Preliminary Statement

Judge William K. Sessions rendered the decision below, which is reported at 349 F.Supp.2d 871 (D. Vt. 2004).

Jurisdictional Statement

A. The Basis for the District Court's Jurisdiction: This action involves a claim of violation of First Amendment rights: the censorship by public school officials of a student's t-shirt which criticized President George W. Bush, in words and illustrations, for alleged alcohol and drug abuse. The basis for jurisdiction below includes 42 U.S.C. § 1983, which provides redress to persons who are deprived of their civil rights under color of law, and 28 U.S.C. §§ 1343(3) and 1331, which confer jurisdiction over federal civil rights actions and civil actions arising under the Constitution and laws of the United States respectively.

B. The Basis for this Court's Jurisdiction: The opinion below was issued on the merits after a three-day bench trial, and it disposed of all parties' claims. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291, which confers jurisdiction on it over appeals from final decisions of the District Courts.

C. Filing Dates Establishing Timeliness of the Appeal: The judgment below was filed on December 21, 2004, and plaintiff Zachary Guiles' appeal is timely

because he filed his Notice of Appeal on January 19, 2005. See A-5.

Statement of the Issue Presented for Review

Whether the District Court erred by holding that the First Amendment protected only the text, not the accompanying illustrations, on a middle school student's t-shirt which criticized President Bush for alleged alcohol and drug abuse.

Statement of the Case

The plaintiff/appellant in this case is Zachary "Zach" Guiles, a 13 year-old eighth-grader at the Williamstown, Vermont Middle High School. The defendants/cross-appellants are the Principal and Assistant Principal of the school, the Superintendent of Schools, and the chairperson of the local school board.

On May 27, 2004 Zach filed suit in the U.S. District Court for the District of Vermont seeking an injunction barring the defendants from further disciplining him for wearing his anti-Bush t-shirt uncensored, and an order requiring expungement of his disciplinary record. A-12.

A bench trial was held on August 18-19 and December 10, 2004. On December 21, Judge Sessions entered judgment for Zach, holding that defendants had violated his First Amendment rights by censoring some of the t-shirt's written text. Judge Sessions ordered expungement of Zach's disciplinary record. A-21-22.

However, Judge Sessions held that the defendants could censor some of the illustrations on the t-shirt without violating the First Amendment, and he denied the injunction request. A-21. Zach appeals that portion of the judgment.

Statement of Facts

During the academic year 2003-04, Zachary Guiles was a seventh-grader at the Williamstown, Vermont Middle High School, a public school which houses grades six through twelve in the same building. A-33. Zach is an outstanding student. During his seventh grade year he took the SAT tests, achieving scores of 760 in math and 600 in English. A-85. Zach is the principal trombonist for the Vermont Youth Orchestra, with which he has played in Carnegie Hall. A-85-86.

In March 2004, Zach attended an anti-war rally on the Vermont Statehouse lawn. There he donated $5.00 to the Vermont Green Party and was given a t-shirt which criticizes President Bush's character and his Iraq War Policy. In Zach's words, he "wanted to have a shirt that expresses my political view." A-88-89.

The t-shirt describes President Bush as the "Chicken-Hawk-in-Chief" who is engaged in a "World Domination Tour." The shirt also accuses Mr. Bush of being an "AWOL draft-dodger," a "crook," a "lying drunk driver" and a "cocaine addict." Numerous illustrations enhance and dramatize the text, including a large caricature

of a helmeted, chicken-bodied Mr. Bush, and drawings of gushing oil wells, dollar signs, chickens, liquor bottles, a Minute Man drinking liquor, martini glasses, and cocaine lines, razor blades, and straws. The opinion below describes the t-shirt in detail, A-15, and photographs of it are reproduced at A-23-26.

Zach wore the t-shirt to school approximately once a week for two months. A-93-94. According to the school's Principal, Zach wore the t-shirt during the two month period "without incident," and its display did not affect the academic mission of the school. A-364. The only problem experienced by Zach was a few students calling him names like "Communist" or "Bush-hater." A-101.

One pro-Bush classmate of Zach's named Ashley Anderson complained to their teachers about the shirt's politics, but they told Zach that the shirt was protected political speech or that it did not violate school policy. A-97-100. One teacher was unsure whether the t-shirt "fit in" under the dress code and asked the Principal what should she should do about it. The Principal "said she'd look into it," but took no action. A-247-248.

Ashley Anderson was particularly upset by the shirt's political message, and she continued to argue with Zach about it. During the second month that Zach wore the t-shirt to school, Ashley noticed the illustrations of drugs on the shirt, and she told Zach that she "might be able to make it so I could not wear the shirt by bring

those up to the school." A-95.

The school's dress code provides in relevant part:

> · Any aspect of a person's appearance, which otherwise constitutes a real hazard to the health and safety of self and others or is otherwise distracting, is unacceptable as an expression of personal taste. Example [Clothing displaying alcohol, drugs, violence, obscenity and racism is outside our responsibility guidelines as a school and is prohibited.] A-32. (Brackets in original.)

On May 12, 2004, Zach was scheduled to go on a school field trip with his classmates, including Ashley Anderson. Ashley's mother, who is a cheerleading coach at the school, was chaperoning the trip. A-151. As Zach walked by them, Ashley pointed the shirt out to her mother, and "they were both reading it and staring at it." A-102-103. Zach then saw them go into the office of defendant Marineau, A-103, the school official in charge of student discipline.

Mr. Marineau met with Mrs. Anderson, A-152, 185, and after conferring with Superintendent Shiok by telephone, A-154-155, he presented Zach with three choices: either remove the shirt, wear it inside out, or place tape over the word "cocaine" and the drug and alcohol illustrations. A-106-108. At this point, Zach called his father for advice. It was Zach's "gut reaction not to take it off because of my free political speech. But I just wanted to have a little bit of advice, a second opinion." A-110. Zach's father, Tim Guiles, came to the school and met with Mr. Marineau and later with Superintendent Shiok. Mr. Guiles attempted to persuade

them to allow Zach to wear his t-shirt, but he was unsuccessful. A-111-114.

The next day, Zach wore the shirt to school uncensored. Zach decided to do so because "it was concerning my free speech, and I think ... free speech is a very important aspect of life...." A-117.

Defendant Marineau caught Zach wearing the shirt and summoned him to his office A-119. Zach noticed that Mr. Marineau had a Holocaust Remembrance Day poster on his wall which included a Nazi swastika with a line or paperclip drawn through it as a symbol of opposition to anti-Semitism. Zach pointed out that the poster would violate the school's dress code if depicted on a student's clothing because the swastika is a symbol of racial hatred. Mr. Marineau responded by removing the poster and throwing it into a trash can. A-121-122, 164-166.

Mr. Marineau gave Zach the same three choices: take the shirt off, turn it inside out, or tape over the offending portions. A-119, 122. Zach declined, and Mr. Marineau filled out a disciplinary action form, see Plaintiff's Exhibit 3, A-33-34, and sent Zach home for the rest of the day. A-123. As the District Court found, the discipline form "is now part of [his] disciplinary record" at the school. A-16, 208.

On May 14, 2004, Zach returned to school with the drug and alcohol illustrations and the word "cocaine" covered with duct tape. He wrote the word "censored" on each piece of tape. A-123-125 Marineau inspected the shirt and

found it acceptable under the dress code. (For photos of the censored shirt see A-27-30.)

The defendants have required the removal of clothing such as Budweiser shirts and hats, which promote substance use and abuse. A-159. Zach's shirt is the first article of clothing with political content that the school has censored. A-161, 374-376.

It was undisputed at trial that the school has permitted students to wear pro-Bush administration, pro-war clothing without censorship or discipline, including shirts with the slogans "Go Army," "U.S.A. No. 1," "Don't Mess with the U.S.A.," and "These Colors Don't Run." A-127.

The defendants conceded during the trial that they had violated Zach's First Amendment rights by censoring the word "cocaine" on the t-shirt. A-194. In an effort to justify their censorship of the drug and alcohol illustrations, the defense presented by deposition the testimony of Carol L. Rose, the Vermont official in charge of school drug and alcohol education programs. Ms. Rose claimed in her testimony, A-520, that Zach's t-shirt had the potential for sending a "mixed message":

> We have a picture of the president of the United States depicted with lines of cocaine and a martini glass and the mixed message that I think that this shirt could give is that, yes, I did cocaine and I drank or I drink and I'm president of the United

> States and that a young person looking at this could say hey, what's the big deal with drugs and alcohol, it's okay for, you know, the president, it's okay for him.

Ms. Rose also explained and endorsed what she called the "environmental approach" to prevention, meaning that students "are not hearing something in the classroom and then seeing a poster, an image, someone's clothing ... that depicts a counter message to what they received in the classroom." Schools should be "a neutral place where students are not being bombarded with alcohol, tobacco and other drug images as they are in their -- in the media, in their communities, in stores, listening to the radio, that this is the place where they are not getting any of the visual or auditory messages glamorizing alcohol, tobacco and other use." A-506-507.

When asked on cross-examination whether she was aware of "any study or evidence other than anecdotal evidence that would link a political t-shirt such as [Zach's] with drug or alcohol abuse by students," the witness replied that she was "not familiar with any research on a political shirt." A-525. Plaintiff's counsel asked Ms. Rose if she knew of any scientific evidence that showing a student a bottle would make that student more likely to abuse alcohol, she replied that she did not know. A-543. Similarly, when asked if she was in possession of any scientific data showing a student a picture of a

martini glass on a piece of clothing would make that student more likely to abuse alcohol, she responded that "I don't have any evidence one way or the other." A-544.

Plaintiff's counsel then asked Ms. Rose whether it was her testimony that "the way to stop drug abuse among youth is to make sure that students don't see any depictions at all of drugs," and she asserted, "It would help." A-547. The following exchange then occurred:

> Q. Well, how would they know what drugs are if they don't see pictures of them? How would they know what to avoid?
>
> A. They wouldn't have to worry about it until they became of age. A-547.

In a subsequent letter which was admitted into evidence, William J. Reedy, the General Counsel of the Vermont Department of Education, stated that Ms. Rose's testimony "was not intended to draw any conclusions with respect to the outcome of the case or any substantive legal issue therein. To the extent that it did, it did not reflect an official position of the Commissioner or Department on the merits of the case or any such substantive legal issue." Plaintiff's Exhibit 4, A-35.

The defendants testified that Zach's shirt did not advocate substance abuse, and that its purpose was to criticize President Bush for abusing drugs

and alcohol. A-161, 268-269. Nonetheless, the defendants in their testimony agreed with Ms. Rose's absolutist approach to student clothing, but for a somewhat different reason. The gist of that testimony was that it is unduly burdensome for school officials to have to discriminate between t-shirts that promote drug and alcohol use and those that condemn it, particularly because some students have been known to wear anti-drug and anti-alcohol shirts as a way of endorsing illegal substances. Hence in their view a ban on all clothing that depicts drugs or alcohol, without regard to context, is necessary for ease of enforcement. See testimony of Superintendent Shiok, A-299-300, Principal Morris-Kortz, A-382-383 and the decision below, A-17.

On the other hand, Principal Morris-Kortz testified that freedom of speech, including free and open discussion of political issues at school, is a very important community value that public schools should foster. As she put it, "I think it's part of our responsibility -- I think one of the primary functions of school is to raise good citizens, and we need to provide students with an educational opportunity to be able to formulate their own thoughts about many things, and politics being one of those issues." The Principal asserted that one of the missions of her school is to educate students in democratic values, and to promote respect for the guarantees contained in the Bill of Rights. A-364-

365. The Principal also conceded that children learn by viewing photographs and illustrations as well as text, that most textbooks are designed that way, and that illustrations can help reinforce textual content. A-366-367.

The plaintiff presented as a rebuttal witness Charles Phillips, who taught English at Montpelier High School for 36 years and was Principal for six of those years, during one of which he was recognized as Vermont's Principal of the Year. He also served as the school's Athletic Director and Assistant Principal. A-432-433.

In Mr. Phillips' view, Zach's t-shirt

> ... was a clear political statement, that the symbols of drug use and alcohol use were used to make some ... inferences about President Bush's past and that there was no way they could be construed to be a positive kind of statement about the use of marijuana or alcohol. And in fact the overall message was that these were things to be avoided. A-454.

Mr. Phillips testified that he was aware of no evidence that t-shirts with anti-drug and anti-alcohol messages encouraged students to use these substances. A-454-456. The Montpelier school dress-code bans only the wearing of clothing that *promotes* alcohol or drug use. A-447-448. While Mr. Phillips conceded that a dress code banning all depictions of drugs and alcohol on student clothing makes administration of such a policy easier, "my concern would be that by doing that, you do limit opportunities to have a more

meaningful conversation or discussion or experience." A-458. According to Mr. Phillips, a blanket ban on drug symbols "creates a climate where you can't talk about these things or [one is] not as apt to talk about them." A-456. As part of the curriculum Montpelier had students design anti-drug and anti-alcohol posters, which Mr. Phillips found to be "more effective in many ways than the canned responses that come down from various publishing companies and things of that sort. It's something that the student himself or herself has created, has put some thought into...." A-456.

Summary of Argument

The Supreme Court and this Court have determined that illustrations are entitled to the same First Amendment protection as written text. Illustrations may enhance a textual message by catching the attention of the viewer, by making it more understandable, and by forming a communicative unity whose power to inform and persuade is greater than the sum of its parts. The Court below incorrectly equated the censorship of illustrations to regulation of the mere "manner" of speech. Unlike the Supreme Court decisions upholding "manner" restrictions on noise, illustrations have independent, substantive communicative value entitled to constitutional protection.

The District Court also erred in its application of Supreme Court case law on student speech to the facts of this case. In *Tinker v. Des Moines School District,* the Court held as a general matter that schools may censor political speech only when it poses a substantial threat of disruption of the school's operations. The defendants conceded in their testimony that Zack's shirt posed no such threat. The exceptions to *Tinker,* which the Supreme Court delineated in the *Hazelwood* and *Fraser* cases, are inapplicable here: Zack's t-shirt was not school-sponsored; nor did it contain obscenity or vulgar language.

Other recent federal cases involving censorship of school clothing militate in favor of First Amendment protection for Zach's anti-Bush t-shirt.

Argument

The District Court Erred by Permitting Censorship of Alcohol and Drug Illustrations on Zach's Anti-Bush T-Shirt.

A. Standard of Appellate Review: In cases involving First Amendment claims, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the United States,* 466 U.S. 485, 499 (1984),

quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-286 (1964). This painstaking review must be conducted "without deference to the factual findings of the trial Court." *Bery v. City of New York,* 97 F.3d 689, 693 (2nd Cir. 1996).

B. Illustrations are Generally Deserving of the Same First Amendment Protection as Text: Judge Sessions' holding that particular political text is protected by the First Amendment, but accompanying illustrations which draw attention to and reinforce the text's political message lawfully may be censored, is to our knowledge without precedent in the annals of constitutional law.

The Supreme Court addressed a closely analogous issue in *Zauderer v. Ohio Disciplinary Counsel,* 471 U.S. 626, 647 (1985), which involved the constitutionality of a ban on a personal injury lawyer's advertisement trolling for clients who had been injured by a notorious intrauterine birth-control device, the Dalkon Shield. The lawyer's ad contained a line drawing of the Dalkon Shield accompanied by the question "DID YOU USE THIS IUD?" and additional text touting the lawyer's services. The Supreme Court held that the illustration was entitled to the same level of constitutional protection as the

written message:

> The ... restriction on illustrations in advertising by lawyers ... fails for much the same reason as does the application of the self-recommendation and solicitation rules. The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech.... *Zauderer, supra,* 471 U.S. at 647.

In *Bery v. City of New York, supra,* this Court determined that visual depictions -- even those devoid of political content -- must be treated on an equal constitutional footing with text. *Bery* invalidated a law that required street vendors of painting, photography, and sculpture to obtain a license, but exempted sellers of printed material. This Court declared that "[v]isual art is as wide ranging in its depiction of ideas, concepts, and emotions, as any book, treatise, pamphlet, or other writing, and is similarly entitled to full First Amendment protection."

> Indeed, written language is far more constricting.... The ideas and concepts embodied in visual art have the power to transcend these language limitations.... As the Supreme Court has reminded us, visual images are "a primitive but effective way of communicating ideas ... a short cut from mind to mind." *Bery, supra,* 97 F.3d at 695, citing *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 632 (1943).

This Court also noted in *Bery* that "written and visual expression do not always allow for neat separation: words may form part of a work of art, and

images may convey messages and stories. *** Visual artwork is as much an embodiment of ... expression as the written text, and the two cannot always be readily distinguished." 97 F.3d at 695.

That observation aptly applies with equal force to illustrations and photographs that accompany text in printed material that people encounter routinely in their day-to-day lives such as books, newspapers, magazines, and catalogs. It is similarly applicable to the t-shirt worn by Zachary Guiles, where the words and illustrations form a shrill synergy, a unified political mini-jeremiad.

Judge Sessions was wrong to hold that the defendants were entitled to require Zach to cover portions of his t-shirt on the theory that by "only prohibiting images of drugs and alcohol," the defendants "only censored the manner rather than the message." *Guiles v. Marineau,* 349 F.Supp.2d 871, 881 (D.Vt. 2004). The flaw in this reasoning is that the "manner" of speech (the use of illustrations) has independent, substantive, and direct communicative value that is entitled to the same First Amendment protection as the written word.

Restrictions on the "manner" of speech that the Supreme Court has in the past deemed constitutional, such as anti-noise regulations, have not

affected its communicative essence. See, *e.g., Kovacs v. Cooper,* 336 U.S. 77 (1949), which upheld an ordinance banning "loud and raucous noises" on public streets. No one doubts that municipalities have the right to regulate noisy sound-trucks. However Judge Sessions' view that blanket suppression of an entire medium (visual images) is permissible as a "manner" restriction readily would subject to censorship the photographs or editorial cartoons in the *New York Times*. Frankly, this is an extreme and dangerous misapplication of First Amendment doctrine.

In sum, the District Court's view is fatally at odds with First Amendment and the constitutionally crucial points made in *Zauderer* and *Bery,* both *supra:* that illustrations often enhance the overall message by attracting the attention of the viewer, by making written text easier to comprehend, and by forming a synthesis whose power to inform or persuade is greater than the sum of its parts. Principal Morris-Kortz recognized this reality when she testified that children learn best through exposure to written words that are accompanied by illustrations, which is why textbooks are designed in that fashion. By censoring the illustrations on Zach's t-shirt, the defendants stripped away much of the communicative value and iconoclastic spirit from its anti-Bush message.

C. Under the *Tinker* Case and its Progeny, Zach's T-Shirt was Pure Political Speech Not Subject to Censorship.

1. No Threat of Disruption: In *West Virginia State Board of Education v. Barnette, supra,* the Supreme Court upheld the right of a public school student to refrain from saluting the American flag.

In *Barnette,* the Court reasoned, in broad language applicable to this case, 319 U.S. at 637, that the First Amendment:

> **... protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.**

The leading case dealing with the right of students actively and affirmatively to express their political views is *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). There, students decided to wear black armbands to school to express their opposition to the Vietnam war and their support for a truce. They publicized widely their intention to do so.

In response to the planned protest, school authorities met and adopted a dress code which prohibited the wearing of all armbands, and

provided that any students wearing armbands would be suspended from school until they returned without armbands.

The Supreme Court held that students could not be disciplined under this dress code provision, noting that the wearing of armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 506. Mr. Justice Fortas, writing for the Court, held that students are entitled to express their political views unless school authorities prove that the exercise of free speech creates a "material and substantial interference with schoolwork or discipline." *Id.* at 511. Justice Fortas eloquently explained:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. *Tinker, supra,* 393 U.S. at 511.

Schools must foster the free speech rights of students because they educate the young in democratic values. A school administration may curtail

the exercise of purely political speech only when it can prove that such exercise poses a significant danger to its academic mission or student discipline or interferes with the rights of others. The potential for such a "disruption" must be "reasonable and not based upon speculation." *Trachtman v. Anker,* 563 F.2d 512, 517 n.5 (2nd Cir. 1977). Any other rule would foster cynicism and disrespect in our youth, who would perceive on the part of those in authority a hypocritical failure to respect and defend the values set forth on the Bill of Rights.

In this case, Zach wore his anti-Bush t-shirt once a week for nearly two months during the 2004 presidential campaign without any particular notice by school officials and with no disciplinary action. School officials conceded at the trial that he wore the shirt without incident, A-364, and the record is devoid of evidence that the t-shirt created a "material and substantial interference with schoolwork or discipline" or the rights of other students. *Tinker, supra,* 393 U.S. at 511.

2. <u>The Wearing of the Shirt was Not a School-Sponsored Activity Where Censorship Furthered a Legitimate Pedagogical Concern</u>: The Supreme Court has further delineated the scope of *Tinker's* reach in the more recent cases of *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 272 (1988),

and *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986). One scholar has stressed that "rather than viewing [these cases] as taking something away from Tinker, one might look at them as merely defining the preexisting limits of Tinker." A.D.M. Miller, "Balancing School Authority and Student Expression," 54 Baylor L.Rev. 623, 641 (2002).

In *Hazelwood,* the Supreme Court permitted a high school principal to censor certain articles in a school-sponsored newspaper which was published as part of a journalism class. One of the articles dealt with teen pregnancy in the school, and the principal felt that the pregnant students quoted in the article "might be identifiable from the text." The other article, on the impact of divorce, mentioned the name of a student who was upset by her parents' behavior, and the parents had not been permitted to respond. 484 U.S. at 262.

While The Supreme Court upheld the principal's right to delete these articles from the student newspaper, it limited the reach of its holding to school-sponsored speech. As the Court put it, "whether the First Amendment requires a school to tolerate particular student speech -- the question we addressed in *Tinker* -- is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 270. Educators may exercise "editorial control of student speech

in *school-sponsored* expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis supplied). In dictum, the Court affirmed "the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use...." *Id.* at 272.

It is obvious without extended discussion that Zach's t-shirt does not fall under the *Hazelwood* exception to *Tinker's* general rule of freedom of speech in schools. First, as the District Court recognized, Zach's political statement was not school-sponsored. 349 F.Supp. at 879. Nor could any reasonable student or teacher have interpreted Zach's t-shirt as advocating harmful or illegal activity, such as drinking or taking drugs. For that reason, censorship of the t-shirt cannot be countenanced under *Hazelwood* as an action somehow "reasonably related to a legitimate pedagogical concern."

Nonetheless the defendants appeared below to rely on *Hazelwood* to justify censorship of Zach's political statement, on the theory that *Hazelwood's* dictum regarding the right to suppress student advocacy of drug and alcohol use in school-sponsored events justifies a heretofore unprecedented level of suppression of speech generally. Their position is that it is constitutional for schools to ban *all* student apparel containing *any* "displays" of alcohol and

drugs, even those that *oppose* substance abuse.

The defense relied for this dubious proposition on the utterly speculative opinion testimony of their star witness, Carol Rose, testimony which was later disavowed in a letter from the General Counsel of her employer, the Vermont Department of Education A-35. Ms. Rose claimed that, in order to fight substance abuse effectively, schools must "protect" students from seeing *any* images of drugs or liquor, no matter what the context. In Ms. Rose's topsy-turvy world, even *anti*-drug and *anti*-alcohol t-shirts are dangerous. A t-shirt like Zach's, which stridently condemns President Bush for driving under the influence and using cocaine, must be censored because some student out there might conclude, just from viewing the illustrations of liquor bottles and drugs, that substance abuse is no barrier to success: drink, drive, snort coke, and you too may someday become President. Such mind-boggling illogic insults the intelligence of students and trivializes the important task of combating substance abuse.

Ms. Rose's defense of the Williamstown school dress code ignores the fact that its proscriptions only apply to "displays" of alcohol and drugs. As Judge Sessions noted in his opinion, "the defendants have interpreted their policy as only prohibiting images" of drugs and alcohol. 349 F.Supp. at 880-

881. Both on its face and as applied, then, the dress code would permit a student to wear a shirt with the written message "Take Heroin" in six-inch block letters, but prohibit the wearing of a shirt with the international "no" sign drawn through an illustration of a marijuana plant, accompanied by the written caption, "Say No to Drugs." It is difficult to see how such a dress code promotes an "environmental approach" to drug abuse, or any other rational approach to this problem, for that matter.

The defendants in their testimony also claimed that blanket censorship of all drug and alcohol images is justified because it is too burdensome to ask teachers and administrators to discriminate between pro-drug and anti-drug and alcohol clothing. This claim unfairly underestimates the abilities of our talented and dedicated educators, whose academic and disciplinary responsibilities require them to make similar judgment-calls daily. To the extent that such discriminations may require school personnel occasionally to make difficult decisions based on their knowledge and experience, this is a small price to pay for freedom. Nor is mere ease of administration convenience a proper ground for dispensing with the First Amendment. See, *e.g., Saxbe v. Washington Post Co.,* 417 U.S. 843, 860 (1974)(regulations tending to undermine First Amendment freedoms must be justified "in terms more

compelling than discretionary authority and administrative convenience"); *Riley v. National Federation of the Blind,* 487 U.S. 781, 795 (1988)("we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency").

The real issue here is political censorship, not substance abuse, and it would be a mistake for this Court to endorse the suppression of all "displays" of drugs or alcohol, without regard to context, in the name of prevention. Such a restriction on student speech reaches far too broadly, and there is no evidence that it would be effective even if it were constitutional.

3. <u>No Lewdness or Obscenity</u>: In *Bethel School District v. Fraser, supra,* the Supreme Court upheld disciplinary action taken against a student who delivered a speech to his high school assembly which was laced with "pervasive sexual innuendo." The Supreme Court agreed that the school officials properly determined, under the rationale of *Tinker,* that "a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." The Supreme Court quoted approvingly from a decision of this Court to the effect that "the First Amendment gives a high school student the right to wear Tinker's armband, but not Cohen's ['Fuck the Draft']

jacket." *Fraser, supra,* 478 U.S. at 682, quoting *Thomas v. Board of Education, Granville School Dist.,* 607 F.2d 1043, 1047 (2nd Cir. 1979), and see *Cohen v. California,* 403 U.S. 15 (1971). In the Court's view, "school authorities, acting *in loco parentis*" have the right "to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech." *Fraser, supra,* 478 U.S. at 684.

The District Court rejected *Tinker* as the proper legal yardstick and relied on *Fraser* as authority for censorship of the t-shirt, equating the illustrations on Zach's t-shirt with Fraser's swear word. The comparison is inapt and unfair. In the first place, "unlike the armbands at issue in 1969 [in *Tinker*], Fraser's speech was not political in nature; it was merely lewd and indecent." "Balancing School Authority and Student Expression," *supra,* 54 Baylor L.Rev. at 630. See *General Media Communications, Inc. v. Cohen,* 131 F.3d 273, 282 (2nd Cir. 1997)(merely lewd speech contains no "viewpoint" against which the government may not discriminate).

Judge Sessions' conclusion that Zach's case belongs in the *Fraser* box was also based on the incorrect premise that suppression of illustrations, as opposed to text, is not problematic because only the "manner" of expression is thereby implicated. In Judge Sessions' view, the images of alcohol and drugs

on Zach's t-shirt were "inappropriate" and the equivalent, from a constitutional perspective, of making a point using obscene language when a clean approach would suffice. 349 F.Supp. at 879-881.

But as we have seen, the *Zauderer* and *Bery* cases make clear that the First Amendment does not relegate illustrations and photographs to a constitutionally inferior position, or allow an entire medium of expression to be subject to blanket censorship in the guise of a "manner" restriction. To the contrary, illustrations are worthy of the same First Amendment protection as text. On Zach's shirt, both image and language had political content; each enhanced and dramatized the political message conveyed by the other; and the censored illustrations imbued the verbal criticism of President Bush with a distinct emotional flavor and force . Hence Judge Sessions' conclusion that *Tinker* does not apply because the school was "not censoring political content" is wrong.

Nor does Judge Sessions' view that the illustrations on Zach's shirt were "inappropriate" subject the t-shirt to censorship under *Fraser*; that exception is expressly limited to sexually explicit speech and vulgar epithets such as those found on Cohen's "Fuck the Draft" jacket. See "Balancing School Authority and Student Expression," *supra,* 54 Baylor L.Rev. at 643.

Judge Sessions' opinion also seems to suggest that *Tinker's* First Amendment protections apply only when viewpoint discrimination occurs. It is true that the Supreme Court in *Tinker* disapproved of viewpoint restrictions, 393 U.S. at 511, and noted that "the action of school authorities appears to have been based on an urgent wish to avoid the controversy which might result" from wearing black armbands. *Id.* at 510. But *Tinker's* holding that student political speech may be restricted only in the unusual circumstance where school order is threatened extends beyond intentional efforts to suppress particular opinions. To the contrary, *Tinker* declared in broad and ringing language that students are entitled to enjoy the full panoply of First Amendment rights, tailored only to "the special characteristics of the school environment..... It can hardly be argued that ... students ... shed their constitutional rights to freedom of speech at the schoolhouse gate." *Tinker, supra,* 393 U.S. at 506.

Contrary to Judge Sessions' view, this case bears some striking similarities to *Tinker*. There, the dress-code provision was adopted after parents complained about the anti-war views of those intending to wear the armbands. Here, Zach wore his anti-war t-shirt without incident until a pro-Bush student opposed to its message made clear that she would try to use the

dress code as a pretext to force him stop wearing the shirt and her mother later complained to defendant Marineau. In both cases, the content of the speech triggered official actions to censor it.

The dress-code prohibition in *Tinker* was on its face viewpoint neutral: it applied to all armbands, not merely those that were donned in opposition to the Vietnam War. Hence the policy was wildly over-inclusive: it would have proscribed armbands intended to signify something as innocuous as grief over the death of a parent or teacher, or participation on the same team in a game of flag football. Similarly, the dress code in this case bans all illustrative "displays" of a laundry-list of subjects, with no exceptions, thereby leading to bizarre contradictions. A t-shirt advocating the use of drugs or alcohol is permissible as long as it is illustration-free. But a political t-shirt arguing that President Bush is unfit for re-election because he allegedly abused alcohol and cocaine is proscribed because of the inclusion of illustrations. Williamstown's dress code prohibits as a "display" of "racism" a pro-civil rights t-shirt containing a photo of Los Angeles police officers beating Rodney King, see A-367, but on its face permits shirts with violently racist or anti-Semitic text as long as they contain no illustrative "displays."

In *Saxe v. State College Area School District,* 240 F.3d 200, 214 (3rd

Cir. 2001), the Court of Appeals neatly set forth the law on student speech:

> Under *Fraser,* a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood,* a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of those categories is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

Saxe's pithy but accurate summary makes this a very simple case. Zach's t-shirt is not governed by *Hazelwood's* rational basis test, for it was not school-sponsored. It is not subject to *Fraser,* for no obscenity was depicted or vulgar language used. Hence the shirt is subject to the general rule of *Tinker.* The defendants had no right to censor the t-shirt under *Tinker's* disruption of school operations standard because, as they conceded at trial, there was no evidence that the shirt had any such impact on the school.

D. Other Decisions on Student Clothing Containing Political Messages Support Zach's Position. A number of recent federal decisions support the view that the First Amendment protects Zach's anti-Bush t-shirt.

In *Newsom v. Albermarle County School Board,* 354 F.3d 249, 252 (4th Cir. 2003) a middle-school principal banned a student's pro-National Rifle Association t-shirt "which depicted three black silhouettes of men holding firearms" which they "appear[ed] to be aiming." The illustration of the

"sharpshooters" on the shirt immediately suggested to the principal "the shootings at Columbine High School in Colorado and other incidents of school-related violence." For that reason, she deemed it inappropriate in her "middle school environment" and required the student to turn it inside-out.

In a decision directly applicable here, the Court of Appeals invalidated the ban on the t-shirt in part under *Tinker,* because there was no evidence that the NRA t-shirt in question and others like it "ever substantially disrupted school operations or interfered with the rights of others." *Id.* at 259.

Judge Sessions' attempt to distinguish *Newsom* because the school policy prohibited "any comment" on certain prohibited subjects and was therefore unconstitutionally overbroad, in contrast to the Williamstown policy, which prohibits only photographic or illustrative "displays," 349 F.Supp.2d at 880, is once again premised on a dichotomy between text and illustration that is without legal support. Moreover, Judge Sessions' analysis ignores that it was the *illustration* of sharpshooters aiming their guns that led the principal to require the student to remove the shirt, not the pro-NRA text.

In *Castorina v. Madison County School Board,* 246 F.3d 536 (6th Cir. 2001), the Court reversed a grant of summary judgment upholding a ban on a t-shirt decorated with Confederate flags and pictures of the country music

singer Hank Williams, Jr. The students testified that t-shirts were intended to commemorate the birthday of the singer's father and "to express their southern heritage." *Id.* at 538. The Court acknowledged the existence of cases that have allowed bans on Confederate flag t-shirts where the shirts actually sparked fights in school. *Id.* at 543. In contrast, display of the Confederate flag in the Hank Williams context "may not have had any significant disruptive effect." *Id.* at 542. Hence the Court denied summary judgment.

At issue in *Chandler v. McMinniville School District,*978 F.2d 524 (9th Cir. 1992) were buttons worn by students during a teacher strike. In response to the strike, the school district hired replacement teachers. To show support for the striking faculty members, students wore buttons to school with the slogans "I'm not listening scab," "Scab we will never forget," "We want our real teachers back" and "Do scabs bleed?" The Court of Appeals applied *Tinker, Hazelwood,* and *Fraser* trilogy, and held that a lawsuit by students threatened with discipline for wearing and distributing those buttons should not have been dismissed. In its view, "[t]he passive expression of a viewpoint in the form of a button worn on one's clothing 'is certainly not in the class of activities which inherently distract students and break down the regimentation

of the classroom.'" *Id.* at 531 (citation omitted).

Finally, in *Barber v. Dearborn Public Schools,* 286 F.Supp.2d 847 (E.D. Mich. 2003), the District Court issued an injunction against a ban on a t-shirt which displayed a photo of President Bush with the caption "International Terrorist." The Court concluded that the school had not met its burden under *Tinker* of proving that disruption would result, even though many of the students and their parents were Iraqi refugees who had been oppressed under the Saddam Hussein regime.

<u>Conclusion</u>

This Court should reverse Judge Sessions' ruling that the defendants did not violate Zachary Guiles' First Amendment rights by censoring the t-shirt. It should remand the case for the issuance of an injunction barring further censorship of the shirt or discipline of Zachary. It should affirm the judgment below in all other respects.

Dated at Bennington, Vermont this 1st day of April, 2005.

By:______________________________

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<u>Certificate of Compliance</u>

I hereby certify that this brief complies with the provisions of F.R.A.P. 32(a)(7)(B), in that the brief uses proportionally spaced 14-point type with serifs and contains 7,288 words.

By:______________________________
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