).

In light of these considerations, "[s]chool authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational mission, because they have the relevant knowledge of and responsibility for the consequences." *Zamecnik*, 636 F.3d at 877-78. "As long as school officials reasonably forecast a substantial disruption, they may act to prevent that disruption without violating a student's constitutional rights," and courts "will not second guess their reasonable decisions." *Hardwick*, 711 F.3d at 440 (citing *Tinker*, 393 U.S. at 506).

The substantial disruption inquiry must be analyzed on a case by case basis. "The test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student." *Cuff*, 677 F.3d at 113 (citing *Tinker*, 393 U.S. at 514). Courts "look to the totality of the relevant facts" including "not only to [the student's actions], but to all of the circumstances confronting the school officials." *Lavine*, 257 F.3d at 989.

While the District Court did not reach this issue, this Court can review the record *de novo* and hold that Defendants could reasonably predict that allowing N.J. and A.L. to wear their shirts at school would cause a substantial disruption. *See SEC v. Bauer*, 723 F.3d 758, 771 (7th Cir. 2013) (stating that this Court may affirm summary judgment on any ground that finds support in the record as long as the

argument was adequately presented in the trial court so that the nonmoving party had an opportunity to contest the issue).[16]

B. The Gun Images On N.J.'s Shirts Led Mr. Sonnabend To Reasonably Forecast A Substantial Disruption In Light Of N.J.'s Troubling Behavioral History.

Before N.J. wore the Smith & Wesson Shirt to school and expressed his intent to wear the Patriot Shirt to school, he had an extensive history of disturbing behavior that led Mr. Sonnabend to objectively believe that permitting him to wear shirts with images of firearms would cause a substantial disruption amongst the 60 or so students in the At Risk Academy. Specifically, N.J. had behavioral issues which included making threatening comments to students, flipping scissors like a switchblade, and whittling drumsticks to sharpened points and then swiping them and other pieces of splintered wood at people. *DPFOF*, ¶ 40. N.J. repeatedly wore another shirt to school that he does not contend was protected—the Bad Ass Shirt. *Id.* at ¶¶ 19-21. N.J. also came to school wearing shell casings like a necklace and on a chain on his belt. *Id.* at ¶ 42. Mr. Sonnabend and the teachers in the At Risk academy believed N.J. engaged in these types of behavior in part because he enjoyed displaying power over other students. *Id.* at ¶ 52. And, these actions did in fact disturb other students. *See, e.g., id.* at ¶¶ 39, 43, 47-50, 53.

A student's past conduct and negative interaction with other students can lead school officials to reasonably forecast a substantial disruption. *See Cuff*, 677 F.3d at

[16] Defendants presented the argument before the District Court that they could reasonably forecast a substantial disruption if they permitted Plaintiffs to wear their shirts at school and Plaintiffs contested this argument on summary judgment. *See* (ECF 34, 37, 40, 45, 47, 50).

113-14 (emphasizing that when a student was suspended for drawing a violent picture "he had a history of disciplinary issues, and his other earlier drawings and writings had also embraced violence," which made it reasonably foreseeable that the drawing could create a substantial disruption at the school). In *Cuff*, the Second Circuit student found that the sharing of a violent drawing could reasonably foster a disruption to the learning process. *See id.* at 114-15 (explaining that school reasonably feared that permitting the student from displaying a violent drawing would lead other students to copy or escalate his behavior which "might then have led to a substantial decrease in discipline, an increase in behavior distracting students and teachers from the educational mission, and tendencies to violent acts").

Similarly, in *Lavine*, a high school student was expelled in connection with a writing a violent poem. 257 F.3d at 983-84. The student's prior disciplinary issues considering "actual school shooting" meant that school officials reasonably could have "forecast" substantial disruption or material interference with school activities, although none occurred. *Id.* at 989-90. The school appropriately weighed the "student's First Amendment right of free expression against school officials' need to provide a safe school environment." *Id.* at 983.

Finally, a school district could reasonably forecast a substantial disruption from a student's violent drawing in light of his past behavioral history, which included exhibiting physical aggression, attempts to hurt himself, oppositional behavior, and threatening behavior and gestures towards staff and peers. *E.T.*, 169 F. Supp. 3d 221 at 249. In fact, the *E.T.* court commented that "from the perspective

of a parent of another student at the school, it would have been unthinkable for the [school] officials not to have taken any action in this case." *Id.* (internal citations omitted).

N.J.'s past behavior caused substantial disruptions within Shattuck Middle School, and this is significant. *See A. M. v. Cash*, 585 F.3d 214, 224 (5th Cir. 2009) ("[A]dministrators will usually meet their burden under *Tinker* by showing that the proscribed speech has in fact been disruptive in the past."). N.J.'s threatening comments and behavior made students increasingly uneasy. Students came to their teachers telling them that they were uncomfortable, felt anxious, and did not feel safe around N.J., especially when he was wearing the Bad Ass Shirt while wearing shell casings around his neck or on his pants. *DPFOF*, ⁋ 50. Students in his classes were so anxious about N.J. that Mr. Sonnabend had to institute a rule that N.J. was not permitted to be in a classroom if he was not supervised by a teacher. *Id.*

Mr. Sonnabend was concerned about the angst and anxiety caused by N.J. because students in the At Risk Academy are sensitive to safety type issues. *Id.* at ⁋ 37. This made them more susceptible to feeling unsafe around N.J. when he wore shirts with images of guns. *Id.* Students went as far to report to teachers that if a student were to bring a gun to school it would be N.J. *Id.* at ⁋⁋ 47-48. Based on his experience with N.J., Mr. Sonnabend could reasonably predict that permitting him to wear shirts depicting guns would lead to further disruptions in the school. N.J.'s behavior already necessitated that special rules be implemented for him. Moreover, the weapons effect can prime students for aggressive behavior which would

exacerbate the situation and interfere with learning. *See id.* at ¶¶ 120-123. To allow N.J. to wear shirts with images of guns would foster a learning environment where other students would feel anxious and unsafe.

This decision was even more objectively reasonable considering the school shootings in the months prior, including a shooting twenty minutes away from Shattuck Middle School. *Id.* at ¶¶ 54-55. Based on N.J.'s prior behavioral history and history of bringing ammunition to school in addition to wearing shirts depicting guns, this Court can find that Mr. Sonnabend could reasonably predict that N.J.'s display of a gun image on his shirts would cause a substantial disruption to the learning environment. The students in N.J.'s class already felt anxious around him without him wearing a shirt depicting guns. Permitting him to freely wear shirts with images of guns would have fostered a classroom of anxiety and concern that would not be conducive to an appropriate learning environment. It was reasonable for Mr. Sonnabend to conclude that the image of a gun on N.J.'s shirts could cause a substantial disruption in the school.

C. Ms. Kaminski Could Reasonably Predict That A.L's Shirt Depicting A Gun Would Cause A Substantial Disruption.

This Court can review the record and find that A.L.'s prior disciplinary and behavioral history would have reasonably lead Ms. Kaminski and Kettle Moraine High School to forecast a substantial disruption. For example, A.L. had previously worn a hat to school displaying the confederate flag. *DPFOF*, ¶ 76. Courts have almost uniformly upheld censorship of the confederate flag. *See Zamecnik*, 636 F.3d at 877 (collecting cases) (explaining that "[a]n example of school censorship that

courts have authorized on firmer grounds is forbidding display of the Confederate flag . . . which is widely regarded as racist and incendiary"). This is because "Confederate flags have been associated with racist ideology, and could undermine the school's mission to promote tolerance." *Guiles*, 461 F.3d at 329-30. Accordingly, "[a] school district [is] entitled to rely on past racial incidents in enforcing its dress code policy, even if those incidents did not directly involve the Confederate flag." *Hardwick v. Heyward*, 674 F. Supp. 2d 725, 732 (D.S.C. 2009) (internal citations omitted).

A.L. picked to display this confederate flag in the midst of escalating racial tensions at the school. *See DPFOF*, ¶¶ 96-99. And, in addition to racial tensions within the school, there was anxiety within the school over school shootings. *Id.* at ¶¶ 90-95. Ms. Kaminski knew that the student body was on edge following a school shooting at a nearby school in Waukesha, a school that partnered with Kettle Moraine High School on numerous academic and extracurricular activities. *Id.* at ¶¶ 87-88. There had also been a shooting threat at Kettle Moraine High School the day after the shooting in Waukesha. *Id.* at ¶ 93. Students have reported feeling uncomfortable around other students because they were wearing clothing that depicted or were associated with firearms. *Id.* at ¶ 84. Ms. Kaminski found that these facts made it even more likely that A.L. wearing a shirt with the image of a gun on it would create anxiety and unrest at the school and flare tensions. Even assuming that there was nothing threatening about A.L.'s display of the confederate flag or the WCI Shirt, it would still distract from education or intimidate other students, which "may

serve as the basis of a disruption." *Brown*, 714 F. Supp. 2d at 597 (citing *Hardwick*, 674 F.Supp.2d at 733-34). Ms. Kaminski could reasonably forecast substantial disruption if a student who openly displayed a confederate flag to school would be permitted to freely wear a shirt that displayed a firearm.

The display of a gun on A.L.'s shirt could also prime aggressive behaviors in light of the weapons effect and create an "us" versus "them" mentality. *DPFOF*, ¶¶ 109-110. His past wearing of the confederate flag could also spur racial tension between black and white students. People tend to divide each other into "us" and "them" categories with the "us" category consisting of the groups we belong to, called "ingroups" and the "them" category consisting of the groups we do not belong to called "outgroups." *Id.* at ¶ 110. There is the possibility of hostility towards outgroups, such as by gun owners and non-gun owners since gun ownership can be an important part of a gun owner's identity or beliefs. *Id.* at ¶¶ 111-113. The perception of inflammatory racial acts like wearing the confederate flag at school coupled with the display of a gun on A.L.'s shirt could be seen to possibly spark racial conflict or insinuate a white versus black dichotomy. Certainly, A.L.'s willingness to display a clearly racially offensive and disruptive symbol in a school with known racial tension, reasonably led Ms. Kaminski to predict that permitting A.L. to wear a shirt displaying the image of a gun would lead to a substantial disruption at the school.

IV. PLAINTIFFS' SHIRTS DID NOT CONSTITUTE PROTECTED SPEECH UNDER THE FIRST AMENDMENT.

While the the District Court ultimately held that Defendants' restrictions did not violate the Constitution, it found as a preliminary matter that Plaintiffs' shirts

were a form of expression protected by the First Amendment. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *14.

Because Plaintiffs' shirts were not protected speech, the District Court did not need to reach the issue of whether the restrictions were reasonably related to legitimate pedagogical concerns. While Plaintiffs claim that this ruling cannot be challenged because Defendants did not file their own appeal, *see* App. Br., p. 8, a cross-appeal on a specific issue is unnecessary when a party is not seeking to attack the judgment in a way that either expands its own rights or narrows the rights of its opponent. *Hamer v. Neighborhood Hous. Servs.*, 897 F.3d 835, 837-38 (7th Cir. 2018). Because this Court can can affirm a judgment on any ground supported by the record, it can affirm summary judgment on this ground as well.

This Court explained in *Zamecnik* and *Nuxoll* that under *Tinker*, a plaintiff must first show that claimed speech is free speech within the meaning of the First Amendment. To constitute "free speech," entitled to First Amendment protection, the speech must "convey a particularized message" and the "likelihood was great that the message would be understood by those who viewed it." *Griggs*, 359 F. Supp. 2d at 737 n.7 (citing *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L.Ed. 2d 342 (1989)).

A clear and unmistakable message is required for a student to invoke a claim of free speech. Pictures on clothing are not constitutionally protected if they do not convey a clear and unmistakable message. *Brandt v. Bd. of Educ. of Chi.*, 480 F.3d 460, 466 (7th Cir. 2007). "Otherwise every T-shirt that was not all white with no

design or words, with not even the manufacturer's logo or the owner's name tag, would be protected by the First Amendment, and schools could not impose dress codes or require uniforms without violating the free speech of the students." *Id.* This Court explained that printed words or images on a t-shirt "can be speech," but whether it is speech is dependent upon whether the words or images are "expressive of an idea or opinion." *Id.* at 466.

A. The Gun Image On A.L.'s Shirt Is Not Protected Speech.

The visible portion of A.L.'s shirt contained a picture of a handgun and the name of a company, "Wisconsin Carry, Inc." *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *7. A.L.'s shirt does not constitute speech because it failed to convey a particularized message. The shirt is merely a company logo and a picture of a firearm. As stated by the court in *Griggs*, an isolated picture of a firearm is likely not protected speech as it does not convey any clear message—it is just a picture of a firearm. 59 F. Supp. 2d at 742. The inclusion of a company name does little to transform the unprotected speech to protected speech. There are no other particularized meanings to this shirt, nor does it clearly express any beliefs.

When A.L. was asked in discovery why he wore his gun shirt, his stated response was simply that "he wanted to wear it that day." *DPFOF*, ¶ 67; (ECF 33-2, p. 10). He said nothing about gun rights, concealed carry, the Second Amendment or any other reason other than self-expression. A.L. never personally sought to convey a particularized message. A.L.'s shirt merely contains an isolated picture of a gun with a logo or advertisement. By A.L.'s own admission it does not convey any

significant message or idea and it "amounts to nothing more than a generalized and vague desire to express [his] individuality." *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005).

A.L.'s shirt also does not convey a message that has a great likelihood of being understood by others. It merely displays a corporate name and the image of a gun. Nothing about this objectively conveys a message that will be understood by those who view the shirt. Does A.L. work for Wisconsin Carry, Inc. and this is his uniform? Did A.L. win a free Wisconsin Carry, Inc. shirt? Nothing about that shirt conveys a particular message that will be understood by the average person. Notably, if A. L. himself did not intend a particular message, it is hard to argue that others would find a message.

Context also weighs against finding that A.L.'s shirt conveys a "great likelihood" that the message will be understood by those observing it. "Context is everything when deciding whether others will likely understand an intended message conveyed through expressive conduct." *Spence v. Washington*, 418 U.S. 405, 411, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974). Nothing about that shirt in the school setting helps it to convey a particular message. School is not where one typically expects to find anyone advocating for gun rights or the right to carry guns, concealed or otherwise. Part of this context is the fact that no one under 21 years of age can carry a concealed weapon (*see* Wis. Stat. § 175.60 (3)), a child under the age of 18, like A.L., cannot possess a pistol (*see* Wis. Stat. § 948.60), and no one can bring a gun onto school grounds (*see* Wis. Stat. § 941.235). A.L. does not offer anything about the

context and surrounding circumstances—a public school—that would have lent meaning to his conduct such that observers would understand a message Plaintiff intended to convey. *See Kuerbitz v. Meisner*, No. 16-12736, 2017 U.S. Dist. LEXIS 152767, at *17 (E.D. Mich. Sep. 20, 2017).

B. The Images On N.J.'s Shirts Were Not Protected Speech.

Just like A.L.'s shirt, the gun image on N.J.'s shirts are not speech that convey a particularized message, nor was there a great likelihood that the message would be understood by those who viewed it. The gun image on N.J.'s Smith & Wesson Shirt does not convey a particularized message because it is simply an advertisement that has a picture of a gun. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *4. Likewise, the gun image on N.J.'s Patriot Shirt does not convey a particularized message. *Id.* at *5. An isolated picture of a firearm does not convey a clear message. *Griggs*, 359 F. Supp. 2d at 742. N.J. also did not intend to convey any message in wearing either shirt. When asked by Mr. Sonnabend why he kept coming to school wearing shirts with images of guns, "N.J. responded that he wanted to express himself with his clothing." *DPFOF*, ¶ 27; (ECF 33-1, p. 4). Like A.L., N.J. said nothing about gun rights, the right to bear arms, the Second Amendment, or any other reason other than self-expression. N.J. never personally sought to convey a particularized message with either shirt. *See Blau*, 401 F.3d at 389.

The gun image on N.J.'s Patriot Shirt is akin to the "Volunteer Homeland Security" t-shirt in *Miller v. Penn Manor Sch. Dist.*, that contained a "meaningless .

. . message that has no place in a public school." 588 F. Supp. 2d 606, 611 (E.D. Pa. 2008).

Even if N.J.'s shirts conveyed a particularized message, the average, objective observer would not understand it. Like the WCI Shirt, the Smith & Wesson Shirt is only a corporate logo with the image of a gun. Nothing about this objectively conveys a message that will be understood by those who view the shirt, and if N.J. did not intend a particular message, it too is hard to argue that others would find a message. Similarly, the Patriot Shirt does not convey any commonly understood message. The same context-based considerations discussed above as to A.L.'s shirt apply equally to N.J.'s shirts. Contextually, a school setting would not support any objectively understood message about guns.

V. PLAINTIFFS' WAIVED THEIR FOURTEENTH AMENDMENT CLAIMS.

Plaintiffs brought a claim that the school dress codes were unconstitutional overbroad and denied them the right to due process under the Fourteenth Amendment. *N.J.*, 2021 U.S. Dist. LEXIS 86185, at *38. Defendants countered that the operative dress codes provided Plaintiffs with sufficient notice to satisfy their due process requirements. *Id.* However, "Plaintiffs did not respond to Defendants arguments regarding this claim." *Id.* at *38-39. As such, the District Court deemed this claim waived by Plaintiffs. *See id.* at *39 (citing *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1078 (7th Cir. 2016)). Correspondingly, Plaintiffs have waived this claim on appeal. *See Jenkins v. Nelson*, 157 F.3d 485, 494 n.1 (7th Cir. 1998) ("[W]hen a party fails to raise an issue in the district court, the issue is waived,

and we will not consider it on appeal."). Even if this Court would consider this claim it fails on the merits as well for the same reasons articulated by the District Court. *See N.J.*, 2021 U.S. Dist. LEXIS 86185, at *39-41.

CONCLUSION

Defendants respectfully request that this Court issue an Order upholding the District Court's decision granting Defendants' motion for summary judgment, denying Plaintiffs' motion for summary judgment, and dismissing this case in its entirety and with prejudice.

Dated this 13th Day of August, 2021.

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