**UNITED STATES COURT OF APPEALS**

**FOR THE THIRTEENTH CIRCUIT**

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No. 09-5367

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**JAMES W. WADSWORTH** and **PETER S. DUPONT**,

Appellants,

v.

**SOUTH PARK SCHOOL DISTRICT**,

Appellee.

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On Appeal from

the United States District Court

for the District of Centennial

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**Brief for Appellants**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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# Questions Presented

Issue #1:

Under *Morse v. Frederick*, which only permits a school to prevent speech when it promotes illegal drug use, did Principal Hunt violate James Wadsworth First Amendment Free speech rights when she prevented him from wearing a t-shirt conveying a legitimate political viewpoint?

Under *Tinker v. Des Moines*, did Principal Hunt violate James Wadsworth’s First Amendment Free speech rights by failing to reasonably forecast substantial disruption or material interference with school activities?

Issue #2:

Did the School District violate a student’s First Amendment free speech rights under the *Hazelwood* test when it suspended him from a school assemble for wearing a shirt that (1) expressed a political opinion about the legal drinking age, and (2) expressed a contrary viewpoint of another club’s school-sanctioned t-shirt?

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# Opinions Below

The opinion of the United States District Court for the District of Centennial, granting the School District’s motion for summary judgment and denying the Student’s cross-motion for summary judgment can be found in this record at R. 7.

# Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291 (2006).

# Standard of Review

“Because First Amendment interests are involved, this Court must conduct an independent review of the record and examine constitutional facts and conclusions of law de novo.” *Crush v. Toa*, 420 F.3d 1018, 1021 (13th Cir. 2007). “Constitutional facts are facts that determine the core issue of whether the challenged speech is protected by the First Amendment.” *United States v. Wolf*, 412 F.3d 1920, 1933 (13th Cir. 2003).

# Constitutional & Statutory Provisions Involved

The First Amendment to the United States Constitution provides:

Congress shall make no law … abridging the freedom of speech…

U.S. Const. amend. I.

Centennial Revised Statute § 18-21-123 states:

Any person under twenty-one years of age who possesses or consumes ethyl alcohol anywhere in the state commits illegal possession or consumption of ethyl alcohol by an underage person.

Cent. Rev. Stat. § 18-21-123 (2)(a)(2008)

# Statement of Facts

This Court is asked to reverse the ruling of the District Court for the District of Centennial on whether a School District’s actions violated students’ free speech rights.

South Park High School (SPHS) is a four-year public high school located in South Park, Centennial. (R. 1 ¶ 5.) The issues before the Court today were set in motion by events in early 2008. At that time James W. Wadsworth became involved in a political organization, the Minor’s Rights Association (MRA). (*Id*. ¶ 9.) The MRA had just attempted a statewide initiative to lower Centennial’s drinking age from 21 to 18. (R. 3 ¶ 5.) When this initiative received extensive press coverage, several SPHS teachers dedicated classroom time for discussions. (*Id*. ¶ 5.) The initiative did not gather enough signatures to be on the state ballot. (*Id.)* Wadsworth was nonetheless inspired by the effort and became a member of the MRA shortly afterwards. (R. 1 ¶ 9.) Wadsworth brainstormed the following slogan for the MRA campaign: “I’m 18. I can vote. I can marry. I can pay taxes. I can go to jail. I can fight in war. NOW GIMME MY BEER!!!” (*Id*. ¶11.) Although MRA did not adopt this slogan, Wadsworth decided to use it himself. (*Id*. ¶ 13.) He made a t-shirt with the slogan printed on the front in black ink. (*Id*. ¶ 15.) On September 22, 2008, satisfied with his slogan and confident in his cause, Wadsworth wore the t-shirt to school. (*Id*. ¶¶ 14, 16.) It resonated with several other students who engaged him in discussion, and it excited several others who wanted to become involved in a similar MRA initiative in 2010. (*Id*. ¶¶ 16-17.) Around noon that day, Principal Hunt called Wadsworth into her office and told Wadsworth he had to cover up the slogan on his t-shirt and he was not to wear the shirt to school again. (*Id*. ¶¶ 16, 19, 20.)

Principal Hunt had received reports from teachers about students being boisterous as they examined the t-shirt and an “unusually high number” of truancies on the day in question. (R. 3 ¶ 6.) There is no indication that any disciplinary action was taken towards these “boisterous” or tardy students. (*Id*.) One student did report leaving mid-day because the t-shirt reminded her of a relative’s alcohol related death and the shirt offended her. (*Id.* ¶ 6.) This relative was a student at SPHS when he died from alcohol poisoning during the 2006-07 academic year. (*Id.* ¶ 3.) Previously, during the classroom discussions about the MRA initiative, two relatives and several close friends of this student requested to be removed from the discussions. (*Id*. ¶ 5.) Principle Hunt reported “at least one fight” because of “high emotions that surrounded the proposed initiative.” (*Id*. ¶¶ 5, 7.) The school has utilized this student’s death as a teaching tool during the freshmen student orientations about the dangers of alcohol abuse. (*Id*. ¶ 1.)

Wadsworth is a member of the Senior Men’s Club at SPHS. (R. 1 ¶ 30.) Peter DuPont is the president of that club and a good friend of Wadsworth. (*Id*. ¶ 37.) DuPont and other members of the SMC decided to support Wadsworth by adopting his t-shirt as the official shirt of the SMC that year. (*Id*. ¶ 39.) SPHS has several student groups. (*Id*. ¶ 31.) These groups are provided with a small budget each year to buy club shirts or host pizza parties. (*Id.* ¶ 33.) For example, the Students Against Drunk Driving have club shirts that say “Friends don’t let friends drink. Drinking kills.” (*Id*. ¶ 35.) These shirts also have the name of the school, the club, and a picture of the school mascot on them. (*Id.*)

After the Senior Men’s Club generally agreed upon the shirt, DuPont made a t-shirt with the same message as Wadsworth’s. (*Id*. ¶ 41.) The only difference between the shirts was the font color, and the inclusion of the club name, school name, and a picture of the school mascot. DuPont wore this t-shirt to a school assembly designed to introduce students to student groups and promote school spirit. (*Id*. ¶ 51.) At this assembly, DuPont introduced the Senior Men’s Club, talked about the goals and plans the club had for the year, and introduced the new club t-shirt. DuPont mentioned that the t-shirt was inspired by Wadsworth and his involvement with the MRA. (*Id*. ¶¶ 48, 49, 51, 52.) Principal Hunt then escorted DuPont from the assembly and suspended him for five days. (*Id*. ¶ 53.)

Principal Hunt forbid Wadsworth from wearing his t-shirt because she thought it might cause disruptions based on the incidents related to the previous attempt to lower the drinking age, as well as the incidents that occurred the day Wadsworth wore his t-shirt to school. (R. 3 ¶ 7.) She also stated that she suspended DuPont because his t-shirt advocated breaking state law prohibiting possession or consumption of alcohol under the age of 21. (*Id*. ¶¶ 19, 20.) Additionally, she felt that the t-shirt advocated breaking a Board of Education policy that prohibits the possession or use of alcohol on school property or at any school sponsored event. (*Id.)*

# Summary of the Argument

Issue # 1 Summary

The District of Centennial’s School District violated Wadsworth’s First Amendment rights by refusing to allow him to wear his t-shirt which said, “I’m 18. I can vote. I can marry. I can pay taxes. I can go to jail. I can fight in war. NOW GIMME MY BEER!!!” The t-shirt did have the image of a beer on the back of it.

The Court should look at two tests in this case. First, does the message on the shirt promote illegal drug use as determined under the “Morse Test;” and second, did Wadsworth’s T-shirt “materially disrupt and substantially interfere with the operation of the school” under the “Tinker Test.”

The “Morse Test” does not apply because Wadsworth’s shirt expresses a viewpoint concerning political issues and does not promote illegal drug use. The *Morse* Court warned against equating challenges to the criminalization of drug laws with the promotion of illegal drug activity. The analysis should stop there and questions regarding what drugs fall under *Morse’s* “illegal drugs” need not be considered. Whether it is student speech about legalizing a drug, lowering the drinking age, lifting an FDA ban on imported drugs, or making contraceptives over the counter; a student has a right to convey these expressions without being equated with promoting an illegal drug.

Second, it will apply the “Tinker Test” and show that the T-shirt did not cause substantial disruption or material interference with school activities based on the current disruptions, forecasted disruptions, and impingement on the rights of others. The school district and the opinion below will try to argue that a handful of facts and events, while individually not substantial or material, if taken as a whole should be considered substantial and material. This obfuscates how poorly each individual fact or event stands up to *Tinker*. The Court should first measure if the individual fact or event even holds up at all. An infinite line of non-disruptions does not make a substantial or material disruption.

The school district has failed under the “Morse Test” or under the “Tinker Test” to prove a genuine issue of fact; therefore, this Court should enter a judgment in favor of Wadsworth as a matter of law and declare that school district has violated his constitutional rights to free speech.

Issue #2 Summary

Principal Mary Hunt violated Peter S. DuPont’s free speech rights by suspending him because he wore a t-shirt advocating a lower drinking age to a school assembly. DuPont’s free speech rights must be evaluated under the *Hazelwood* standard since they occurred during a curricular activity and bore the imprimatur of the school. The District Court for the District of Centennial granted summary judgment for the School District and this appeal urges a reversal of that judgment. It should be reversed because, under the *Hazelwood* standard, Principal Hunt’s actions were not reasonably related to legitimate pedagogical concerns and were not viewpoint neutral. DuPont’s speech did not obstruct the purpose of the school assembly, he did not expose his audience to material that was inappropriate for its maturity level, and he did not erroneously attribute the opinion proclaimed by SMC’s t-shirt to the School as a whole. Schools have a legitimate pedagogical concern preventing alcohol misuse and abuse, but schools do not have a legitimate pedagogical concern with censoring student speech that challenges current political standards relating to policies about alcohol.

Although the District court below found that *Hazelwood* allows viewpoint discrimination, this Court is urged to reconsider interpreting the Supreme Court’s silence on this issue as eliminating an important right. The District court found that “there is no question that the School District’s regulation of DuPont’s message constituted viewpoint discrimination.” On this factual conclusion, the District court was correct. However, this Court is urged to reevaluate and reverse the District court’s holding on whether viewpoint discrimination is allowed under the *Hazelwood* standard.

Even though courts often defer to school officials’ decisions, this Court should not. Schools should not be allowed to censor school-sponsored student speech free from any judicial review in order to preserve American schools as places of debate, discussion, and deliberation. Because of the importance of schools in forming democratic participants, this Court is urged to reverse the ruling of the United States District Court for the District of Centennial and declare that the School District’s censorship of Peter S. DuPont’s speech violated his First Amendment right of free speech.

# Argument

1. THE COURT SHOULD DECLARE UNCONSTITUTIONAL THE RESTRICTION OF WADSWORTH’S RIGHT TO WEAR HIS T-SHIRT BECAUSE THE SCHOOL DISTRICT HAS FAILED TO PROVE IT PROMOTES ILLEGAL DRUG USE AND HAS FAILED TO PROVE IT CAUSED A MATERIAL AND SUBSTANTIAL DISRUPTION.

This brief will show that the “Morse Test” does not apply because Wadsworth’s shirt expresses a viewpoint concerning a political issue and does not promote illegal drug use. *See* *Morse v. Frederick*, 127 S.Ct. 2618 (2007). Second, it will apply the “Tinker Test” and show that the T-shirt did not cause substantial disruption or material interference with school activities based on the current disruptions, forecasted disruptions, and impingement on the rights of others. *See Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

Democracy in the United States and Centennial requires that Wadsworth be allowed to express his political ideas. Schools are for “educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual.” *Id.* at 507. “These fundamental ‘values of habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.” *Bethel Sch. Dist. No. 403 v. Fraser* 478 U.S. 675, 681 (1986). The courts rarely see the cases that schools handle properly, and one example is a high school principal in Tigard, Oregon, who found himself caught between the district’s ban on clothing displaying alcohol and the several defiant students purposely trying to violate the ban. 12 *Lewis & Clark L. Rev.* 61, 66 (Spring 2008). He challenged the students to write legal briefs for both sides of the case, and argue before a mock Supreme Court made up of local lawyers and law professors. *Id.* The mock court was a huge success and provided advice for the school board concerning their ban and taught a great civics lesson to the students. *Id.* at 83.

While Wadsworth’s message may not be perfect, it does convey Wadsworth’s beliefs, and striking an outright ban on the shirt fails Wadsworth and all high school students of Centennial. As will be shown, the school district and the opinion below have failed to equate this political opinion with the promotion of underage drinking. Furthermore, they have failed to loosely connect it to minor disruptions. Therefore, this Court should reverse the opinion below and allow Wadsworth to wear his t-shirt.

1. *Morse* does not apply to Wadsworth’s T-shirt because it conveys a political message in the debate regarding lowering the drinking age and should not be equated with promoting illegal drug use.

In *Morse*, the Court held that a school may restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use and not debates concerning political or social issues about drug laws. 127 S.Ct. 2618. The court below and the school district argue that *Morse* should have a broad reading to include alcohol as a drug. However, before that question can be determined, the focus should be on whether political speech advocating the decriminalization of an act should be equated with promoting the criminal act under *Morse*.

Wadsworth’s viewpoint about lowering the drinking age is a viewpoint about a political issue and does not apply to *Morse* because the holding in *Morse* focuses on messages promoting illegal drug use in schools and precludes discussions concerning political or social issues. In *Morse*, the Supreme Court examined the importance of prohibiting student speech when a school reasonably believes the speech promotes illegal drug use. The *Morse* decision, however, resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school “reasonably view[s] as promoting illegal drug use.” *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (quoting *Morse v. Frederick*, 127 S.Ct. 2618 (2007)). The student in *Morse* attended a school-supervised event to watch the Olympic torch pass in front of the high school and unfurled a banner displaying the words "BONG HiTS 4 JESUS,” in order to get the attention of media. 127 S.Ct. at 2622. The student admitted the words were quixotic and ambiguous. *Id.* The principal recognized the reference to drug paraphernalia and, not being able to interpret it as anything other than promoting illegal drug use, confiscated the banner. *Id.* at 2629. Chief Justice Roberts, delivering the opinion of the Court, found that Principal Morse reasonably determined that an ambiguous banner with a drug reference could be interpreted as promoting an illegal drug. *Id.* Justice Roberts goes on to assure the Court that the opinion is “plainly not a case about *political debate* over the *criminalization* of drug use or possession.” *Id.* at 2629 (italics added for emphasis). Also, Justice Alito’s concurrence, which Justice Kennedy joins, giving the Court its 5 vote majority, concurs “on the understanding that…the opinion provides no support for any restriction of speech that can plausibly be interpreted as *commenting on any political or social issue*.” *Id.* at 2629. (Alito, J., concurring) (italics added for emphasis). Both Justice Robert’s opinion and Alito’s concurrence do not wish equate political debates regarding the decriminalization of an act with promoting the criminal act.

Wadsworth’s t-shirt is a protected political statement and doesn’t fall under the promotion of illegal drugs in *Morse*, because it is not ambiguous, it mirrors Wadsworth’s belief, and Wadsworth’s actions back up the shirt and his belief. First, unlike Frederick’s banner, Wadsworth’s slogan is political speech expressing his viewpoint and not some quixotic and ambiguous message. *Id.* The message on his shirt states “I’m 18. I can vote. I can marry. I can pay taxes. I can go to jail. I can fight in war. NOW GIMME MY BEER!!!” (R. 1 ¶ 15.) This is not ambiguous; he is stating a political viewpoint that other rights and responsibilities of eighteen year olds are coextensive with the rights and responsibilities of drinking alcohol. He wishes to decriminalize the purchasing and possession of alcohol for a certain section of the population which should not be equated with the promotion of underage drinking. This is not a promotion of an illegal drug anymore than is student speech advocating the lifting an FDA ban on imported drugs. The slogan, being political speech, is backed by Wadsworth’s actions. He joined a national organization, the Minors’ Rights Association (the “MRA”), which advocates lowering the drinking age. (R. 1 ¶ 9.) He discussed proposing renewed legislation 2010 with other MRA members. (*Id.* ¶ 10.) He contacted the MRA to see if they would adopt his t-shirt slogan for their cause. (*Id.* ¶ 11.) Finally, several students were aware of Wadsworth’s activities to lower the drinking age with the MRA. (*Id.* ¶ 39) Wadsworth’s t-shirt expresses a political viewpoint about lowering the drinking age in Centennial and should not be equated with promoting illegal drug use as was warned by the *Morse* Court.

Because Wadsworth’s t-shirt conveys a political message in the debate regarding the decriminalization of section of the population’s right to purchase or possess alcohol, and it should not be equated with promoting illegal drug use, the school district should not be permitted to prevent Wadsworth’s message.

1. Wadsworth’s First Amendment rights were violated because he did not cause material and substantial disruptions based on the current disruptions, forecasted disruptions, or impingement on the rights of others.

Contrary to the opinion below, Principal Hunt could not reasonably determine that a substantial disruption or material interference with school activities due to “the disruption of that morning and the disruption that had occurred the year before when an initiative to lower the state’s drinking age was on the ballot.”

In *Tinker v. Des Moines*, the Supreme Court determined that the school violated several students’ free-speech rights by preventing them from wearing black armbands in protest of the Vietnam War. 393 U.S. 503. The school in *Tinker* feared the disruptions given the climate of the nation, where a wave of violent protests in reaction to the war had gripped the nation, including very highly emotional draft card burnings. *Id*. at 510. Also, a former student of the school had been killed in Vietnam and the school was concerned with how the school would handle the armbands given several of the deceased’s friends were still in school. *Id.* at 509. However, the Supreme Court did not find these concerns to be a substantial disruption or material interference with school activities to warrant preventing the students’ political speech. *Id.*

Like *Tinker*, A school does have a right and obligation to regulate speech that may “interfere with the requirements of appropriate discipline;” however, Centenial High School must show a “material and substantial interference,” because “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 509.

1. Principal Hunt could not determine a “material and substantial” current disruption because of a lack of evidence between the speech and current levels of disruption.

“Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.” *Tinker*, 393 U.S. 503.

The Court of Appeals in the 6th Circuit found a student’s First Amendment speech rights were not violated when principal prevented him from wearing the image of a Confederate Flag because of current high levels of racial tension and because of a direct connection between the image and current disruptions. *Barr v. Lafon*, 538 F.3d 554, 560 (6th Cir. Tenn. 2008). Between 2004 and 2006 the school worked to calm highly escalated racial tensions that had been provoked by racial graffiti. The racist graffiti, accompanied with images of the confederate flag, had been found containing demeaning racial slurs, an image of a noose, and "hit lists" naming African American students. *Id.* at 559. Many parents had come to the school or called the school, and consumed the time of the school administrators with concerns about the graffiti. *Id.* at 568. There was evidence of “fear-motivated increase in absenteeism among African-American students.”  *Id.* A fight broke out between a white student and an African American student over the Confederate Flag. *Id.* at 569. Students and parents direct testimony that the absentee rate of African American students had been caused by images of the flag. *Id.* at 568. The tension became so bad that the school had to be put in lockdown by the local sheriff. *Id.* at 559. The court found that, because of the violent level of disruption and substantial evidence linking the image to the disruptions, the Principal was justified in suppressing the image of the flag. *Id.* at 560.

Wadsworth’s shirt didn’t create material and substantial current disruption because the intensity of disruption was too low and because the evidence does not indicate a direct connection between the shirt’s slogan and the disruptions. First, Principal Hunt’s evidence that she heard other teachers observing students rough-housing and being boisterous in the school halls as they examined the shirt is hearsay and not backed up by any affidavits from the teachers themselves. (R. 3 ¶ 6.) Furthermore, rough-housing and being boisterous describes fairly typical teenage behavior and hardly qualifies as a material and substantial interference with schoolwork. (*Id.*) Reports that the rough-housing happened while students examined the t-shirt do not show a direct connection between the boisterous students and the shirt and could be merely coincidental. (*Id.*) Finally, the affidavit does not indicate that the “boisterous” students had to be controlled by a local sheriff or any other means, and none of the students were disciplined because of the roughhousing. (*Id.*) The school district also implies a connection between the T-shirt and an “unusually high number” of students being late to the morning periods when Wadsworth wore the shirt. (*Id.* at ¶ 6.) While an increase in tardiness does warrant some concern, the affidavit only indicates that an “unusually high number” of students were late to the morning periods; however, nothing in the affidavit indicates exactly how much is “unusually high.” (*Id.*) Again, a spark in tardiness could be merely coincidental. (*Id.*) Also, there is no indication of investigations into this “unusually high” rate. (*Id.*) Finally, Wadsworth wore his t-shirt during all of the morning classes. (*Id.*) At no time was he either disciplined or was any other student’s actions disciplined by any teachers. The only recorded action resulting from Wadsworth’s t-shirt happened at lunch when Principal Hunt called him into her office to stifle his speech. The school district has failed to show any material disruptions or substantial interfere with the operation of the school caused by Wadsworth on the day he wore his t-shirt.

Unlike the evidence in *Barr* that supported a judgment in favor of the school, the school district in this case, has taken typical teenage behavior, hearsay, and coincidence as support that Wadsworth’s t-shirt caused current disruptions.

1. Principal Hunt could not reasonably determine a “material and substantial” forecast disruption because there is no association between the Wadsworth’s expression and past levels of disruption.

If a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (9th Cir. 2001).

Courts have required that past incidents of disruption have a direct association with the student speech under consideration. The United States Court of Appeals for the Third Circuit found that the school could not associate the term “redneck” with the past disruptive activities of a white supremacy gang named the “Hicks,” which had caused past disruptions at the school. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3rd Cir. 2002). When a student wore a shirt from a famous comedian making fun of being a redneck, the Principal required the student to turn the shirt inside out because he felt that term redneck was associated a school gang named the “Hicks.” *Id*. at 249. Furthermore, courts require more than just “at-least one fight” to be substantial enough to predict future substantial disruption. In *Castorina v. Madison County Sch. Bd.*, the Sixth circuit held that two Hank Williams, Jr. concert T-shirts, which depicted confederate flags, could not be prevented from being worn just because one single fight had broken out the previous day over the display of a confederate flag. 246 F.3d at 538 (6th Cir. 2001). Finally, a few courts have found that a school’s failure to provide a least restrictive means instructive in evaluating whether a student’s free speech rights have been violated. The District Court of Rhode Island found a public school had violated a homosexual student’s First Amendment rights by preventing him from bringing his boyfriend to the prom because of concerns stemming from an attack on a gay student at the previous prom. Fricke v. Lynch, 491 F.Supp. 381 (R.I. Dist. Ct. 1980). The court found the school’s concerns wanting since they could have easily used a lesser restrictive means by providing security at the dance. *Id.* at 386.

Principal Hunt has failed to show an association between Wadsworth’s T-shirt and past incidents of disruption, at-least one fight does not rise to the level of a material and substantial disruption, and she has been more concerned with preventing the speech than calming disruptions. Principal Hunt states that “due to the incidents at school related to the previous attempt to lower the drinking age in Centennial…[she] foresaw that additional disruption would occur if Jimmy were allowed to continue to wear his T-shirt at school.” (R. 3 ¶ 7.) The single disruptive incident she describes is “at least one fight,” on school grounds caused by the “high emotions” surrounding the legislation. (*Id.* ¶ 5.) This goes further than the leap in *Sypniewski* by associating the term redneck with previous disruptions by a gang called the Hicks. 307 F.3d 243. It is odd logic to ban a form of speech because it is a point of view related to certain legislation; and, the legislation had previously created high emotions; and in turn, the high emotions had led to at least one high school fight. There are numerous mitigating factors in high schools causing heightened emotional atmospheres. By this argument, the school’s suppression of a specific expression should not be allowed if it could contribute to heightened emotions. The connection between Wadsworth’s T-shirt and any previous fights at the school is tenuous at best. Furthermore, even if it can be determined there is some association; “at least” one school fight does not warrant the suppression of First Amendment rights, as the court determined in *Castorina*. 246 F.3d at 538. Many forms of speech can instigate a single high school fight; stemming from themes of love, jealousy, competition, and insecurity. Finally, there is no evidence that Principal Hunt tried to mitigate any disruptions caused by the t-shirt nor did she provide Wadsworth with any instruction on a less disruptive way to present his message.

Principal Hunt could not reasonably determine a “material and substantial” forecast disruption because she had been more concerned with preventing the speech than preventing forecast disruptions, at-least one fight does not rise to the level of a material and substantial disruption, and she has failed to show an association between Wadsworth’s T-shirt and past fights.

1. Principal Hunt could not determine an impingement on rights of other students because all viewpoints about the ballot initiative are widely spread.

For a school to justify the prohibition of a particular expression of [speech], it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” 393 U.S. 503, 509 (1969).

The District court in *Bowler v. Town of Hudson* determined a poster with a URL link to violent images did not impinge on the rights of others because the link was widely spread and it did not create a tort liability. *See* 514 F. Supp. 2d 168 (Mass. Dist. Ct. 2007). A high school club put up posters which had a link to a website, which in-turn contained a link to graphic video footage of hostage beheadings. *Id.* at 172. The school removed the images because of the sensitivities of other students. *Id.* at 178. The court granted that the images were offensive but determined that they did not impinge upon the rights of others because of a URL’s wide availability and they would not be “capable of triggering tort liability.” *Id.* at 176-178. The court in *Bowler* had concerns that the sensitivities to the videos could be used as a pretext to censor the Club's controversial political views. *Id.* at 182.

Wadsworth’s T-shirt should not be singled out because the viewpoints about the proposed legislation to lower the drinking age are widely available and sensitivities to his political message would not provoke tort liability. The ballot initiative was state wide, it had received extensive press coverage, several teachers dedicated classroom time to discussing it, it had been compared to a high school student’s unfortunate alcohol related death, and the school had used the death of the student in its freshmen orientations to warn about the abuses of alcohol. (R. 3 ¶ 1-5). The legislation was a widely debated issue in and out of the school, and out of all the discussions in relation to both the ballot initiative and the death of the high school student, Wadsworth’s political message is singled out. While this brief does not wish to imply Principal Hunt used the sensitive students as a pretext to banning Wadsworth’s message, the danger does exist. Students like all citizens have experiences that create personal sensitivities towards many subjects involving legislation including war, abortion, the death penalty, traffic laws, sexual orientation, marriage, divorce, school funding, and race; and the school needs to show more than just a single student leaving early for the day to justify violating a student’s right to discuss these political issues. The school district has failed to show impingement on the rights of other students that could be associated with Wadsworth’s t-shirt.

Because the school district has failed to show any substantial or material current disruptions, any substantial or material past disruptions, or any substantial or material impingement on the rights of students; the South Park School District has violated Wadsworth’s First Amendment rights by preventing him from wearing his shirt.

1. THIS COURT SHOULD REVERSE THE DISTRICT COURT FOR THE DISTRICT OF CENTENNIAL’S RULING IN FAVOR OF THE SCHOOL DISTRICT AND ENTERING JUDGMENT FOR PETER S. DUPONT BECAUSE THE SCHOOL DISTRICT’S CENSORSHIP OF DUPONT’S SPEECH IS A VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court has ruled on student First Amendment free speech rights four times. *Tinker v. Des Moines Independent Community School District*, the first of the four cases, decided in 1969, established that “[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. 503, 506 (1969). The *Tinker* test held that a student’s right to express an opinion could not be prohibited unless the school could reasonably forecast that such expression would lead to substantial or material interference with school activities. 393 U.S. 503*.*

The next time the Supreme Court reviewed student free speech rights was in *Bethel School District v. Fraser*, in 1986. 478 U.S. 675 (1986). The Court tightened the *Tinker* test and exempted “lewd and indecent speech” from protected student speech. *Id.* at 685.

The *Tinker* test was again tightened in *Morse v. Frederick*, decided in 2007. *Morse v. Frederick*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2618 (2007). In *Morse*, the Court held that “consistent with the First Amendment… student speech at a school event” can be restricted “when that speech is reasonably viewed as promoting illegal drug use.” *Id.* at 2625. *Bethel* and *Morse* both serve to further articulate, clarify, and tighten the *Tinker* Test.

In 1988’s *Hazelwood School District v. Kuhlmeier*, the Supreme Court set out a different test to address what level of control over student speech is allowed when the speech is deemed to be “school sponsored speech.” 484 U.S. 260 (1988). School-sponsored speech occurs in a curricular activity and bears the imprimatur of the school. *Id.* at 271. The Supreme Court defines curricular activities broadly, “whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.* at 270. Speech that bears the imprimatur of the school only has to be speech that “students, parents, and members of the public might reasonably perceive” to be school approved. *Id.* at 281. The *Hazelwood* test holds “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

This test for school-sponsored speech is distinct from the *Tinker* test and it is under the *Hazelwood* test that DuPont’s actions should be viewed. The school assembly where DuPont wore his shirt was a mandatory school event, supervised by faculty, which was designed to introduce students to school clubs and promote school spirit. (R. 3 ¶ 13.) This meets the criteria under *Hazelwood* for a curricular activity. DuPont’s t-shirt bore the name of a SPHS club and a picture of the school’s mascot. DuPont’s t-shirt would be reasonably viewed as bearing the imprimatur of the school. Having met both of the criteria for school-sponsored speech under *Hazelwood*, DuPont’s speech can only be regulated by the school if “their actions are reasonably related to legitimate pedagogical concerns.” 484 U.S.273.

A. The School District’s Censorship Of DuPont’s Speech Was Not Reasonably Related To A Legitimate Pedagogical Concern As Required Under the *Hazelwood* Test

The *Hazelwood* Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities *so long as* their actions are reasonably related to legitimate pedagogical concerns.” *Id.* (emphasis added). In discussing what legitimate pedagogical concerns are, the Court emphasized a school’s need to assure (1) “that participants learn whatever lessons the activity is designed to teach,” (2) “that readers or listeners are not exposed to material that may be inappropriate for their level of maturity,” and finally (3) “that the views of the individual speaker are not erroneously attributed to the school.” *Id.* at 271. In *Hazelwood*, the Principal decided to exclude two pages of a school newspaper when he “concluded that the students who had written … these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, [and] the need to protect the privacy of individuals,” illustrating the first and second categories of pedagogical concern recognized by the Court. *Id.* at 276. Although the three categories are not exhaustive, they are instructive in evaluating whether a school is protecting a legitimate pedagogical concern.

1. Peter DuPont’s Behavior Cannot Be Appropriately Regulated Under The Guidelines From *Hazelwood*.

Peter DuPont’s conduct did not interfere with the school assembly’s educational purpose. DuPont did not expose the audience of the assembly to inappropriate material given their maturity levels. DuPont also did not erroneously attribute the views of the Senior Men’s Club to the school as a whole. Therefore, his activities fall outside the three categories emphasized in the *Hazelwood* discussion of what qualified as a “legitimate pedagogical concern.” *Id*. The point of the school assembly was to introduce new students to student clubs and to promote school spirit. (R. 3 ¶ 13.) DuPont interfered with neither of these goals. He did introduce his club, describing it and outlining some of its goals for the year. (R. 1 ¶ 48.) He then displayed the club’s new t-shirt and gave background information on the Minor’s Rights Association. (R. 1 ¶ 49, 52.) Since the SMC had generally agreed to adopt the t-shirt as their club t-shirt, displaying the shirt at the assembly and giving information about its meaning was perfectly in line with the assembly’s purpose. Principal Hunt complains that DuPont was “prancing around the stage in an exaggerated imitation of a fashion model,” but at an assembly to promote school spirit and excitement about student clubs a little silliness is not inappropriate. (R. 3 ¶ 17.)

Neither DuPont’s display of the t-shirt nor his following explanation of its meaning was inappropriate for the maturity of his audience. Discussions of alcohol use are common at SPHS. At the school assembly new students were introduced to the Students Against Drunk Driving club. (R. 3 ¶ 17; *see* *also* R. 1 ¶ 31). It is likely that S.A.D.D. members were wearing their club t-shirts which declare “Friends don’t let friends drink. Drinking kills.”(R. 1 ¶ 35.) In addition to allowing S.A.D.D. to introduce the topic of alcohol use, SPHS discusses student alcohol use at freshmen orientation, which is comprised of the youngest students in the school. (R. 3 ¶ 13.) Earlier in 2008, when the initiative to lower the drinking age in Centennial was happening, several SPHS teachers devoted considerable class time to discussing the issue. (R. 3 ¶ 5.) By the actions of SPHS, it is implicit that discussions of alcohol use are not inappropriate for the students to engage in.

Although DuPont’s t-shirt bears the imprimatur of the school, Principal Hunt should not be concerned that the views on the t-shirt will erroneously be attributed to the school. Since the t-shirt clearly displays the name of the SMC club, most reasonable viewers would attribute the message to that club, not the school. (R. 1 ¶ 41(b).) Since the school also recognizes a club, S.A.D.D., with a club t-shirt advocating the opposite position on alcohol, a reasonable viewer would have further confirmation that the messages on the t-shirts express the opinions of the clubs, not the school. Since SPHS teaches incoming freshmen about the dangers of alcohol use early in their progression through the school, parents and students should have no confusion about the position of the school on the subject.

2. DuPont’s Speech Was Political And Cannot Be Censored Under The Guise Of Discouraging Drug Use.

Principal Hunt’s reasons for censoring DuPont’s speech cannot be upheld under the test from *Hazelwood*. Principal Hunt claims she was concerned that DuPont’s t-shirt promoted a violation of School Board policy and state law. (R. 3 ¶ 20.) Certainly speech that advocates breaking the law could be connected to pedagogical concerns, but DuPont’s speech did not advocate violating either School Board policy or state law. The School Board policy Principal Hunt was concerned about forbids students from possessing, using, or being under the influence of illegal alcohol on school property. (R. 3 Ex. B.) The state law she was concerned about simply states that the legal drinking age of Centennial is 21. Cent. Rev. Stat. § 18-21-123 (2)(a)(2008). Both the School Board policy and the state law deal almost exclusively with the underage possession or consumption of alcohol. However, DuPont’s t-shirt does not advocate or even broach the subject of underage drinking. DuPont’s t-shirt is aimed at changing the legal drinking age, not encouraging or promoting underage illegal drinking. Principal Hunt conflates the two distinct points when she says the t-shirt “unabashedly advocated adolescent drinking.” (R. 3 ¶ 4.) DuPont’s t-shirt is a political message and there is no School Board policy or state law against advocating for lowering the legal drinking age through the political process.

When the Supreme Court affirmed a school’s ability to censor speech related to illegal drug use in *Morse*, they “emphasized that the banner [debated in *Morse*] did not involve political speech. It did not, for example, engage in political debate over the criminalization of drug use or possession.” 127 S. Ct. 2618, 2632. DuPont’s speech is clearly a political statement about the drinking age. Since the *Hazelwood* test requires that censorship of school sponsored speech be reasonably related to legitimate pedagogical concerns, Principal Hunt’s actions were not protected under *Hazelwood* and thus amounted to a First Amendment violation.

B. The School District’s Censorship Of DuPont’s Speech Amounts To Viewpoint Discrimination Which Should Be Understood As Not Allowed Under *Hazelwood*.

Since the *Hazelwood* opinion is silent on the issue of viewpoint discrimination, it should be understood that the Court meant for the important element of viewpoint neutrality to continue to be required in restrictions of school-sponsored speech. The Supreme Court’s silence on this issue in *Hazelwood* has prompted a circuit split, with some courts recognizing it is unlikely that the Court would do always with such an important right covertly, while other courts have interpreted this silence to mean that viewpoint discrimination is now tolerable under *Hazelwood*. The law in this area is unsettled, but this Court is urged to add its voice to other courts, such as the Sixth, Ninth and Eleventh Circuits, that feel it would be a disservice to the Supreme Court to read silence as the removal of a traditional and protected right.

The Eleventh and Ninth Circuits have both ruled that the silence in *Hazelwood* did not indicate a radical departure from previous law that required viewpoint neutrality. Additionally, the text of *Hazelwood* gives no indication that the Court considered the decision to eliminate the requirement of viewpoint neutrality. In *Searcey v. Harris*, the Eleventh Circuit heard a case dealing with a school board’s attempt to exclude a peace organization from a school career day. 888 F.2d 1314 (11th Cir. 1989) . The school board tried that claim that their actions were allowable under *Hazelwood* since the decision did not require viewpoint neutrality. The Eleventh Circuit found this claim “concern[ing]” and ruled that “[a]lthough the Supreme Court did not discuss viewpoint neutrality in *Hazelwood*, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker’s view,” adding “*Hazelwood* acknowledges a school’s ability to discriminate based on *content* not *viewpoint*.” *Id.* at 1319. (emphasis in original).

In *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*,the Ninth Circuit applied the *Hazelwood* test when Planned Parenthood claimed that the school district’s decision to ban Planned Parenthood publications from high school yearbooks and newspapers violated the First Amendment. 941 F.2d 817 (9th Cir. 1991) . The court found that the *Hazelwood* test had been satisfied. The Court stated it was “[b]ecause [the school district’s] decision to limit access [is]… not an effort at viewpoint discrimination, [that] the school district did not violate the first amendment in declining to publish Planned Parenthood's advertisements.” *Id.* at 830.

*Hansen v. Ann Arbor Public Schools*, does not have precedential value since it is a district court decision, but it is enlightening in the harsh criticism it contains for the Tenth Circuit’s decision *Fleming v. Jefferson County School District R-1.* 293 F. Supp. 2d 780 (E.D.M. 2003); 298 F.3d 918 (10th Cir. 2002) . *Fleming* held that *Hazelwood* did not require viewpoint neutrality. *Hansen* states “the reasoning in *Fleming* is flawed,” and critiques the precedents that *Fleming* uses to support its conclusion. *Hansen* claims that in relying on *Ward v. Hickey* and *C.H. ex rel Z.H. v. Oliva*, from the First and Third Circuits respectively, *Fleming* fails to take into account that the speech discussed in these cases was *government* speech, not school-sponsored speech. 996 F.2d 448, 454 (1st Cir. 1993) ; 195 F.3d 167 (3d Cir. 1999). This is a critical distinction since, according to *C.H. ex rel Z.H. v. Oliva*, “the requirement of viewpoint neutrality, while essential to the analysis of a school's restrictions on extracurricular speech*…* is simply not applicable to restrictions on the State's own speech.” *Id*. at 173. *Ward v. Hickey* and *C.H. ex rel Z.H. v. Oliva* state that viewpoint neutrality is not required when it is the school or a school employee speaking as a representative of the state. *Fleming*’s holding is weakened by using precedential cases that deal with government speech, and trying to extend them to school sponsored student speech, a very different issue.

Even in *Hazelwood* itself, there is no evidence that the Court supported viewpoint discrimination. The Court supported the Principal’s decision to edit the newspaper because he was concerned about students’ privacy and the maturity of the audience reading the articles, not because he was opposed to the viewpoints of the articles. Because of the silence in *Hazelwood* and the importance of viewpoint neutrality, it should be found that this fundamental First Amendment right is still required under the *Hazelwood* test.

1. The Censorship Of DuPont’s Speech is Unmistakable Viewpoint Discrimination.

By allowing the S.A.D.D. club to wear their club t-shirts but not allowing DuPont to wear the SMC’s t-shirt, Principal Hunt was unequivocally sanctioning the expression of one side of a political controversy while banning the other. Principal Hunt allows the school group Students Against Drunk Driving to wear t-shirts that proclaim “Friends don’t let friend drink. Drinking kills.” (R. 1 ¶ 35.) These shirts are similar to DuPont’s banned t-shirt. They contain a political message about alcohol, they are the official t-shirts of school clubs, and they have the school name and mascot on them. *Id.*  This is blatant viewpoint discrimination and it silences educational dialogue about importance controversial issues.

Normally courts have been deferential to the decisions of school officials. *See* 484 U.S. at 273. In *Morse,* the Supreme Court even discussed that school officials need to be given even more deference when discouraging illegal drug use. 127 S. Ct. 2618. In the situation before the Court today however, it is vitally important not to simply defer to Principal Hunt’s decision. School officials’ decisions are valued because they are closer to the realities that affect students and they are in the best position to respond to students’ needs. Since the shaping and education of young minds is a great responsibility, federal courts have been reluctant to substitute their judgment for that of school officials. *See* 484 U.S. at 273. However, it is *because* the shaping and education of young minds is so important that it cannot be left completely to the discretion of school officials. The *Bethel* Court observed that the essential goal of public education is to inculcate in students “fundamental values necessary to the maintenance of a democratic political system.’” *Id*. Because schools must prepare youth to participate in an adversarial system of politics, where multiple contrasting viewpoints must co-exist, schools should not be allowed to censor political student speech because it takes an unpopular position or promotes a message that makes them uncomfortable. DuPont’s t-shirt was advocating for lowering the drinking age. This is not a position teachers and school officials probably agree with, but in their mission to prepare young minds for the democratic process they must allow the expression of viewpoints that are not in-line with their own. In order to ensure that American schools do not become “enclaves of totalitarianism” school officials cannot be given complete deference when it comes to censoring political and unpopular student speech, even if it is school-sponsored. 484 U.S. 260, 280 (dissent).

# Conclusion

A school district should not be given the room to equate legitimate political expressions with promoting illegal drugs. Furthermore, a school district should not be allowed to add up a handful of minor disruptions as a pretext to violate a student’s First Amendment right to freedom of expression. “Where the First Amendment is implicated, the tie goes to the speaker, not the censor.” *Bowler v. Town of Hudson*, 514 F.Supp.2d 168 (quoting *Fed. Election Comm'n v. Wisconsin Right to Life,* 551 U.S. 449, 127 S.Ct. 2652, 2669 (2007)).

In order to provide students with an education that will prepare them as future participants in a democratic society, schools should not be allowed to censor political speech because it is unpopular or controversial. The *Hazelwood* test of legitimate pedagogical concerns should be applied carefully and schools should not be allowed to censor political speech under the guise of discouraging drug use. Additionally, a school should be required to be viewpoint neutral in its actions so that students are not shielded or sheltered from political debate and discussion of important yet difficult topics.

For the reasons laid out in this brief, the Court should reverse the decision below and decide in Wadsworth’s and DuPont’s favor, declaring unconstitutional the restriction of their First Amendment rights to express their political views and direct the School District to permit Wadsworth to wear his T-shirt at school and remove DuPont’s suspension from his record.

Respectfully Submitted,

/s/

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# Certificate of Compliance

This certifies that the author of this Memorandum has complied with all applicable provisions of the Honor Code and that this Memorandum does not exceed this assignment’s word limit. The word count is: words.

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# Certificate of Service

This certifies email delivery and hand delivery of one copy of the above Memorandum to the law school mailbox of Leslie Samuelson and Emily Harlan by noon on March 20, 2009.

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