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ADR

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
N.D. CALIF. 1986

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*Co-Counsel for Plaintiffs as listed on the signature page*

CPV

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**JOHN DARIANO and DIANNA DARIANO**, individually and as next friend on behalf of their minor child **M.D.**; **KURT FAGERSTROM and JULIE ANN FAGERSTROM**, individually and as next friend on behalf of their minor child **D.M.**, and **KENDALL JONES and JOY JONES**, individually and as next friend on behalf of their minor child **D.G.**,

Plaintiffs,

vs.

**MORGAN HILL UNIFIED SCHOOL DISTRICT**; **NICK BODEN**, individually and in his official capacity as Principal, Live Oak High School, Morgan Hill Unified School District; and **MIGUEL RODRIGUEZ**, individually and in his official capacity as Assistant Principal, Live Oak High School, Morgan Hill Unified School District,

Defendants.

Case No.

**COMPLAINT**  
**CV 10-02745**  
Nature of Action: Civil Rights Case  
Under 42 U.S.C. § 1983

BY FAX

PVT

1 Plaintiffs, by and through their undersigned counsel, bring this Complaint against the  
2 above-named Defendants, their employees, agents, and successors in office, and in support  
3 thereof allege the following upon information and belief:

#### 4 INTRODUCTION

5 1. This case seeks to vindicate fundamental constitutional rights. It is a civil rights  
6 action brought pursuant to the First and Fourteenth Amendments to the United States Constitu-  
7 tion, Article I, § 2 of the California Constitution, and 42 U.S.C. § 1983, challenging the unconsti-  
8 tutional acts, policies, practices, procedures, and/or customs of Defendants as set forth in this  
9 Complaint.  
10

11 2. It has been “the unmistakable holding” of the United States Supreme Court for  
12 more than 50 years that “students [do not] shed their constitutional rights to freedom of speech or  
13 expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S.  
14 503, 506 (1969). Defendants’ content- and viewpoint-based speech restriction, which prohibited  
15 Plaintiffs M.D., D.M., and D.G. (hereinafter collectively referred to as “Student Plaintiffs”) from  
16 conveying a pro-United States of America (“U.S.A.”) message by wearing t-shirts depicting im-  
17 ages of the American flag at Live Oak High School on May 5, 2010, violates this well-  
18 established principle of law. Moreover, Defendants do not have authority to suspend the consti-  
19 tutional rights of students for one day, even if that day is “Cinco de Mayo.” As the Supreme  
20 Court has long held, “The loss of First Amendment freedoms, for even minimal periods of time,  
21 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).  
22

23 3. Plaintiffs seek a declaration that Defendants have deprived them of their constitu-  
24 tional rights; a permanent injunction enjoining the enforcement of Defendants’ content- and  
25 viewpoint-based speech restriction and the unconstitutionally vague and overbroad policy that  
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1 permitted the challenged restriction; and an award of nominal damages for the deprivation of  
2 their constitutional rights. Plaintiffs also seek an award of the reasonable costs of litigation, in-  
3 cluding attorney's fees and expenses, pursuant to 42 U.S.C. § 1988, California Code of Civil  
4 Procedure § 1021.5, and other applicable law.

#### 5 **JURISDICTION AND VENUE**

6  
7 4. This action arises under the First and Fourteenth Amendments to the United  
8 States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28  
9 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over the state law claim pur-  
10 suant to 28 U.S.C. § 1367(a).

11 5. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C.  
12 §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the gener-  
13 al legal and equitable powers of this Court. Plaintiffs' claim for nominal damages is made pur-  
14 suant to 42 U.S.C. § 1983.

15  
16 6. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the  
17 events or omissions giving rise to Plaintiffs' claims occurred in this district.

#### 18 **INTRADISTRICT ASSIGNMENT**

19 7. Pursuant to Civil L.R. 3-2(e) and Civil L.R. 3-5(b), this case is properly assigned  
20 to the San Jose Division because a substantial part of the events or omissions giving rise to Plain-  
21 tiffs' claims occurred in the County of Santa Clara, California.

#### 22 **PLAINTIFFS**

23  
24 8. Plaintiffs John and Dianna Dariano are the parents and legal guardians of Plaintiff  
25 M.D., a minor, who at all relevant times was a sophomore student at Live Oak High School,  
26 which is in the Morgan Hill Unified School District, Morgan Hill, California. Plaintiff John Da-  
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1 riano is suing on his own behalf and on behalf of Plaintiff M.D., as his next friend. Plaintiff Di-  
2 anna Dariano is suing on her own behalf and on behalf of Plaintiff M.D., as his next friend. At  
3 all relevant times, Plaintiffs John and Dianna Dariano resided within the Morgan Hill Unified  
4 School District.

5 9. Plaintiffs Kurt and Julie Ann Fagerstrom are the parents and legal guardians of  
6 Plaintiff D.M., a minor, who at all relevant times was a freshman student at Live Oak High  
7 School, which is in the Morgan Hill Unified School District, Morgan Hill, California. Plaintiff  
8 Kurt Fagerstrom is suing on his own behalf and on behalf of Plaintiff D.M., as his next friend.  
9 Plaintiff Julie Ann Fagerstrom is suing on her own behalf and on behalf of Plaintiff D.M., as his  
10 next friend. At all relevant times, Plaintiffs Kurt and Julie Ann Fagerstrom resided within the  
11 Morgan Hill Unified School District.

12 10. Plaintiffs Kendall and Joy Jones are the parents and legal guardians of Plaintiff  
13 D.G., a minor, who at all relevant times was a sophomore student at Live Oak High School,  
14 which is in the Morgan Hill Unified School District, Morgan Hill, California. Plaintiff Kendall  
15 Jones is suing on his own behalf and on behalf of Plaintiff D.G., as his next friend. Plaintiff Joy  
16 Jones is suing on her own behalf and on behalf of Plaintiff D.G., as his next friend. At all rele-  
17 vant times, Plaintiffs Kendall and Joy Jones resided within the Morgan Hill Unified School Dis-  
18 trict.

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21 **DEFENDANTS**

22 11. Defendant Morgan Hill Unified School District (hereinafter "School District") is a  
23 public entity established and organized under, and pursuant to, the laws of California with the  
24 authority to sue and be sued in its own name. Live Oak High School is a school operated by and  
25 located within the School District.  
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1            12. Defendant Nick Boden, at all times relevant herein, was the Principal of Live Oak  
2 High School acting under color of state law. Defendant Boden is responsible for adopting, im-  
3 plementing, and enforcing School District policies, practices, procedures, and/or customs, in-  
4 cluding the challenged policy, practice, procedure, and/or custom set forth in this Complaint.  
5 Defendant Boden is sued both individually and in his official capacity.

6  
7            13. Defendant Miguel Rodriguez, at all times relevant herein, was an Assistant Prin-  
8 cipal of Live Oak High School acting under color of state law. Defendant Rodriguez is respon-  
9 sible for adopting, implementing, and enforcing School District policies, practices, procedures,  
10 and/or customs, including the challenged policy, practice, procedure, and/or custom set forth in  
11 this Complaint. Defendant Rodriguez is sued both individually and in his official capacity.

#### 12    13    14    15    16    17    18    19    20    21    22    23    24    25    26    27    28

#### STATEMENT OF FACTS

14            14. On May 5, 2010, Student Plaintiffs and two other students wore patriotic t-shirts  
15 depicting images of the American flag to Live Oak High School. A true and accurate photo-  
16 graph of the patriotic t-shirt worn by Plaintiff M.D. on May 5, 2010, is attached to this Com-  
17 plaint as Exhibit 1. A true and accurate photograph of the patriotic t-shirt worn by Plaintiff D.M.  
18 is attached to this Complaint as Exhibit 2. A true and accurate photograph of the patriotic t-shirt  
19 worn by Plaintiff D.G. is attached to this Complaint as Exhibit 3.

20            15. Student Plaintiffs wore their patriotic shirts to Live Oak High School on May 5,  
21 2010, as they had on prior occasions, without incident, to express a message conveying a pro-  
22 U.S.A. viewpoint.

23            16. Plaintiffs D.M. and D.G. arrived on campus on May 5, 2010, at approximately  
24 7:04 a.m., which is when "zero" period begins. Plaintiff M.D. arrived at approximately 9:15  
25 a.m. due to a previously scheduled medical appointment.

1           17.     When Student Plaintiffs arrived on the school campus on May 5, 2010, their pro-  
2 U.S.A. shirts did not cause any disruption to the school environment.

3           18.     At approximately 10:05 a.m. on May 5, 2010, Student Plaintiffs attended “brunch  
4 break,” a scheduled period during the school day, and sat together at a table in the courtyard area  
5 of their high school.

6           19.     From the time Student Plaintiffs arrived on campus on May 5, 2010, up to and in-  
7 cluding the time they were on “brunch break,” their pro-U.S.A. shirts did not cause any disrup-  
8 tion to the school environment.

9           20.     Shortly after “brunch break” began, Defendant Rodriguez confronted Student  
10 Plaintiffs at their table. Defendant Rodriguez told the boys that they would not be permitted to  
11 wear their pro-U.S.A. shirts and gave them the option of either removing the shirts or turning  
12 them inside out. Plaintiffs refused to comply with either option because doing so would disres-  
13 spect their country and the American flag. When asked by Plaintiff D.M. why the shirts were not  
14 permitted, Defendant Rodriguez responded by ordering the boys to go to his office.

15           21.     On May 5, 2010, Defendants did not object to students at Live Oak High School  
16 expressing messages conveying a pro-Mexico viewpoint. In fact, that day many students were  
17 expressing a pro-Mexico viewpoint through message-bearing t-shirts and body paint, displaying  
18 Mexican flags, and through other forms of speech, including singing and dancing.

19           22.     Prior to Defendant Rodriguez ordering Student Plaintiffs to remove their pro-  
20 U.S.A. shirts or turn them inside out, the shirts had not caused any disruption to the school envi-  
21 ronment.

22           23.     Student Plaintiffs complied with Defendant Rodriguez’s order to go to his office,  
23 and on the way, Plaintiff M.D. contacted his mother, Plaintiff Dianna Dariano, via his cell phone.  
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1 During this call, Plaintiff M.D. informed his mother that Defendant Rodriguez was ordering him  
2 and his friends to remove or turn inside out their pro-U.S.A. shirts. Plaintiff Dianna Dariano told  
3 her son not to do so, and Plaintiff M.D. responded, "Not a chance."

4 24. Upon hearing from her son and being told of the situation that he and his friends  
5 were facing, Plaintiff Dianna Dariano immediately departed for the school and attempted to con-  
6 tact the other parents.

7  
8 25. When Plaintiff Dianna Dariano arrived at Live Oak High School, she went to De-  
9 fendant Rodriguez's office. Upon arriving, the door was closed, but she could hear what was  
10 being discussed and knew that her son was in the room. In particular, she could hear Defendant  
11 Rodriguez lecturing the boys about "Cinco de Mayo."

12 26. Plaintiff Dianna Dariano entered the office and stood with her son. The other  
13 boys stepped outside. While in the office, Defendant Rodriguez reiterated to Plaintiff Dianna  
14 Dariano that the boys' pro-U.S.A. shirts were not permitted and began to lecture her about "Cin-  
15 co de Mayo." Plaintiff Dianna Dariano, herself half-Mexican, took offense, and stated, "Isn't  
16 this America?" or words to that effect. Defendant Rodriguez responded, "Not today, we need to  
17 give them [Mexicans] their day today," or words to that effect.

18  
19 27. While Plaintiff Dianna Dariano was with Defendant Rodriguez, other parents, in-  
20 cluding Plaintiffs Julie Ann Fagerstrom and Joy Jones, arrived at the office. The parents re-  
21 quested an immediate meeting with the principal, Defendant Boden.

22  
23 28. The meeting with Defendant Boden took place moments later in a nearby confe-  
24 rence room. During this meeting, Defendants Boden and Rodriguez again began lecturing to the  
25 parents about the meaning of "Cinco de Mayo," and Defendant Boden affirmed the order that  
26 Student Plaintiffs were required to remove or turn their pro-U.S.A. shirts inside out. At one  
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1 point, Defendant Boden expressed his anger at Student Plaintiffs' pro-U.S.A. shirts and slammed  
2 his fist on the table, stating that it was inappropriate for these students to wear these shirts to  
3 school on "Cinco de Mayo" and that they could wear their American flag shirts "any day but that  
4 day."

5           29. Because Plaintiff M.D. and two of the other boys were wearing "Tap Out" t-shirts  
6 and not ones conveying a purely pro-U.S.A. message, like the shirts worn by Plaintiffs D.M. and  
7 D.G., Defendant Boden, over the objection of Defendant Rodriguez, lifted Defendant Rodri-  
8 quez's ban on these shirts based on the demand by one parent that these boys be allowed to re-  
9 turn to class. The parent pointed out that their sons had worn the "Tap Out" shirts as well as the  
10 American flag shirts in the past without objection. At this point, the boys had been in the office  
11 for approximately an hour and a half.

12           30. Defendants Boden and Rodriguez, however, did not lift the ban with regard to the  
13 shirts worn by Plaintiffs D.M. and D.G., and again gave them the ultimatum of turning their pro-  
14 U.S.A. shirts inside out or being suspended from school. Not wanting to disrespect their country  
15 and its flag, Plaintiffs D.M. and D.G. refused to comply with this order, so they were directed to  
16 leave the school with their parents.

17           31. Shortly after her son was allowed to return to class with his "Tap Out" shirt and  
18 after learning that Defendants were permitting students to express a pro-Mexico viewpoint  
19 through message-bearing t-shirts, body paint, the display of Mexican flags, music, and dance,  
20 Plaintiff Dianna Dariano removed her son. Plaintiff Dianna Dariano believed that her son was  
21 unfairly singled out by Defendants for adverse treatment on account of his pro-U.S.A. viewpoint  
22 and did not want him to remain in school that day.



1           32.    On May 5, 2010, School District officials, including Defendants Boden and Ro-  
2 driguez, approved, supported, and endorsed pro-Mexico messages expressed by students at Live  
3 Oak High School, but censored pro-U.S.A. messages, specifically including the pro-U.S.A. mes-  
4 sage and viewpoint conveyed by Student Plaintiffs.

5           33.    Defendants' censorship of Student Plaintiffs' pro-U.S.A. message was pursuant to  
6 School District policy, which states, "Clothing . . . or actions which . . . disrupt school activities  
7 will not be tolerated. Such actions or the wearing and/or possession of these items may be cause  
8 for suspension."

9           34.    Defendants' censorship of Student Plaintiffs' pro-U.S.A. message was made pur-  
10 suant to School District policy even though Student Plaintiffs' shirts and the message they con-  
11 veyed caused no disruption to the school environment, let alone a disruption that was material or  
12 substantial. In fact, on May 5, 2010, no classes were disrupted or cancelled at Live Oak High  
13 School, and the school's schedule proceeded as normal.

14           35.    The challenged School District policy provides school officials, such as Defen-  
15 dants Boden and Rodriguez, with no objective standards or guidelines to enforce its provisions,  
16 thereby granting government officials unbridled discretion to silence messages and viewpoints,  
17 such as the message and viewpoint expressed by Student Plaintiffs, that the government officials  
18 dislike.

19           36.    The challenged School District policy permits school officials, such as Defen-  
20 dants Boden and Rodriguez, to engage in a prior restraint of student speech by prohibiting stu-  
21 dents from wearing message-bearing clothing without any objective evidence that the speech  
22 caused or will cause substantial or material disruption to the school environment.

1 37. The challenged School District policy was the moving force behind the unconsti-  
2 tutional acts committed by Defendants Boden and Rodriguez as set forth in this Complaint.

3 **FIRST CLAIM FOR RELIEF**

4 **(Violation of Freedom of Speech under the First Amendment)**

5 38. Plaintiffs hereby incorporate by reference all stated paragraphs.

6  
7 39. By reason of the aforementioned policy, practice, custom, acts, and omissions,  
8 engaged in under color of state law, Defendants have imposed a content- and viewpoint- based  
9 restrictions on Plaintiffs' speech in violation of the Free Speech Clause of the First Amendment  
10 as applied to the states and their political subdivisions under the Fourteenth Amendment to the  
11 United States Constitution and 42 U.S.C. § 1983.

12 40. By reason of the aforementioned policy, practice, custom, acts, and omissions,  
13 engaged in under color of state law, Defendants have imposed a prior restraint on Plaintiffs'  
14 speech in violation of the Free Speech Clause of the First Amendment as applied to the states  
15 and their political subdivisions under the Fourteenth Amendment to the United States Constitu-  
16 tion and 42 U.S.C. § 1983.

17  
18 41. Defendants' policy restricting Plaintiffs' speech is overbroad in violation of the  
19 Free Speech Clause of the First Amendment as applied to the states and their political subdivi-  
20 sions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

21 42. As a direct and proximate result of Defendants' violation of the Free Speech  
22 Clause of the First Amendment, Plaintiffs have suffered irreparable harm, including the loss of  
23 their constitutional rights, entitling them to declaratory and injunctive relief and nominal damag-  
24 es.  
25

1 **SECOND CLAIM FOR RELIEF**

2 **(Violation of Due Process Under the Fourteenth Amendment)**

3 43. Plaintiffs hereby incorporate by reference all stated paragraphs.

4 44. By reason of the aforementioned policy, practice, custom, acts, and omissions,  
5 engaged in under color of state law, Defendants have violated the Due Process Clause of the  
6 Fourteenth Amendment to the United States Constitution as applied to the states and their politi-  
7 cal subdivisions under the Fourteenth Amendment to the United States Constitution and 42  
8 U.S.C. § 1983, in that Defendants' policy restricting Plaintiffs' speech is unconstitutionally va-  
9 gue.  
10

11 45. As a direct and proximate result of Defendants' violation of the Due Process  
12 Clause of the Fourteenth Amendment, Plaintiffs have suffered irreparable harm, including the  
13 loss of their constitutional rights, entitling them to declaratory and injunctive relief and nominal  
14 damages.  
15

16 **THIRD CLAIM FOR RELIEF**

17 **(Violation of Equal Protection Under the Fourteenth Amendment)**

18 46. Plaintiffs hereby incorporate by reference all stated paragraphs.

19 47. By reason of the aforementioned policy, practice, custom, acts, and omissions,  
20 engaged in under color of state law, Defendants have unconstitutionally deprived Plaintiffs of the  
21 equal protection of the law guaranteed under the Fourteenth Amendment to the United States  
22 Constitution and 42 U.S.C. § 1983, in that Defendants, through their acts, policies, practices,  
23 procedures, and/or customs, prevented Plaintiffs from expressing a message based on its content  
24 and/or viewpoint, thereby denying the use of a forum to those whose views Defendants find un-  
25 acceptable.  
26  
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1           48.     As a direct and proximate result of Defendants' violation of the Equal Protection  
2 Clause of the Fourteenth Amendment, Plaintiffs have suffered irreparable harm, including the  
3 loss of their constitutional rights, entitling them to declaratory and injunctive relief and nominal  
4 damages.

5   **FOURTH CLAIM FOR RELIEF**

6                                 **(Violation of Freedom of Speech under the California Constitution)**

7           49.     Plaintiffs hereby incorporate by reference all stated paragraphs.

8           50.     By reason of the aforementioned policy, practice, custom, acts, and omissions,  
9 engaged in under color of state law, Defendants have imposed a content- and viewpoint-based  
10 restriction on Plaintiffs' speech in violation of Article I, § 2 of the California Constitution.  
11

12           51.     As a direct and proximate result of Defendants' violation of the Liberty of Speech  
13 Clause of the California Constitution, Plaintiffs have suffered irreparable harm, including the  
14 loss of their constitutional right to freedom of expression, entitling them to declaratory and in-  
15 junctive relief and nominal damages.  
16

17   **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

18           52.     Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other  
19 than the named parties, there is no such interest to report.

20           **WHEREFORE,** Plaintiffs ask this Court:

21           A)     to declare that Defendants have violated the First and Fourteenth Amendments to  
22 the United States Constitution, as set forth in this Complaint;  
23

24           B)     to declare that Defendants have violated the California Constitution, as set forth in  
25 this Complaint;  
26

1 C) to permanently enjoin Defendants' policy, practice, procedure, and/or custom of  
2 banning pro-U.S.A. messages and viewpoints, as set forth in this Complaint;

3 D) to award Plaintiffs nominal damages against Defendants in their individual capac-  
4 ities for violating their constitutional rights pursuant to 42 U.S.C. § 1983 and other applicable  
5 law;

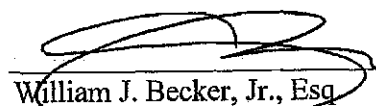
6 E) to award Plaintiffs their reasonable attorneys' fees, costs, and expenses pursuant  
7 to 42 U.S.C. § 1988, California Code of Civil Procedure § 1021.5, and other applicable law;

8 F) to grant such other and further relief as this Court should find just and proper.  
9

10 Respectfully submitted this 23 day of June 2010.

11  
12 **THE BECKER LAW FIRM**

13 By:

14   
15 William J. Becker, Jr., Esq.  
16 *Affiliate attorney of The Rutherford Institute and the*  
17 *Thomas More Law Center*

18 **THOMAS MORE LAW CENTER**

19 Robert J. Muise, Esq.\*  
20 \*Subject to admission *pro hac vice*

21 *Co-Counsel for Plaintiffs John Dariano, Dianna Dariano,*  
22 *M. D., Kurt Fagerstrom, Julie Ann Fagerstrom, D.M.,*  
23 *Kendall Jones, Joy Jones, and D.G.*