

No. _____

**In the
Supreme Court of the United States**

Watson Chapel School District, *et al.*,
Petitioners

v.

Chris Lowry, *et al.*,
Respondents

*On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Eighth Circuit improperly apply *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) to a case involving a school dress code that was sufficiently specific to prescribe a uniform?
2. Is there a split among the Eighth, Fifth and Ninth Circuit Courts of Appeals concerning the application of *Tinker* to school dress codes?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows:

Defendants/Appellants and Petitioners:
 Watson Chapel School District, Charles Daniel Knight, Watson Chapel School District Superintendent, and Henry Webb, Junior High School Principal.

Plaintiffs/Appellees and Respondents Chris Cowry, by, through, and with his Mother, Wendy Crow; Colton Dougan, by, through, and with his Mother, Frank Dougan and his Mother, Leigh Dougan; Michael Joseph, by, through, and with his Mother, Heidi Joseph; Wendy Crow; Frank Dougan; Leigh Dougan; Heidi Joseph

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PETITION FOR A WRIT OF CERTIORARI

Watson Chapel School District, Charles D. Knight and Henry Webb respectfully petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Opinion of the Eighth Circuit dated September 2, 2008 is officially reported at 540 F.3d 52 and is reproduced at Appendix pages 1a through 12a. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Arkansas, Pine Bluff Division dated August 22, 2007 is reported at 508 F.Supp. 2d. 713 and is reproduced at Appendix pages 1b through 40b.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was entered on September 2, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within ninety (90) days of the entry of the Opinion and Judgment sought to be reviewed. This Court has jurisdiction to review the Judgment of the U.S. Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to 42 U.S.C. § 1983 claiming violation of Plaintiff's rights to free speech under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

On October 6, 2006 several students of the Watson Chapel School District wore black armbands to school to protest the school dress code. The students and some parents had previously criticized the dress code by addressing the school board; picketed school board meetings; had held rallies and had appeared in local media expressing their dissatisfaction with the District's dress code. The detailed dress code contained a provision that stated "any attempt to defeat the uniformity intended by this policy is prohibited."

The District interpreted this provision to prohibit the use of apparel (black armbands) to attempt to defeat the uniformity of the policy. This was communicated to students. Students who entered the campus on October 6, 2006 wearing black armbands were requested to remove them. Those that did not were disciplined according to the school district's progressive discipline policy. Three students who were disciplined filed this action by and through their parents seeking injunctive relief, money damages and a declaration that their constitutional rights had been violated.

In the District Court, prior to commencing a jury trial, the school district Defendants stipulated that no material disruption occurred as a result of the black armband protest and the District Court, utilizing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), found that the District had violated the Plaintiffs' constitutional right to free speech. The only issue submitted to the jury relevant to this petition was the amount of damages sustained by the Plaintiffs. The jury returned a verdict in favor of Defendants finding that no damages had been sustained. The District Court, upon motion of the Plaintiff, entered a judgment for nominal damages, made the temporary injunction permanent and awarded Plaintiffs attorney's fees.

The Eighth Circuit Court of Appeals affirmed the Judgment of the District Court, again applying *Tinker*. The Court of Appeals held that since the black armband protest did not materially disrupt school activities *Tinker* was controlling. Defendant/Appellants argued to both the District Court and the Eighth Circuit Court that *Tinker* was an incorrect precedent because the school district's detailed dress code, unlike the facts of other cases that have applied *Tinker* to dress codes,¹ constituted a prescribed uniform. This uniform is the functional

¹*Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Wesom v. Albemarle County School Board*, 354 F.3d 249 (4th Cir. 2003); *Barr vs. Lafon*, 538 F.3d 554 (6th Cir. 2008).

equivalent of school sponsored speech discussed in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and *Morse v. Frederick*, _____ U.S. _____, 127 S.Ct. 2618 (2007) requiring analysis of whether the District restrictions were reasonable under the circumstances and advanced legitimate pedagogical concerns.

The Watson Chapel School District Defendants petition this Court for review of the Eighth Circuit's decision holding that *Tinker* is controlling precedent in this case.

REASONS FOR GRANTING THE PETITION

I. Did the Eighth Circuit improperly apply *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) to a case involving a school dress code that was sufficiently specific to prescribe a uniform?

This Court in *Tinker* stated "the problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair styles or deportment." 393 U.S. at 507-508. Where, as here, the dress code is sufficiently detailed to prescribe a school uniform, the overall appearance of the students is school sponsored speech. Decisions concerning the dress code should appropriately be governed by the analysis provided by this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and later ratified by *Morse v. Frederick*, _____

J.S. _____, 127 S.Ct. 2618 (2007) in that the dress of students wearing the prescribed school uniform bears the Watson Chapel School District's imprimatur.

The State of Arkansas has stated through its statutory enactment of Arkansas Code Annotated § 6-8-102 the importance the state places upon dress codes to the enhancement of the learning environment. The misapplication of *Tinker* to schools that have adopted dress codes can have far reaching effects.

The prioritization of emphasis by the school district on one activity versus another is just the type of discretionary function of local schools that courts could not interfere with. As this Court has noted, the determination of what manner of speech in the classroom or in the school assembly is appropriate properly rests with the school rather than the federal courts." *Hazelwood*, 484 U.S. at 267. The District, through its school board and administration should be allowed to place greater emphasis on school apparel, even when doing so results in a prohibition against wearing black armbands in protest of the uniform policy. The only protest of the policy that was prohibited was a protest using apparel as the means of protest. School uniforms and apparel bear the indicia of the local school district and are the functional equivalent of school speech rather than personal speech. All students in the District must wear clothing and apparel required by the student apparel policy. Throughout the community,

"students, parents, and members of the public might reasonably perceive [the students' apparel] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271.

II. Is there a split among the Eighth, Fifth and Ninth Circuit Courts of Appeals concerning the application of *Tinker* to school dress codes.

The Fifth Circuit in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001) relying on the holding in *Hazelwood* and *Bethel School District No. 403 vs. Frazier*, 478 U.S. 675 (1986), found that a lower standard of review than set out in *Tinker* should exist when the restrictions of student expression are "unrelated to any political viewpoint."

...Because (1) choice of clothing is personal expression that happens to occur on the school premises and (2) the School Board's uniform policy is unrelated to any viewpoint, a level of scrutiny should apply in this case that is higher than the standard in *Kuhlmeier*, but less stringent than *Tinker*. Both the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct satisfy this requirement. The time, place and manner analysis and the *O'Brien* tests are virtually the same standard of

scrutiny for the purpose of assessing the validity of the school uniform policy. Thus the School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than necessary to facilitate that interest. (Internal Citations omitted).

Janady, 240 F.3d at 443.

The Eighth Circuit's decision is also in conflict with that of the Ninth Circuit opinion *Jacob v. Clark County School District*, 526 F.3d 419 (2007) which held that the *Tinker* standard does not apply to a school dress code. The Ninth Circuit also held that an intermediate scrutiny should apply to determine whether the uniform policy in question either places content neutral restrictions on student's pure speech or places incidental restrictions on student's expressive conduct.

CONCLUSION

This Court should resolve this conflict and make clear the appropriate standard for review of school dress codes that are sufficiently detailed to prescribe a uniform. The number of cases litigating these questions demonstrates the importance and frequency of conflicts arising in this area.

Petitioners respectfully request that this Court grant their petition.

Respectfully Submitted,

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