No. _____

In The
Supreme Court of the United States

D.A., A MINOR, BY AND THROUGH HIS MOTHER, B.A.;
X.A., A MINOR, BY AND THROUGH HIS MOTHER, B.A.;
B.A., MOTHER OF MINORS D.A. AND X.A.,

Petitioners,

v.

TRI COUNTY AREA SCHOOLS;
ANDREW BUIKEMA, IN HIS INDIVIDUAL CAPACITY;
WENDY BRADFORD, IN HER INDIVIDUAL CAPACITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sara E. Berinhout
FOUNDATION FOR
INDIVIDUAL RIGHTS
AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

Conor T. Fitzpatrick
Counsel of Record
Robert Corn-Revere
Daniel A. Zahn
FOUNDATION FOR
INDIVIDUAL RIGHTS
AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
conor.fitzpatrick@fire.org

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QUESTION PRESENTED

Students have a First Amendment right to wear political apparel to school unless it causes substantial disruption. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Court later recognized a narrow exception by allowing schools to prohibit profane and sexually lewd speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

This case concerns "Let's Go Brandon," a popular political slogan for expressing disdain for President Joe Biden. Members of Congress have used it during floor speeches, and it airs uncensored on broadcast TV and radio. But a divided Sixth Circuit panel applied *Fraser* to hold a Michigan school district can ban high school students from silently wearing apparel with the slogan because of its origin in a profane chant.

To reach its published holding, the majority split with the Third and Ninth Circuits, which confine the *Fraser* exception to "plainly" profane and lewd speech. The majority instead held *Fraser* permits censoring nondisruptive political speech that any single teacher or administrator "reasonably understands" as vulgar.

Judge Bush dissented that the test grants schools "unrestrained authority to suppress speech based on subjective interpretations" and, given nationwide confusion over its scope, "the Supreme Court … must ultimately clarify, and ideally limit, *Fraser*'s reach."

The question presented is whether *Fraser* permits schools to censor nondisruptive political speech that is not plainly profane or lewd.

PARTIES TO THE PROCEEDING

Petitioners were the plaintiffs-appellants in the court of appeals. They are high school students D.A. and X.A., proceeding through their mother, B.A., and B.A., as mother of minors D.A. and X.A.

Respondents were the defendants-appellees in the court of appeals. Respondents are the Tri County Area Schools school district, school administrator Andrew Buikema, and teacher Wendy Bradford.

RELATED PROCEEDINGS

This case arises from these proceedings:

- *B.A. v. Tri County Area Schools*, No. 24-1769, 6th Cir. (October 14, 2025) (affirming dismissal); and
- *D.A. ex rel. B.A. v. Tri County Area Schools*, No. 1:23-cv-423, W.D. Mich. (August 23, 2024) (granting defendants' motion for summary judgment).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Congressional Records

Other Authorities

PETITION FOR WRIT OF CERTIORARI

The decision below poses a stark threat to the First Amendment rights of millions of public school students. It licenses individual teachers and administrators to banish nondisruptive political speech containing sanitized expressions if it clashes with their personal notion of "vulgarity."

Judge Bush sounded the alarm in dissent that the decision sharply splits from other circuits and "essentially gives school administrators boundless discretion" to censor political speech, "akin to 'I know it when I see it.'" App. 32a (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)). Worse yet—and as the respondent school district concedes—the majority's approach "will produce disparate outcomes across different schools" for identical *nondisruptive* political speech. Resp. to Pet. for Reh'g and Reh'g En Banc 16, *B.A. v. Tri Cnty. Area Schs.*, No. 24-1769, 2025 WL 3969583 (6th Cir. Dec. 26, 2025), Dkt. No. 94.

This Court has never approved, in any context, a subjective standard for restricting speech. America's public schools, our "nurseries of democracy," should not be the first. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021).

Since October 2021, "Let's Go Brandon" has been a popular conservative political slogan expressing disdain for President Joe Biden. Though it began as a misheard "F*** Joe Biden" chant at a NASCAR race, it quickly became part of the American cultural and political lexicon as a sanitized way to express

displeasure with the Biden administration. Multiple members of Congress have used the slogan during floor speeches opposing President Biden's legislative initiatives, and the phrase has never been censored on broadcast television or radio. Given the slogan's cleaned-up status, Petitioners D.A. and X.A. received "Let's Go Brandon" sweatshirts from their mother as Christmas presents.

Yet when Petitioners wore the sweatshirts to school, an assistant principal and a teacher (Respondents Andrew Buikema and Wendy Bradford, respectively) deemed them in violation of the school's prohibition on "profanity" and forced them to remove the apparel, even though it caused no disruption. In Respondents' view, a sanitized expression "means" its profane corollary and is thus equally forbidden, even in nondisruptive political expression. App. 5a.

Respondents' view, affirmed by a Sixth Circuit panel in a 2-1 decision, is incompatible with decades of First Amendment doctrine. In 1969, during the height of protests over the Vietnam War, this Court upheld students' right to wear highly controversial black armbands expressing opposition to the war. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969). It explained that America's public schools must prepare the next generation for the "hazardous freedom" of living in a country where their neighbors and leaders may not think, talk, or pray the same way they do. *Id.* at 508. Under *Tinker*, the First Amendment protects students' freedom of speech, unless their school demonstrates actual or reasonably forecasted substantial disruption. *Id.* at 509.

This case results from widespread confusion and disagreement in the lower courts over the scope of this Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), which established a narrow exception to *Tinker*'s substantial disruption test, authorizing schools to prohibit profane and sexually lewd speech. Attempting to apply *Fraser*, lower courts have reached diametrically opposed results even when addressing identical nondisruptive student speech. While the Third and Ninth Circuits interpret *Fraser* to cover "plainly" profane and sexual speech, the Sixth Circuit majority below embraced a far more expansive reading, allowing censorship of nondisruptive political speech that any single teacher or administrator "reasonably understands" as vulgar.

As Judge Bush's dissent explains, the majority decision "creates at least two circuit splits" and makes every school (and classroom) a kingdom unto itself. App. 32a. A political shirt could have First Amendment protection in second-period algebra but not third-period biology. The dissent warns this approach "open[s] the door for viewpoint discrimination," because it "grants schools unrestrained authority to suppress speech based on subjective interpretations." App. 53a–54a.

The First Amendment is intended to shield Americans from inconsistent enforcement based on government officials' whims and political leanings. But "[i]f we allow schools the power to censor political speech by recharacterizing it as vulgarity, we risk turning disagreement with political speech into justification for its censorship—something the First Amendment flatly forbids." App. 32a (Bush, J.,

dissenting). The Constitution must provide the same protection for students' nondisruptive political apparel in Michigan as it does in Montana, no matter the idiosyncrasies of school staff.

Judge Bush stressed that given the confusion among the circuit courts over *Fraser*'s meaning, "the Supreme Court itself must ultimately clarify, and ideally limit, *Fraser*'s reach." App. 62a (quoting Recent Case, B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) (en banc)*, 127 Harv. L. Rev. 1049, 1050 (2014)). This Court should grant certiorari to clarify *Fraser*.

OPINIONS BELOW

The district court's decision granting Respondents' motion for summary judgment is reported at 746 F. Supp. 3d 447 and reprinted at App. 64a–95a. The Sixth Circuit's decision affirming summary judgment is reported at 156 F.4th 782 and reprinted at App. 1a–63a. The Sixth Circuit's order denying rehearing is unreported but available at 2025 WL 3969583 and reprinted at App. 96a–97a.

JURISDICTION

The Sixth Circuit entered judgment on October 14, 2025. App. 1a. On December 26, 2025, the Sixth Circuit denied rehearing. App. 96a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in part: "Congress shall make no law … abridging the freedom of speech."

STATEMENT OF THE CASE

At the heart of this case is the "Let's Go Brandon" political slogan. In 2021, after Brandon Brown won a NASCAR race, members of the crowd began chanting "F*** Joe Biden" during Brown's post-race interview. App. 3a–4a. A TV commentator remarked they were shouting "Let's Go Brandon!" and a political slogan was born. App. 4a. It transformed overnight into a popular, cleaned-up slogan for expressing displeasure with President Biden's administration. App. 4a.

"Let's Go Brandon … permeated American society … appearing prominently on politically themed merchandise—including T-shirts, hats, flags, and bumper stickers—as well as at campaign rallies, political protests, and even on billboards across the country." App. 33a (Bush, J, dissenting). The slogan was omnipresent on broadcast television, radio, and the news. App. 4a; App. 33a (Bush, J., dissenting). President Biden even repurposed the slogan for his own campaign, sharing "Dark Brandon" memes. App. 4a. In Congress, to convey strong disapproval of President Biden's administration and initiatives, elected officials embraced "Let's Go Brandon" in floor speeches without violating legislative decorum rules. *See* 168 Cong. Rec. H5240 (daily ed. June 7, 2022) (statement of Rep. Douglas L. LaMalfa); 167 Cong. Rec. H5880 (daily ed. Oct. 26, 2021) (statement of

Rep. Mary E. Miller); 167 Cong. Rec. H5776 (daily ed. Oct. 21, 2021) (statement of Rep. William J. Posey).

During the 2021–2022 school year when the relevant events occurred, Petitioners and brothers D.A. and X.A. were in sixth and eighth grade respectively in Respondent Tri County Area Schools (the "School District"). App. 5a. After receiving "Let's Go Brandon" sweatshirts at Christmas from their mother, they wore them to school to silently express disapproval of President Biden. App. 5a–6a.

Respondent Andrew Buikema, the assistant principal, and Respondent Wendy Bradford, a teacher, instructed Petitioners to remove their sweatshirts or face discipline. App. 5a–6a. Buikema ordered removal of the apparel because he said the phrase "means the F-word" and has a "profane double meaning." App. 5a–6a.

The School District concedes it never experienced disruption due to students using or wearing apparel with the "Let's Go Brandon" slogan. App. 7a. The School District also never alleged that Petitioners were breaking any rule apart from the dress code's prohibition on "profanity" or that the expression invaded the rights of others. *See* App. 6a–7a.

After the School District refused to lift the prohibition,[1] Petitioners filed this lawsuit. App. 7a. The district court had federal question jurisdiction under 28 U.S.C. § 1331 and civil rights jurisdiction

1. The School District's prohibition of "Let's Go Brandon" apparel extends to Tri County High School, which the brothers now attend.

under 28 U.S.C. § 1343. The district court held "Let's Go Brandon" constitutes "profanity" sanctionable by public schools and granted summary judgment for the School District and its employees. App. 83a–87a. A divided Sixth Circuit panel affirmed because "the school reasonably understood the slogan 'Let's Go Brandon' to be vulgar." App. 3a. Petitioners sought rehearing en banc, urging the full Sixth Circuit to instead align itself with the Third and Ninth Circuits' approach. But the Sixth Circuit denied rehearing en banc on December 26, 2025. App. 96a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision deepens confusion and disagreement in the lower courts on an issue affecting tens of millions of public school students: What political apparel does the First Amendment protect at school? *Tinker*'s baseline test is clear: Schools may not censor political speech absent actual or reasonably forecasted substantial disruption or an invasion of the rights of others.

But the contours of *Fraser*, an exception to *Tinker*, are anything but. And after 40 years of percolation in the lower courts, the exception now threatens to swallow the rule, with even nondisruptive, fully sanitized political speech facing censorship. Because disruptive speech is already regulable under *Tinker*, the Third and Ninth Circuits sensibly interpret *Fraser* narrowly, bypassing *Tinker*'s substantial disruption test only for "plainly" profane or sexual expression. The Sixth Circuit reads it far more broadly, interpreting *Fraser* as permitting censorship of a wide range of materials, from T-shirts for the

band Marilyn Manson, *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (reasoning the school appropriately found the shirt "contrary to [its] educational mission" because the "rock group promotes disruptive and demoralizing values"), to the "Let's Go Brandon" political slogan here, App. 10a–14a (holding an administrator could "reasonably understand" the sanitized slogan as "vulgar" because of its genesis in a profane chant).

This divergence in authority makes public school students' First Amendment right to nondisruptive political speech inconsistent across the circuits. And in the Sixth Circuit, it makes the right inconsistent not only between schools but also between *classes*, with individual teachers authorized to enforce their own subjective notion of "vulgarity."

Students' First Amendment rights do not and must not depend on the sensitivities of individual teachers. As Judge Bush explained in dissent, subjective standards are a petri dish for viewpoint discrimination and thus anathema to the First Amendment. App. 53a–54a. This Court should grant certiorari, clarify *Fraser*, and provide predictability for the nation's teachers, parents, and students.

I. There Is a Recognized Split over Whether *Fraser* Permits Schools to Censor Nondisruptive Political Speech That Is Not Plainly Profane or Lewd.

This Court said it best: "The mode of analysis employed in *Fraser* is not entirely clear." *Morse v. Frederick*, 551 U.S. 393, 404 (2007). The lower courts

agree, with nationwide lamentations that *Fraser*'s analysis, deciding factors, and ultimate holding are ambiguous and thus difficult to apply with consistency. Those differences have resulted in multiple federal courts reaching opposing views on whether, for example, *Fraser* permits a school to prohibit the *same bracelet*. *Compare B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 297–98 (3d Cir. 2013) (en banc) (holding *Fraser* did not authorize middle school to prohibit "I ♥ boobies!" breast cancer awareness bracelets if students remain nondisruptive), *with J.A. v. Fort Wayne Cmty. Schs.*, No. 1:12–cv–155, 2013 WL 4479229, at *8 (N.D. Ind. Aug. 20, 2013) (holding *Fraser* authorized prohibiting the bracelets in a high school), *and K.J. ex rel. Braun v. Sauk Prairie Sch. Dist.*, No. 11-cv-622, 2012 WL 13055058, at *1 (W.D. Wisc. Feb. 6, 2012) (holding *Fraser* authorized prohibiting the bracelets in a middle school).

After 40 years of good faith disagreement and inconsistent application in the lower courts and America's schools, it is time, as Judge Bush urged in dissent, for "the Supreme Court itself" to "ultimately clarify, and ideally limit, *Fraser*'s reach." App. 62a (quoting Recent Case, *supra*); *see also* Frederick Schauer, *Abandoning the Guidance Function:* Morse v Frederick, 2007 Sup. Ct. Rev. 205, 219, 227 (arguing "*Fraser* muddied the [*Tinker*] waters considerably" and urging the Court to provide additional clarity to students and teachers on in-school First Amendment rights).

A. *Fraser*'s lack of guidance leaves the lower courts guessing.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). That is because "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Id.* (quoting *Keyishian*, 385 U.S. at 603). Students therefore do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Instead, *Tinker* requires that if a school wishes to censor nondisruptive student expression, it bears the burden of demonstrating actual or reasonably forecasted substantial disruption or an invasion of the rights of others. *Id.* at 509.

In 1986, *Fraser* carved out a narrow exception to *Tinker*'s test. *Fraser* involved a student delivering a speech laden from beginning to end with sexual innuendo at a school assembly. 478 U.S. at 677–78. The student used "an elaborate, graphic, and explicit sexual metaphor" to endorse a student council candidate, *id.* at 678, proclaiming him "a man who is firm—he's firm in his pants," and promising he would "take[] his point and pound[] it in" and "go to the very end—even the climax, for each and every one of you," *id.* at 687 (Brennan, J., concurring in the judgment). During the speech, "[s]ome students hooted and yelled," while others "by gestures graphically

simulated the sexual activities pointedly alluded to in [the student's] speech." *Id.* at 678 (majority opinion). The Court held the First Amendment did not shield the student from punishment and distinguished his remarks from *Tinker* in four key respects.

First, this Court emphasized the "marked distinction" between the raucous, nonpolitical student council assembly speech in *Fraser* and the silent political message of the anti-war armbands in *Tinker*. *Id.* at 680. Second, the Court noted that unlike Mary Beth and John Tinker, who passively wore controversial anti-war armbands during the school day, Matthew Fraser directed his expression at a captive student audience during a school assembly. *Id.* at 677. Contrasting *Tinker* with *Fraser*, this Court in *Hazelwood School District v. Kuhlmeier* distinguished between suppression of "a student's personal expression that happens to occur on the school premises" and "educators' authority over school-sponsored … activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S. 260, 271 (1988). Third, Fraser's assembly speech, unlike the Tinkers' armbands, used "graphic" and "explicit" sexual language. *Fraser*, 478 U.S. at 678. Fourth and finally, *Fraser* noted the student's assembly speech would have violated the decorum rules of the U.S. Senate and House of Representatives. *Id.* at 681–82.

But unlike *Tinker*, which provided the workable and objective substantial disruption test, the "mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404. Likewise for *Fraser*'s scope. Though the lower courts agree *Fraser* is an exception

to *Tinker*, *i.e.*, an allowance for schools to regulate certain speech absent substantial disruption, they have sharply diverged over the content necessary to trigger it.

There is broad agreement among lower courts, however, that *Fraser* is difficult to interpret and apply. The Second Circuit lamented that "[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges." *Doninger v. Niehoff*, 642 F.3d 334, 353 (2d Cir. 2011); *see also Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (citing *Fraser* in "acknowledg[ing] some lack of clarity in the Supreme Court's student-speech cases").

So as "a result of the numerous applications of *Fraser*, the extent of students' free speech in public schools is more than a bit tangled." Cindy Lavorato & John Saunders, *Public High School Students, T–Shirts and Free Speech: Untangling the Knots*, 209 West's Educ. L. Rep. 1, 1 (2006); *see also* Martha McCarthy, *Student Expression Rights: Is A New Standard on the Horizon?*, 216 West's Educ. L. Rep. 15, 19 (2007) ("The *Fraser* decision has generated a greater range of interpretations than has the *Hazelwood* ruling.").

In short: "Reconciling *Tinker* and *Fraser* is no easy task." *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated as moot*, 549 U.S. 1262 (2007).

Relying on this Court's discussion of *Fraser* in *Hazelwood*, the Eleventh Circuit and some district courts have reasoned that a logical reading of *Hazelwood* limits *Fraser*'s reach "to situations in which the speech involved is likely to be perceived as bearing the imprimatur of the school." *Denno v. Sch. Bd. of Volusia Cnty.*, 218 F.3d 1267, 1274 n.5 (11th Cir. 2000) (citing *Hazelwood*, 484 U.S. at 270–73); *see also McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415, 1426 (W.D. Okla. 1992) (observing that, while "the Supreme Court's opinion in *Fraser* is oblique at best and certainly less than clear," it is inapplicable if the speech does not "bear[] the imprimatur of the school").

Most courts, however, interpret *Fraser* as applying to all on-campus student speech. But they sharply split over what constitutes sufficiently "offensive," "profane," "vulgar," or "lewd" speech to trigger the exception, particularly with respect to political speech.

B. The Third and Ninth Circuits apply *Fraser* only to plainly profane or lewd speech.

The Third and Ninth Circuits read *Fraser* narrowly, providing the strongest protection to nondisruptive political speech. In the en banc Third Circuit's view, "*Fraser* addressed only a school's power over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non-lewd." *Hawk*, 725 F.3d at 306.

Likewise, the Ninth Circuit interprets *Fraser* as permitting restriction of only "per se vulgar, lewd, obscene, or plainly offensive" speech. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (rejecting school's position that pro-union "scab" buttons could be regulated under *Fraser*, explaining, "these buttons cannot be considered per se vulgar, lewd, obscene, or plainly offensive within the meaning of *Fraser*"). And though the Second Circuit has not explicitly cabined *Fraser* to "plainly" and "per se" profane and sexual expression, it has limited *Fraser*'s holding to the type of "vulgar, lewd, and sexually explicit language that was at issue in that case." *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008) (upholding punishment of high schooler for calling school administrators "douchebags").

Of note, the Third Circuit uniquely interprets *Fraser* and *Morse* to treat "ambiguously" profane and lewd speech differently depending on whether it is political—placing *political* speech in a preferred position to nonpolitical speech of the same variety. *Hawk*, 725 F.3d at 308–15. In support, the court pointed to *Fraser*'s commentary on the "marked distinction" between the political anti-war armbands in *Tinker* and the sexually lewd student council speech of Matthew Fraser, reasoning that "the *Fraser* exception does not permit" schools to restrict "ambiguously lewd, vulgar, or profane" student speech if it is "plausibly interpreted as political or social commentary." *Id.* at 307, 309–10, 315.

These largely similar frameworks on one side of the circuit split present a commonsense, workable approach: Students retain their First Amendment

right to nondisruptive political speech unless they express themselves in plainly sexual or profane terms. In short, kids can't use swearwords or be lewd at school. For close calls on the margins, *Tinker* stands ready as a circuit breaker, immediately available to teachers and administrators if expression causes, or is reasonably forecasted to cause, disruption, or invades the rights of others.

C. The Sixth Circuit applies *Fraser* broadly to any speech a single administrator or teacher subjectively deems "vulgar."

The Sixth Circuit expressly rejects the Third and Ninth Circuit's approach and instead interprets *Fraser* to justify sweeping censorship far beyond swearing and sexual speech. It took its first step towards that split in *Boroff*, 220 F.3d 465. There, the Sixth Circuit relied on *Fraser* to uphold a school's decision to ban T-shirts for the band Marilyn Manson not because the shirts used profanity or sexual language or imagery, but because the artist's lyrics—none of which were on the shirt—were "contrary to the school's educational mission." *Id.* at 470; *see also id.* at 471 ("Rather, the record demonstrates that the School prohibited Boroff's Marilyn Manson T-shirts generally because this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education.").

The Sixth Circuit supercharged that expansive view of *Fraser* in this case. It explicitly rejected the Third Circuit's speech-protective approach in *Hawk*, which called *Boroff*'s "sweeping and total deference to

school officials … incompatible with the Supreme Court's teachings." *Hawk*, 725 F.3d at 316. Instead, the Sixth Circuit reaffirmed its *Boroff* approach, allowing individual school administrators and teachers to subjectively decide what speech is inappropriate for school. App. 25a–29a; *see also* App. 15a (explaining "although we are mindful of what the en banc Third Circuit said, to our knowledge, no panel of the Sixth Circuit has recognized *Boroff*'s abrogation").

Under the Sixth Circuit's approach, so long as the administrator or teacher's determination that speech is "vulgar" is "reasonable," they not only avoid monetary liability, but they also dictate whether the student's political expression is *constitutionally protected*. As Judge Bush warned in dissent, no other circuit follows this path. *See* App. 46a ("The majority's reading of *Fraser* conflicts with what that case said, and ignores how this court and our sister circuits have interpreted *Fraser*.").

II. The Sixth Circuit's Approach Contradicts *Tinker*, Misapplies *Fraser*, and Flouts First Amendment Principles.

A. The decision below relies on a 19th-century view of student rights that *Tinker* plainly ended in public schools.

The Sixth Circuit justifies its break from its sister circuits by insisting its "deferential approach" of allowing individual teachers and administrators to decide what speech students may utter is "consistent with the history of how free speech rights were

understood at the time of the Fourteenth Amendment's ratification." App. 17a. But this Court has already rejected such a "historical" approach to constitutional rights in public schools—because public schools as we know them today *did not exist* at the framing. *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 (1954). As the Court explained, "Education of white children was largely in the hands of private groups," and for black children "was almost non-existent." *Id.* Therefore, there is "little in the history of the Fourteenth Amendment relating to its intended effect on public education." *Id.*

Until the late 19th century, schools exercised total control over students because parents willingly (and contractually) delegated their parental authority to another, usually a private school or tutor. *See Mahanoy*, 594 U.S. at 198–200 (Alito, J., concurring) (discussing the evolution of school authority over students from the Blackstone era to the present). "Today, of course, the educational picture is quite different" because school attendance is mandatory and "parents and public schools do not enter into a contractual relationship." *Id.* at 199–200. Critically, "when a public school regulates student speech," it does so as an "arm of the State." *Id.* at 196. As this Court recently explained, "the government's operation of the public schools … implicates direct, coercive interactions between the State and its young residents." *Mahmoud v. Taylor*, 606 U.S. 522, 557 (2025).

Importing the *in loco parentis* principles from 19th-century private schools would permit "even blatant viewpoint discrimination in schools," where

"[s]tudents could be disciplined for taking any even quiet position that diverges from the political orthodoxy of school officials." Vikram David Amar, Morse*, School Speech, and Originalism*, 42 U.C. Davis L. Rev. 637, 649 (2009). That is precisely the approach *Tinker* rejected. *Id.*

In *Tinker*, the Des Moines school district insisted wearing anti-war armbands was inappropriate for a school setting. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966). Under a historical approach, that determination would have been final. But this Court in *Tinker* held otherwise. "In our system, students … may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511.

America regards its public schools as "nurseries of democracy" where the "marketplace of ideas" is free to flourish unless expression substantially disrupts the school day. *Mahanoy*, 594 U.S. at 190. The decision below attempts to resuscitate the ironfisted authority over student speech that private school headmasters enjoyed in the 19th century. That era is over. *Tinker* governs and protects Petitioners' freedom to engage in nondisruptive political speech.

B. The First Amendment and *Tinker* are designed to protect political speech like the "Let's Go Brandon" slogan.

The Sixth Circuit majority rightly acknowledged that "Let's Go Brandon" is "firmly established in the national lexicon" as an anti-Biden political slogan. App. 5a. That is unsurprising. "It is a prized American privilege to speak one's mind" about our national leaders. *Bridges v. California*, 314 U.S. 252, 270 (1941). And "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Political slogans about our leaders have a rich history in America's robust political discourse. The Whig Party's 1840 slogan "Tippecanoe and Tyler Too" highlighted William Henry Harrison's heroism in the Battle of Tippecanoe. Slogans can sting, too. In 1884, Republicans used "Ma. Ma. Where's My Pa?" to remind voters that Democrat Grover Cleveland fathered a child out of wedlock. Democrats countered with "Blaine, Blaine, James G. Blaine, the Continental Liar from the State of Maine!" trying to tie Republican candidate James Blaine to a corruption scandal. Barack Obama's "Yes We Can" and Donald Trump's "Make America Great Again" leave little doubt that the rhetorical power of pithy slogans remains strong in American discourse.

The sanitized "Let's Go Brandon" political slogan—used everywhere from campaign rallies to

the floor of Congress to convey disapproval of President Biden and his administration—fits squarely within our nation's deeply rooted tradition of peaceful dissent under the First Amendment.

The First Amendment protects public school students' right to participate in that American tradition if they remain nondisruptive. *Tinker* stressed that students experiencing and interacting with different viewpoints "is not only an inevitable part of the process of attending school; it is also an important part of the educational process." 393 U.S. at 512. And this Court recently explained that "schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 594 U.S. at 190.

Yet the Sixth Circuit majority, relying on *Fraser*, blessed Respondents' censorship of "Let's Go Brandon" apparel. Though it acknowledged Petitioners are "correct on the fact that a euphemism" like "Let's Go Brandon" is "not the same as the explicitly vulgar or profane word it replaces," it held administrators could "reasonably … determine that the euphemism still conveyed the vulgar message" of the uncensored "F*** Joe Biden" chant. App. 13a (cleaned up).

The Sixth Circuit's approach defies common sense. English speakers throughout history have turned to sanitized expressions to avoid the social taboo of profanity. Sanitizing socially taboo words and expressions for general audiences is why radio edits

of songs and Kidz Bop exist. And it is how PG-13- and R-rated movies air on broadcast television. *See generally* Carrie A. Beyer, *Fighting for Control: Movie Studios and the Battle over Third-Party Revisions*, 2004 U. Ill. L. Rev. 967, 985–86.

Sanitized expressions enable the speaker to convey a sense of urgency, indicate outrage, or otherwise discuss sensitive topics while staying inside cultural norms for polite conversation. Two hundred years ago, Victorians referred to trousers as "unmentionables" because "their shape revealed a man's legs, and a man's having legs implied that he very likely had other body parts up there." Melissa Mohr, *Holy Sh*t: A Brief History of Swearing* 191 (2013). In modern times, we use (or try to use) sanitized words and phrases like "fudge," "gosh darn," and "Let's Go Brandon" to express ourselves without using profanities.

Allowing schools to equate sanitized euphemisms with their uncensored corollaries leads to absurd results. Words like "shoot" and "frick" would be sanctionable in America's high schools because they "mean" something else. The Sixth Circuit majority *acknowledges* this result, reasoning, "'Heck' is not literally the same word as 'Hell.' But the word's communicative content is the same even if the speaker takes some steps to obscure the offensive word." App. 13a. Yet the majority points to nothing—no cases, scholars, agency opinions, nor anything else categorizing intentionally sanitized speech as profanity—to support this result. As Judge Bush correctly put it, "Nothing in *Fraser* or any subsequent Supreme Court decision suggests that this exception

should be extended to encompass political or euphemistic expression that is not overtly profane." App. 58a.

This Court explained that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's ['F*** the Draft'] jacket." *Fraser*, 478 U.S. at 682 (quotation marks omitted) (discussing *Cohen v. California*, 403 U.S. 15 (1971)). This makes good sense. Kids can't say "f***" at school. But under the Sixth Circuit's holding, a school administrator could even prohibit a student from wearing an anti-draft jacket emblazoned with the words "Cohen's Jacket" on the asserted ground that it "means" "F*** the Draft." That is simply not how profanity—or language—works. And nothing in *Tinker* or *Fraser* gives school officials such broad censorial powers over nondisruptive political speech.

Notably, "Let's Go Brandon" meets all four benchmarks this Court used in *Fraser* to differentiate Matthew Fraser's lewd assembly speech from the anti-war armbands in *Tinker*. First, "Let's Go Brandon" is core political expression, a "marked distinction" from Fraser's expression. *Fraser*, 478 U.S. at 680. Second, like the Tinkers, Petitioners passively wore their apparel, making it expression that "happen[ed] to occur on the school premises" rather than speech at a "school-sponsored" activity that "members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Third, "Let's Go Brandon" lacks the "graphic" and "explicit" sexual language of Fraser's speech. *Fraser*, 478 U.S. at 678. And fourth, unlike Fraser's address, *id.* at 681–82,

"Let's Go Brandon" does not violate congressional decorum rules and members of Congress have repeatedly used the popular slogan in policy speeches. *See supra* pp. 5–6.

American teenagers can handle sanitized expression at school. Writing for the Court in *Brown v. Entertainment Merchants Ass'n*, Justice Scalia noted that "high-school reading lists are full" of intense imagery. 564 U.S. 786, 796 (2011). "Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake," and "[i]n the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch." *Id.* (citing Homer's *Odyssey* and then Dante's *Inferno*). And in John Steinbeck's magnum opus *East of Eden*, Cathy Trask shoots her husband Adam and flees her children to become the madam of a brothel catering to sexual sadism. John Steinbeck, *East of Eden* 202, 314–22 (Penguin Books 1992) (1952). It defies belief that teenagers could navigate Dante's *Inferno* and Cathy Trask's brothel in the classroom but have their education disturbed by seeing a "Let's Go Brandon" hoodie in the hallway.

Judge Bush put it best: "'Let's Go Brandon!'—regardless its origin—has evolved into a widely recognized political slogan used to express opposition to a now-former president. It is not vulgar on its face, nor so socially deviant that it must be sanitized from student expression. It has become a political hallmark entitled to the First Amendment protection described in *Tinker*." App. 46a. Yet the majority below insisted that no matter how careful students are to express their political views in a school-appropriate, sanitized

way, schools may censor their expression if it might cause a classmate to *think* about the uncensored original. America's students are not so fragile, and the First Amendment is not so brittle.

C. The Sixth Circuit's interpretation of *Fraser* as licensing unbounded subjective enforcement is anathema to the First Amendment.

The Sixth Circuit's approach deputizes teachers and administrators with censorship authority to enforce each of their subjective notions of what constitutes "vulgarity." This is untenable for the nearly five million K-12 public school students in the circuit.

Here's how it will unfold in practice: Two Michigan public high school students in the same district arrive at different schools quietly wearing a T-shirt with Governor Gretchen Whitmer's "Fix the Damn Roads" slogan. One school is untroubled by the apparel. The other finds the slogan "vulgar" and orders the student to remove the shirt or face suspension. In the Sixth Circuit's view, the First Amendment protects the shirt in one school, but the *same shirt* is unprotected in the other, based purely on the sensitivity of administrators.

The First Amendment rejects speech restrictions turning on "ad hoc and subjective" determinations by government officials, because of the acute "dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). The "opportunity for abuse" of a prohibition with "open-

ended interpretation[] is self-evident." *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (quotation marks omitted). This basic principle of objectivity—that the Constitution protects the same nondisruptive political speech in East High School as in West High School—is irreconcilable with the Sixth Circuit's deputization of individual administrators to determine what speech is sanctionable.[2] Students' First Amendment rights do not and must not depend on their school district's zoning map.

Teachers and administrators are already well-shielded from financial liability for gray-area judgment calls because "educators are rarely denied immunity from liability arising out of First-Amendment disputes." *Morgan v. Swanson*, 755 F.3d 757, 760 (5th Cir. 2014); *see also Abbott v. Pastides*, 900 F.3d 160, 174 (4th Cir. 2018) (citing *Morgan* and noting same). But there is no legal basis, and no workable reality, under which the First Amendment's *protection* for nondisruptive political speech changes from school to school. As Judge Bush put it, "What's left of *Tinker*'s First Amendment protections in schools when we now must defer to school administrators in these decisions without any

2. Constitutional objectivity is not confined to the First Amendment. *See, e.g.*, *United States v. Ray*, 803 F.3d 244, 266 n.12 (6th Cir. 2015) ("Whether a suspect is 'in custody,'" such that Fifth Amendment rights attach, "is an objective determination."); *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011) (holding likewise for the Fourth Amendment); *Graham v. Florida*, 560 U.S. 48, 61–62 (2010) (holding likewise for analyzing violations of the Eighth Amendment's prohibition on "cruel and unusual punishment").

showing of disruption of school operations? The answer: less than what the Constitution requires." App. 52a.

What is more, "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (cleaned up). "Better safe than sorry" self-censorship of political speech is the wrong lesson to teach the next generation of Americans.

So, if *Fraser*'s reach remains muddled and the Sixth Circuit's decision is left undisturbed, civic participation will suffer. If teenagers must now fear suspension (or, even worse, their parents arriving at school with a change of clothes) for wearing apparel with a political message any teacher or administrator deems "vulgar," few will risk exercising the right to nondisruptive expression that *Tinker* guarantees.

Justice Brennan stressed in his *Fraser* concurrence that "school officials do not have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to ensure that robust rhetoric is not suppressed by prudish failures to distinguish the vigorous from the vulgar." 478 U.S. at 689–90 (Brennan J., concurring) (cleaned up). But the Sixth Circuit abandons its responsibility to stand guard over the next generation's First Amendment rights, delegating it to the government officials who Justice Brennan warned need supervision. Government officials must not get to decide when they have violated the First Amendment.

III. The Question Presented Is Exceptionally Important, and This Case Is an Ideal Vehicle to Address It.

This case provides the perfect opportunity to clarify *Fraser* because it is uncontested that Petitioners' speech was political and did not disrupt the school day. As Judge Bush explained, "The school district has never argued that the sweatshirts led to a material disruption or that the clothing interfered in any fashion with the operation of the school." App. 32a. There is likewise agreement between the majority and dissent that "Let's Go Brandon" constitutes political speech. App. 21a (noting "this slogan's political valence"); App. 31a (Bush, J., dissenting) (noting "the phrase is purely political speech"). The Court should take this opportunity, with the benefit of a clean record and an undisputed invocation of *Fraser* to censor nondisruptive political speech, to clarify its reach for the nation's 50 million K-12 public school students.

For these students, school is their "community." *Mahanoy*, 594 U.S. at 190. It is where they spend most of their time, meet their friends, and prepare for adulthood. Communication between students about life inside and outside the schoolhouse gate is "not only an inevitable part of the process of attending school; it is also an important part of the educational process." *Tinker*, 393 U.S. at 512.

Censoring sanitized political expression leaves students unprepared for life as an American adult, where every belief, no matter how sacred, will be fair game for disagreement and even ridicule (often with

real swearwords). And it teaches the next generation that the way to fight disagreeable speech is by silencing the speaker. "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967). This is particularly true of our public schools. "That [schools] 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Public schools "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *Id.* If a student's political expression is not disruptive, the government must meet a high bar to justify censorship. America's commitment to freedom of speech demands no less.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

Sara E. Berinhout
FOUNDATION FOR
INDIVIDUAL RIGHTS
AND EXPRESSION
510 Walnut St.
Suite 900
Philadelphia, PA 19106

Conor T. Fitzpatrick
Counsel of Record
Robert Corn-Revere
Daniel A. Zahn
FOUNDATION FOR
INDIVIDUAL RIGHTS
AND EXPRESSION
700 Pennsylvania Ave. SE
Suite 340
Washington, DC 20003
215-717-3473
conor.fitzpatrick@fire.org

Counsel for Petitioners

March 26, 2026

APPENDIX TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0282p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

B. A., mother of minors D. A. and X. A.,
Plaintiff,

D. A. and X. A., minors, by and through their mother, B. A.,
Plaintiffs-Appellants,

v. No. 24-1769

TRI COUNTY AREA SCHOOLS; ANDREW BUIKEMA and WENDY BRADFORD, in their individual capacities,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Michigan
at Grand Rapids.
No. 1:23-cv-00423—Paul Lewis Maloney,
District Judge.

Argued: June 12, 2025

Decided and Filed: October 14, 2025

Before: MOORE, BUSH, and NALBANDIAN,
Circuit Judges

COUNSEL

ARGUED: Conor T. Fitzpatrick, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, Washington, D.C., for Appellants. Annabel F. Shea, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees. **ON BRIEF:** Conor T. Fitzpatrick, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, Detroit, Michigan, Sara E. Berinhout, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, Philadelphia, Pennsylvania, for Appellants. Annabel F. Shea, Timothy J. Mullins, Kenneth B. Chapie, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees. Krista L. Baughman, DHILLON LAW GROUP INC., San Francisco, California, Ilya Shapiro, Tim Rosenberger, MANHATTAN INSTITUTE, New York, New York, Robert Alt, Bradley A. Smith, David C. Tryon, Alex M. Certo, J. Simon Peter Mizner, THE BUCKEYE INSTITUTE, Columbus, Ohio, M.E. Buck Dougherty III, LIBERTY JUSTICE CENTER, Austin, Texas, Derek L. Shaffer, QUINN EMANUEL URQUHART & SULLIVAN, Washington, D.C., Matthew Kudzin, COVINGTON & BURLING LLP, Washington, D.C., J. Michael Connolly, CONSOVOY MCCARTHY PLLC, Arlington, Virginia, Michael J. Grygiel, CORNELL UNIVERSITY, Ithaca, New York, Daniel Feinberg, MICHIGAN ASSOCIATION OF SCHOOL BOARDS, Lansing, Michigan, for Amici Curiae.

NALBANDIAN, J., delivered the opinion of the court in which MOORE, J., concurred. BUSH, J. (pp. 19–40), delivered a separate dissenting opinion.

OPINION

NALBANDIAN, Circuit Judge. Two middle schoolers in Michigan wore sweatshirts emblazoned with the phrase "Let's Go Brandon" to school. Based on the commonly understood meaning of the slogan, the school administrators determined that the sweatshirts were inappropriate for the school environment. They asked the students to remove the sweatshirts, and fearing punishment, the students complied. But they still wanted to wear the sweatshirts at school to express their disapproval of then-President Joe Biden's administration and its policies. So, through their mother, the students sued the school district and several school administrators, alleging that the school deprived them of their First Amendment rights. The district court sided with the school district, concluding that the school could reasonably prohibit the sweatshirts since they were vulgar speech. Because the school reasonably understood the slogan "Let's Go Brandon" to be vulgar, we affirm.

I.

On October 2, 2021, Brandon Brown, a professional racecar driver, scored his first major win at the Sparks 300, a NASCAR Xfinity Series race, at the Talladega Superspeedway in Alabama. But it was what happened afterward that propelled his name into the national consciousness. During a post-race

interview with Brandon, the crowd began to audibly chant the phrase "Fuck Joe Biden." As the chant increased in volume, NBC Sports reporter Kelli Stavast interjected on live TV: "You can hear the chants from the crowd, 'Let's Go Brandon.'" While it is unclear whether Stavast had misheard the crowd or whether she was simply trying to put a fig leaf over the chant's vulgarity, the damage was done. The clear disconnect between what the crowd was chanting and what Stavast had claimed caused the clip and its audio to proliferate. The phrase "Let's Go Brandon" became, for lack of a better term, a meme.

From the beginning, the expression had a wide range of meanings. Some saw it as merely a euphemism for what the crowd really said. Others used it as a shibboleth to express antipathy towards the then-President and his policies. And still others used it to question what they perceived as liberal bias in the media—based on the theory that NBC had been trying to hide the anti-Biden sentiment on display at Talladega. In any event, the phrase "Let's Go Brandon" quickly entered common usage, appearing in broadcast television, the Congressional record, and even President Biden's NORAD Santa tracker call-in on C-SPAN. And the phrase continued to evolve. Some of Biden's supporters adapted the phrase to make the "Dark Brandon" meme, which depicted the then-President as a preternaturally powerful leader with eyes of glowing flame. Indeed, President Biden himself shared one of these memes on social media to poke fun at online conspiracy theories that he'd orchestrated the Kansas City Chiefs' Super Bowl win to have prominent Chiefs fan Taylor Swift endorse him in the 2024 election.

With the phrase "Let's Go Brandon" so firmly established in the national lexicon, its addition to shirts, sweatshirts, and flags was inevitable. Which brings us to the events underlying this suit.

In December 2021, brothers D.A. and X.A. each received a "Let's Go Brandon" sweatshirt from their mother for Christmas. At that time, both children attended Tri County Middle School in Howard City, Michigan—D.A. as a sixth grader and X.A. as an eighth grader. And both were aware of the expression's provenance. Still, D.A. chose to wear his "Let's Go Brandon" sweatshirt to school in February 2022. Andrew Buikema, the assistant principal of Tri County Middle School, stopped D.A. in the hallway and asked him to remove the sweatshirt since the phrase "means the F-word." R.38-4, Buikema Dep., p.67, PageID 433. Because D.A. was also wearing a "Let's Go Brandon" t-shirt underneath the sweatshirt, Buikema instructed D.A. to remove both and change into school-provided clothing. And D.A. obliged.

But only a few weeks later, D.A. again wore his "Let's Go Brandon" sweatshirt to school. This time, Wendy Bradford, a teacher, confronted him and said: "[Y]ou might want to take that off, otherwise Mr. Buikema is right down the hallway, you can talk to him." R.38-5, Bradford Dep., p.34, PageID 446. Fearing punishment, D.A. again complied by removing the sweatshirt for the rest of the school day. And yet in May 2022, X.A. followed in his brother's footsteps by wearing his own "Let's Go Brandon" sweatshirt to school. Buikema called him to the front office and told him to remove the sweatshirt because the slogan had a "profane

double meaning" and so was in violation of the school's dress code. R.38-4, Buikema Dep., p.66, PageID 433. X.A. complied with Buikema's request and the brothers were not involved with any further violations of the dress code. Though a third student was also asked to remove a "Let's Go Brandon" sweatshirt in 2022.

At the time of these incidents, the Tri County Middle School dress code noted that "[s]tudents and parents have the right to determine a student's dress, except when the school administration determines a student's dress is in conflict with state policy." R.39-10, 2022-23 TCMS Student Handbook, p.24, PageID 644. The code specifically prohibited any "[a]ttire with messages or illustrations that are lewd, indecent, vulgar, or profane, or that advertise any product or service not permitted by law to minors." *Id.* And any staff member has the power to enforce the requirements of the dress code.

Buikema testified that the dress code didn't prevent the students from wearing clothing that expressed political statements so long as it didn't violate the dress code. For example, both X.A. and D.A. themselves testified that they had seen some of their peers wearing "Make America Great Again" (MAGA) apparel as well as other clothing endorsing President Donald Trump. In a similar vein, Bradford testified that she had seen students wearing clothing supporting candidates from both political parties. And the school's principal, Joseph Williams, emphasized in his deposition that students could—and often did—wear clothing with political messages without violating the dress code.

Clothing didn't need to be disruptive to violate the dress code. Indeed, Principal Williams testified that he was not aware that the school had experienced any disruption from students wearing "Let's Go Brandon" apparel. And yet both Williams and Buikema stated that sweatshirts and other clothing bearing the expression could be banned because it was vulgar.

In May 2022, the plaintiffs, through counsel, sent the district a cease-and-desist letter, outlining their view that the ban on wearing the "Let's Go Brandon" sweatshirts had violated D.A. and X.A.'s First Amendment rights. The district rejected the demands, noting that the commonly understood meaning of "Let's Go Brandon" was profane or vulgar and that the school dress code allowed administrators to prevent students from wearing clothing with profanity or vulgarity.

So in April 2023, the plaintiffs filed this lawsuit, asserting claims against the school district as well as against Buikema and Bradford in their individual capacities. Their complaint asserted five causes of action. The first two claims alleged deprivations of the brothers' First Amendment rights by Buikema and Bradford under 42 U.S.C. § 1983 and by the school district under a *Monell* theory. The last three sought injunctive and declaratory relief against the various parties to stop the school's infringement of First Amendment rights and because the dress code was unconstitutionally vague and overbroad. After discovery, the parties each moved for summary judgment. In their summary judgment briefing, the plaintiffs noted that later changes to the dress code had mooted the vagueness and overbreadth claims.

The district court granted the defendants' motion, concluding that the school administrators had not deprived the plaintiffs of any constitutional right. The court noted that because "schools can prohibit students from wearing apparel that contains profanity, schools can also prohibit students from wearing apparel that can reasonably be interpreted as profane." *D.A. ex rel. B.A. v. Tri Cnty. Area Schs.*, 746 F. Supp. 3d 447, 460 (W.D. Mich. 2024). So the court held that because the administrators "reasonably interpreted the phrase as having a profane meaning, the School District can regulate [the] wearing of Let's Go Brandon apparel during school without showing interference or disruption." *Id.* at 461. This determination that there was no underlying constitutional violation meant that the plaintiffs' three remaining claims failed. And the district court entered judgment for the defendants dismissing all the plaintiffs' claims with prejudice. The plaintiffs appealed.

II.

We review the district court's grant of summary judgment de novo. *Capen v. Saginaw County*, 103 F.4th 457, 461 (6th Cir. 2024). Summary judgment is proper only when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Our Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. And this limitation also binds state and local governments through the

Fourteenth Amendment. *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2302 (2025). Public schools, "like all government institutions," may not ignore the strictures of the First Amendment. *See Mahmoud v. Taylor*, 145 S. Ct. 2332, 2350 (2025). So, as "a general matter," the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Paxton*, 145 S. Ct. at 2302 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). But still, "not all speech is protected." *Id.* And a school's "special characteristics" give it "additional license to regulate student speech." *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021).

Of course, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But those retained rights "are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Under *Tinker*, schools can generally forbid or punish student speech that causes a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. But the Supreme Court has recognized several exceptions to *Tinker*'s standard. On school grounds, a school may generally prohibit (1) indecent, lewd, and vulgar speech; (2) speech that promotes illegal drug use; and (3) speech that others may reasonably perceive as bearing the imprimatur of the school. *Mahanoy*, 594 U.S. at 187–88 (2021). Without one of these exceptions, the *Tinker* standard applies and the school has the burden of showing that it reasonably believes its regulation of student speech

will prevent substantial and material interference with school functions. *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

This case is about the vulgarity exception. And specifically, how a school may regulate political speech without vulgar words that the school nonetheless reasonably understands as having a vulgar message. To answer that, we must resolve two preliminary questions. The first is linguistic, asking whether a phrase that lacks explicitly profane words might still have a vulgar meaning. The second is doctrinal, asking whether a school administrator may prohibit student political speech that has a vulgar message. The district court answered yes to both and so held that the plaintiffs hadn't suffered any constitutional deprivation because the school administrators' actions comported with the First Amendment. For the reasons given below, we agree.

A.

The question of what is vulgar or profane can depend on the individual. To paraphrase the late George Carlin, everybody has a list of words that they consider profane—but the contents of that list vary greatly from person to person. In answering whether a jacket emblazoned with the words "Fuck the Draft" deserved constitutional protection, the Supreme Court noted that it's "often true that one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). So this high degree of subjectivity means that what is profane often hinges on who decides. And in related contexts, the Supreme Court has said that the

question of who decides should be evaluated in a manner "consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

The Constitution doesn't hamstring school administrators when they are trying to limit profanity and vulgarity in the classroom during school hours. Again, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. But neither are school administrators powerless to prevent student speech that the administrators reasonably understand to be profane or vulgar. *Fraser*, 478 U.S. at 683. And so "the First Amendment gives a . . . student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* at 682 (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J. concurring in the result)). Schools are charged with teaching students the "fundamental values necessary to the maintenance of a democratic political system." *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)). And avoiding "vulgar and offensive terms in public discourse" is one such value. *Id.* at 683. After all, "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Id.* at 681.

The plaintiffs and their amici respond that the slogan "Let's Go Brandon" is not profane. They emphasize that the phrase is "a purposely non-profane

substitute expression, often called a euphemism."[1] Appellant Br. at 27. Citing scholar Melissa Mohr's work on the history of swearing, the plaintiffs insist that the use of euphemism "'is the opposite of swearing'" because it allows the speaker to "discuss sensitive topics while staying inside cultural norms for polite conversation." *Id.* at 27–28 (quoting Melissa Mohr, *Holy Sh*t: A Brief History of Swearing* 197 (2013)). And both the plaintiffs and their amici can point to several historical examples of euphemism or other avoidance language being employed to disguise a vulgar or profane word— some of which are as old as this nation.[2] So they use this history to argue that a

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1. The amicus brief of the Linguistic Scholars articulates a tripartite division of what they call self-censoring. The first are euphemisms, which use "deliberately indirect, conventionally imprecise, or socially 'comfortable' ways of referring to taboo, embarrassing, or unpleasant topics" (for example, "the bad place" instead of "Hell"). Amicus Br. of Linguistic Scholars at 9 (internal quotation marks omitted). The second category consists of minced oaths, which are "a specific type of euphemism whereby the offending term or taboo phrase is distorted or 'minced' so that it no longer offends" ("Heck" instead of "Hell"). *Id.* at 10 (internal quotation marks omitted). And third are sanitized expressions, which use symbols to distort a profane or vulgar word ("H*ll" instead of "Hell"). *Id.* at 11. As noted by the plaintiffs, "Let's Go Brandon" could be interpreted as either a euphemism or a form of minced oath. For simplicity's sake, and because it does not alter our analysis, we refer to "Let's Go Brandon" as a euphemism.

2. For example, Mohr points to St. George Tucker, the renowned Virginian jurist and editor of the first American edition of Blackstone's *Commentaries*, who around 1790 wrote a poem with the lines "'G— d— your books!' the testy father said, / 'I'd not give — for all you've read.'" Melissa Mohr, *Holy Sh*t* 215–16 (2013). While the meaning behind the first two blanks is self-

euphemism cannot be "reasonably interpreted" as profane. *Id.* at 29 (internal quotation marks omitted). Indeed, they argue that prying too closely into what a student meant when he used a euphemism runs the risk of "policing *thought*, not expression" and so punishes students "based not on words used, but words imagined." *Id.* at 30–31.

This argument is correct on the fact that a euphemism is not the same as the explicitly vulgar or profane word it replaces. "Heck" is not literally the same word as "Hell." But the word's communicative content is the same even if the speaker takes some steps to obscure the offensive word. The plaintiffs concede that a school could prohibit students from saying "Fuck Joe Biden" because "[k]ids can't say 'fuck' at school." *Id.* at 20. And yet they insist that the euphemism "Let's Go Brandon" is distinct—even though many people understand that slogan to mean "Fuck Joe Biden." So it's not clear that the school administrators acted unreasonably in determining that the euphemism still conveyed that vulgar message.

After all, *Fraser*—the first case that recognized the vulgarity exception—involved a school assembly speech that had a rather elaborate sexual metaphor

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evident, scholars believe that "the third — is replacing 'a fuck,' producing the first recorded example of the modern teenage mantra, 'I don't give a fuck.'" *Id.* at 216.

instead of explicitly vulgar or obscene words.[3] And yet the Supreme Court had no reservation in holding that the school was not required to tolerate "lewd, indecent, or offensive speech and conduct." *Fraser*, 478 U.S. at 683. And it was up to the school to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.* Because "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person," the school could discipline his speech despite the absence of explicitly obscene or vulgar words. And so *Fraser* demonstrates that a school may regulate speech that conveys an obscene or vulgar message even when the words used are not themselves obscene or vulgar.

This conclusion fits with our circuit precedent, which reads *Fraser* to leave it to the school to decide what is vulgar or profane so long as the decision is not

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3. The entire speech that Matthew Fraser gave to the high school assembly is as follows:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax for each and every one of you. So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be. *Fraser*, 478 U.S. at 687 (Brennan, J., concurring in the judgment).

unreasonable. *See Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000). In *Boroff* this court showed the extent of this deference by holding that a school could ban a student's Marilyn Manson shirts as "vulgar, offensive, and contrary to the educational mission of the school." 220 F.3d at 471. And so *Boroff* shows that schools have significant latitude to find that speech is vulgar—even when there are other plausible interpretations of the same speech.

To resist this conclusion, the plaintiffs argue that *Boroff* has been rendered a "dead letter" by the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007). Appellant Br. at 37 n.18 (citing *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 316 (3d Cir. 2013) (en banc)). Although we are mindful of what the en banc Third Circuit said, to our knowledge, no panel of the Sixth Circuit has recognized *Boroff*'s abrogation. And so it's not clear that *Boroff* is so inconsistent with intervening Supreme Court caselaw as to require modification. The defendants and their amici emphasize that *Boroff* is still good law. But at times they stretch *Boroff*'s holding beyond what the decision can bear. In essence, they claim that in *Boroff* "the Sixth Circuit altered *Fraser* to no longer be about whether a school may regulate vulgar language, but instead to be about whether the language is political or not." Amicus Br. of Mich. Ass'n of Sch. Bds. at 8. That interpretation seems to simultaneously read *Boroff* too broadly and *Fraser* too narrowly. After all, *Fraser* was not just concerned with regulation of vulgar words but the regulation of vulgar speech. That distinction is crucial. Though the double entendre in Matthew Fraser's

speech was obviously vulgar, he didn't use any explicitly vulgar words. And so *Fraser* focuses on the discretion that school administrators have to regulate speech that is *reasonably understood* as vulgar.

Boroff is best understood as simply reaffirming *Fraser*'s core holding that determinations of what is impermissibly vulgar, lewd, indecent, or plainly offensive should be left in the hands of teachers, school administrators, and the popularly elected school board. As this court has noted elsewhere, this discretion is not limitless—especially not when considering "plainly offensive speech" because "much political and religious speech might be perceived as offensive to some." *Barr*, 538 F.3d at 564 n.5 (quoting *Morse*, 551 U.S. at 409)). And so courts should be wary of unreasonable definitions of vulgarity, lewdness, indecency, or offensiveness that seem designed to misuse *Fraser* to engage in viewpoint discrimination.

But in the mine run of cases, federal courts should view a school administrator's reasonable and good-faith determinations of what is vulgar with some deference. Doing so ensures that unelected federal judges do not supplant democratically elected school boards as the arbiters of what is or is not appropriate for a student to say while at school. Although the judiciary has an important role to play in protecting individual freedoms, judges must be careful to not run roughshod over democratically elected officials when the conflict is avoidable. So where, as here, we conclude that the school didn't violate the First Amendment, "we leave questions regarding its policy to the people, their elected representatives, and the

democratic process." *United States v. Skrmetti*, 145 S. Ct. 1816, 1837 (2025).

This deferential approach, at least with regard to the type of speech covered by *Fraser*, is consistent with the history of how free speech rights were understood at the time of the Fourteenth Amendment's ratification. At common law, a father could "delegate part of his parental authority . . . to the tutor or schoolmaster, of his child; who is then *in loco parentis* and has such a portion of the power of the parent committed to his charge, . . . that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 2 William Blackstone, *Commentaries on the Laws of England* 453 (St. George Tucker ed. 1803). And later American commentators largely accepted this view of the doctrine. *See* 2 James Kent, *Commentaries on American Law* 170 (1827) (noting that parental authority "may be delegated to a tutor or instructor, the better to accomplish the purposes of education"); Finley Burke, *A Treatise on the Law of Public Schools* 90 (1880) (noting that a teacher generally "has authority, as *in loco parentis*, to enforce . . . civil deportment, respect for the rights of other pupils, and all obligations inherent in every school system"). So the doctrine of *in loco parentis* afforded a good deal of deference to schoolteachers when they acted in a parent's place.

While the Supreme Court doesn't incorporate this common-law doctrine wholesale, it has looked to it for guidance on the interaction between free speech and

public schools.[4] *See Mahanoy*, 594 U.S. at 187 (citing *Fraser*, 478 U.S. at 684). So reviewing its role in early American history helps show that the original understanding of the First and Fourteenth Amendments did not limit a teacher's ability to curtail vulgar or offensive speech in the classroom. For example, in the 1874 case of *Peck v. Smith*, the Connecticut Supreme Court held that a member of the district school committee could discipline a student when "the language in which he indulged was grossly profane." 41 Conn. 442, 446 (1874). When asked to stop swearing by the committee member, the student had replied that "he would not for him or for any G–d d—n man," leading to his forcible ejection from the school building. *Id.* at 444. The student then sued the committee member for assault and battery and, after losing at trial, the student sought a new trial. *Id.* The state high court affirmed because "the force used against the plaintiff [wa]s fully justified" due to his profanity. *Id.* at 447. This holding suggests that at the

4. While *in loco parentis* was a sound basis for a teacher's authority at the time of the Fourteenth Amendment's ratification, the Supreme Court "has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'" *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (quoting *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)); *see also Morse*, 551 U.S. at 424 (Alito, J., concurring) ("It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*."). So even though the historical understanding of *in loco parentis* may help us articulate why deference to school administrators is consistent with the original meaning of the Constitution, it is not binding as a matter of law and informative only to a degree.

time of the Fourteenth Amendment's ratification, a student's right to free speech didn't immunize them from punishment for vulgarity.

That is not to deny that the modern "educational picture is quite different" than what existed in Connecticut at that time. *Mahanoy*, 141 S. Ct. at 2051 (Alito, J., concurring). Even so there are some points of commonality that make a comparison useful.[5] Without reading too much into century-old caselaw, we can deduce that at the time of the Fourteenth Amendment's ratification, a teacher's regulation of vulgar or profane language was not viewed as violating the freedom of speech guaranteed by the state constitutions. *See Deskins v. Gose*, 85 Mo. 485, 486 (1885) (punishing a student for using "profane language"); *Bd. of Educ. v. Helston*, 32 Ill. App. 300, 304 (Ill. Ct. App. 1890) (punishing a student for covering up classmate's obscene graffiti); *cf. Lander v. Seaver*, 32 Vt. 114, 115, 120 (1859) (punishing a student for yelling insults at a teacher). Additionally, the doctrine of *in loco parentis* was understood to give the teacher great latitude in regulating vulgarity or profane speech, notwithstanding the shift from a

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5. When *Peck* was decided, Connecticut had recently passed a statute making public school attendance compulsory for all children between ages eight and fourteen. 1872 Conn. Pub. Acts 43. And though this decision occurred more than a half-century before incorporation of the First Amendment began to be recognized in *Gitlow v. New York*, 268 U.S. 652 (1925), Connecticut's constitution at the time included a free speech protection analogous to the First Amendment. Conn. Const. of 1818, art I, § 6 ("No law shall ever be passed to curtail or restrain the liberty of speech or of the press.").

system of voluntary private schools to one of compelled public schooling. *See Peck*, 41 Conn. at 446–47. And so the history supports a deferential approach.

With this history in mind, we turn back to the question of who decides what is vulgar. Precedent is clear; *Fraser* puts a thumb on the scale in favor of the school administrators. And here the uncontroverted origin of the slogan shows a plainly vulgar meaning. And so it was reasonable for Buikema and the other administrators to classify the phrase as vulgar based on its association with a vulgar expression. *Fraser* is not so limited that administrators can ban only George Carlin's list of seven words you can't say on television. *Cf. FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978). Vulgarity and profanity are ever shifting marks.[6] Swearwords that would have curled a prudish Victorian's hair in 1890 have lost their potency in the intervening decades. And new slang terms have taken their place. So the rule governing student speech in the classroom must afford teachers and administrators some deference in determining whether certain speech is vulgar. A needlessly restrictive rule is unsupported by our history or caselaw and would hobble school administration as it looks to ensure a safe and appropriate learning environment.

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6. *See Fraser*, 478 U.S. at 691 (Stevens, J., dissenting) ("'Frankly my dear, I don't give a damn.' When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's fourletter expletive is less offensive than it was then.").

B.

Having decided that the administrators reasonably understood "Let's Go Brandon" as profane, we must now address the question of whether this slogan's political valence affords it greater protection than nonpolitical vulgarity. It is almost a truism that political speech is "at the core of what the First Amendment is designed to protect." *Morse*, 551 U.S. at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality)). The First Amendment's protections reflect "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because "speech concerning public affairs is . . . the essence of self-government," it "is entitled to special protection." *Id.* (first quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964); and then quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). So the government normally bears a high burden when attempting to prohibit political speech or limit debate on issues of public importance.

And as the Supreme Court has long recognized, our nation's schools are charged with "educating the young for citizenship." *Tinker*, 393 U.S. at 507 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Given that active participation in the political process is one of our most treasured national values, students must retain their rights to political expression to teach them not "to discount important principles of our government as mere platitudes." *Id.*

So students retain the right to engage in political speech in a nondisruptive manner. *Id.* at 514. And yet that right is not unlimited, especially in school—a familiar refrain in these cases. *See Fraser*, 478 U.S. at 682. Which raises the question of what a court should do when the prohibited speech is both vulgar and political.

Fraser answers this question by holding that vulgarity trumps the political aspect of speech at school.[7] The Court emphasized "that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point" doesn't imply that "the same latitude must be permitted to children in a public school." 478 U.S. at 682. So a public school may "prohibit the use of vulgar and offensive terms" by students even when those terms are being used to make a political point or comment on a matter of public concern. *Id.* at 683. This is because a student's right to speak freely must be calibrated and "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. How can a school create an environment conducive to learning if it is compelled to tolerate "lewd, indecent, or offensive

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7. This is, of course, broadly consistent with *Cohen*. After all, the limitations on speech can be tied to the boundaries of a school as "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases." *Cohen*, 403 U.S. at 19. So even if "Let's Go Brandon" is "otherwise permissible speech," a school may still prohibit students from engaging in such speech during school hours on school grounds. *Id.*

speech and conduct" at the whim of its students? *Fraser*, 478 U.S. at 683. And a key function of schools is teaching students values such as civility, which are "essential to a democratic society." *Id.* at 681. The essence of this holding doesn't change just because the vulgar speech also has a political message.

After all, Matthew Fraser was delivering a nomination speech in support of a fellow student's candidacy for school vice president—a quintessentially political act, though one with relatively low stakes. *Id.* at 677. The plaintiffs try characterizing Fraser's speech as a "non-political student council assembly speech." Appellant Br. at 33. But this view is hard to square with how the Court described the incident. To start, the Court noted that Fraser "delivered a speech nominating a fellow student for student elective office." *Fraser*, 478 U.S. at 677. Indeed, the Court emphasized that this "assembly was part of a school-sponsored educational program in self-government." *Id.* And Fraser's speech achieved the desired political goal—his candidate won over ninety percent of the vote.[8] So the speech was both political and vulgar— like Cohen's jacket. *Id.* at 682.

Resisting this conclusion, the plaintiffs argue that in Fraser "the student's speech was unrelated to any political viewpoint." Appellant Br. at 32. And from this they determine that Fraser's address couldn't be

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8. Jeff Kuhlman, the student for whom Fraser had stumped, won the vice presidency "with some 90 percent of the vote" indicating that Fraser's puerile and "controversial speech was electorally effective." Justin Driver, *The Schoolhouse Gate* 93 (2019).

political speech. But this misunderstands the opinion by cutting off the first half of this quote. The Court did note that "the *penalties* imposed in [Fraser's] case were unrelated to any political viewpoint." *Fraser*, 478 U.S. at 685 (emphasis added). But that doesn't imply that his address wasn't political speech. Instead, it merely confirms that, in regulating Fraser's political speech, the school administrators didn't engage in impermissible viewpoint discrimination based on the political views expressed. This is how *Fraser* differs from *Tinker*. In *Tinker*, the school's punishments were tied to the *political content* of the speech. 393 U.S. at 508. And yet in *Fraser*, the sanctions imposed by the school were linked to the *vulgar content* of the speech—notwithstanding its political nature. 478 U.S. at 680.

So while the Court in *Fraser* did distinguish "between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech," that doesn't mean that it discounted the political nature of that speech. *Id.* Indeed, much of the Court's opinion is spent explaining why the speech's vulgarity allowed the school to punish Fraser despite the protections for student political speech. The Court's reference to "Cohen's jacket," shows that when student speech is both vulgar and political, the school's interest in prohibiting vulgarity predominates over the student's interest in making a political statement in the language of their choosing.[9] *Id.* at 682.

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9. Some might argue—notwithstanding the Court's statements to the contrary—that *Fraser* shouldn't be understood

As a fallback, the plaintiffs argue that even if *Fraser* would allow a school to ban political speech that is reasonably understood as vulgar, that holding has been modified by subsequent caselaw. To support this conclusion, they point to *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, where the Third Circuit, in a sharply contested en banc decision, held that *Morse* had altered the framework set forth by *Fraser*. 725 F.3d 293, 316–17 (3d Cir. 2013) (en banc). In short, that court held that a school could not "categorically restrict ambiguous speech that a reasonable observer could interpret as having a lewd, vulgar, or profane meaning and could plausibly interpret as commenting on a social or political issue." *Id.* at 320. And yet this approach doesn't come from the holding of *Fraser* itself. Instead, the Third Circuit's creation of a quasi-protected category of ambiguously vulgar student

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as addressing political speech. After all, the political issue was a student government election rather than something weightier like a protest of the Vietnam War. But this would toe the line of inviting courts to apply different standards to political speech based on that speech's connection to "real" electoral politics. The protection for political speech doesn't hinge on the "judicial determination that particular speech is useful to the democratic process." *McCutcheon v. FEC*, 572 U.S. 185, 206 (2014) (plurality). So we are hesitant to recast *Fraser* as holding that student speech on student government is not political for the purposes of the First Amendment. The better view is that Fraser's rule for vulgar speech applies equally to all student political speech—regardless of its content or subject. A student can no more wear Cohen's profanity-laced jacket protesting military conscription than he can deliver Fraser's double-entendre laden speech promoting a candidate for school vice president. *Fraser*, 478 U.S. at 682. Both are political. Both are reasonably understood as vulgar. And both can be prohibited at school.

speech stems from Justice Alito's concurrence in *Morse*, which it understood as narrowing the holding in *Fraser*. But there are two problems with that reading.

First, the Third Circuit's conclusion that Justice Alito's concurrence in *Morse* constitutes the controlling opinion relies on a questionable application of the rule set forth in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the Supreme Court clarified that the holding of a case in which there was no majority opinion "may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But that was not the situation presented by *Morse* since Justices Alito and Kennedy joined Chief Justice Roberts's majority rather than merely concurring in the judgment. That's not to deny that Justice Alito prefaced his separate concurrence with a statement that he joined the majority "on the understanding that . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422 (Alito, J., concurring). But at most that disclaimer would only serve to limit the extent of the Court's holding in *Morse*. It would not convert Justice Alito's concurrence into a binding majority opinion that could limit and modify the Court's earlier holding in *Fraser*. Holding otherwise would allow the concurrence to "co-opt an opinion" by binding three justices to a separate concurring opinion that they did not join. *See B.H.*, 725 F.3d at 327 (Hardiman, J., dissenting). This is not the proper

application of the *Marks* rule. Which is why a majority of the circuit courts, including this one, agree that Chief Justice Roberts's majority opinion in *Morse* is controlling.[10]

Second, even if we assumed that Justice Alito's concurrence was the controlling opinion, it's not clear that it should be viewed as modifying *Fraser*. As noted by Judge Hardiman's dissent, the exceptions to *Tinker*'s requirements created by *Morse* and *Fraser* are distinct from one another. *See B.H.*, 725 F.3d at 330–31 (Hardiman, J., dissenting). *Fraser* dealt with the power of school administrators to categorically prohibit speech that is vulgar, profane, or extremely offensive. 478 U.S. at 685–86. In contrast, *Morse* involved a school administrator's more limited power to prohibit speech advocating illegal drug use. *See* 551 U.S. at 403; *id.* at 422 (Alito, J., concurring).

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10. *Compare Defoe ex. rel. Defoe v. Spiva,* 625 F.3d 324, 332–33 (6th Cir. 2010) (treating Chief Justice Roberts's majority as the controlling opinion), *and Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011) (same), *and Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 435 (4th Cir. 2013) (same), *and Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011) (same), *and D.J.M ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 761 (8th Cir. 2011) (same), *and Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) (noting Justice Alito's concurrence but treating Chief Justice Roberts's majority as controlling), *and Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 948 (11th Cir. 2007) (treating Chief Justice Roberts's majority as the controlling opinion), *with Morgan v. Swanson*, 659 F.3d 359, 374 n.46 (5th Cir. 2011) (en banc) (noting that the Fifth Circuit treats Justice Alito's concurrence as the controlling opinion).

But in using Justice Alito's *Morse* concurrence to create a new protected category of ambiguously vulgar political speech, the Third Circuit ignored these distinctions. This, in turn, has led to a confusing cross-pollination between two distinct lines of cases. It is not obvious from the cases that the interest that a school has in preventing vulgar or obscene speech is the same as it has in preventing speech that advocates illegal drug use. *B.H.*, 725 F.3d at 330 (Hardiman, J., dissenting) ("In addition to overriding the careful steps taken to allow schools to regulate student speech since *Tinker*, the Majority errs by placing *Morse* at the center of a case that has nothing whatsoever to do with illegal drug use."). And so it is not clear how *Morse* would limit *Fraser*, especially when nothing in either the majority opinion or Alito's concurrence purported to do so. Put differently, Justice Alito's statement that *Morse* "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue" doesn't purport to limit *Fraser*'s holding. *See Morse*, 551 U.S. at 422 (Alito, J., concurring). It's only about the precedential effect of *Morse*.

Although we are mindful of what the en banc Third Circuit said, we decline to view Justice Alito's concurrence in *Morse* as controlling. But even if we did, it would make no difference to the outcome of our case because nothing in that concurrence overruled *Fraser sub silentio*. As such, *Fraser* requires our conclusion that a school may prohibit students from wearing a slogan reasonably understood as profane or vulgar. In the schoolhouse, vulgarity trumps politics. And the protection for political speech doesn't give a

student *carte blanche* to use vulgarity at school—even when that vulgarity is cloaked in innuendo or euphemism. Here, the school administrators reasonably interpreted the "Let's Go Brandon" slogan as being vulgar speech that "a school may categorically prohibit" despite its political message. *Barr*, 538 F.3d at 563–64. Requesting that students remove clothing with that slogan didn't violate the First and Fourteenth Amendments.

III.

For this reason, we affirm.

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting. For a young person, wearing apparel with a political message can be the first point of entry to civic engagement. One mother thought so when she gave her two sons sweatshirts bearing a political message—"Let's Go Brandon!"—as Christmas presents. The phrase was a popular way for critics to express opposition to President Joe Biden's policies. But when the students tried to wear their sweatshirts to protest the presidential administration, the school administration quickly ended their civic engagement.

The majority blesses this outcome without requiring that the school district meet the legal standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, the Supreme Court held that students had a First Amendment right to wear black armbands to

school in protest of President Lyndon Johnson's Vietnam War policies. Under *Tinker*, student political speech may not be restricted in school unless the speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or might "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Id.* at 509, 514.

Discarding the *Tinker* standard, the majority misapplies a narrow exception to *Tinker* recognized in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). There, the Supreme Court upheld a school district's disciplining of a student who, during a school assembly, gave a sexually explicit speech that had nothing to do with national politics. Here, the majority concludes that a political slogan critical of a president but containing no words that are vulgar or profane—"Let's Go Brandon!"—looks more like the sexually explicit, non-political speech delivered in *Fraser* than it does the political criticism expressed through the black armbands in *Tinker*.

In my view, *Tinker*, not *Fraser*, should apply. The district court erred in sidestepping that analysis, so the judgment for the school district should be vacated and this case should be remanded. Because the school district does not dispute that these sweatshirts did not cause a substantial disruption, on remand, the district court should view the constitutional issue as being resolved against the defendants and, as to the damages claims, should consider only whether the defendants are entitled to qualified immunity.

To be sure, in a limited category of cases, the explicit nature of the speech is so evident that courts need not apply the *Tinker* test. *See Fraser*, 478 U.S. at 685. But the speech here— "Let's Go Brandon!"—is neither vulgar nor profane on its face, and therefore does not fall into that exception. To the contrary, the phrase is purely political speech. It criticizes a political official—the type of expression that sits "at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)). No doubt, its euphemistic meaning was offensive to some, particularly those who supported President Biden. But offensive political speech is allowed in school, so long as it does not cause disruption under *Tinker*. As explained below, *Tinker* is the standard our circuit applied to cases involving Confederate flag T-shirts and a hat depicting an AR-15 rifle[1]—depictions arguably more offensive than "Let's Go Brandon!"

We are not the only circuit that applies the *Tinker* standard to arguably offensive political speech.[2] The majority's holding to the contrary goes against this

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1. *C.S. ex rel. Stroub v. McCrumb*, 135 F.4th 1056, 1059, 1061–62 (6th Cir. 2025); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 333 (6th Cir. 2010); *Barr v. Lafon*, 538 F.3d 554, 557 (6th Cir. 2008).

2. The majority does not distinguish between vulgar versus plainly offensive speech, and neither does *Fraser*, 478 U.S. at 683, so I take the majority's holding to apply to both vulgar and plainly offensive speech with equal force.

consensus and, in so doing, creates at least two circuit splits described below.

Because even offensive political speech demands First Amendment protection, it is inappropriate to delegate unfettered discretion to school officials to characterize the phrase "Let's Go Brandon!" as vulgar and then regulate it outside the bounds of *Tinker*. The majority essentially gives school administrators boundless discretion—akin to "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)—to redefine facially non-vulgar speech as vulgarity in order to ban it. And only by interpreting "Let's Go Brandon!" by its *political* meaning (as opposed to a *non-political* meaning, such as, for instance, student speech that cheers achievements of a classmate named Brandon) do the school officials claim authority to censor the message. If we allow schools the power to censor political speech by recharacterizing it as vulgarity, we risk turning disagreement with political speech into justification for its censorship—something the First Amendment flatly forbids.

The school district has never argued that the sweatshirts led to a material disruption or that the clothing interfered in any fashion with the operation of the school such that censorship was constitutional, so, under *Tinker*, the students' constitutional rights were violated. I therefore respectfully dissent.

I.

As the majority recognizes, "Let's Go Brandon!" has permeated American society. The phrase, in whole or in part, has become a widely recognized political slogan, appearing prominently on politically themed merchandise—including T-shirts, hats, flags, and bumper stickers—as well as at campaign rallies, political protests, and even on billboards across the country.

The students' choice to don the "Let's Go Brandon!" sweatshirts reflects the phrase's political pervasiveness. It goes beyond simple fashion or an expression of teenage rebellion disapproved of by parents and detached from any political significance. Rather, the sweatshirts were *gifts* from the students' mother, who *approved* of her kids wearing the sweatshirts to school as an ideological statement. By displaying the message on these shirts publicly, the students participated in the broader civic discourse, a notion that the Supreme Court has never rendered inappropriate for the school environment.

The majority says the sweatshirts' slogan is crude. *See* Majority Opinion at 15. But neither the phrase itself nor any word in it has ever been bleeped on television, radio, or other media.[3] Not one of the

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3. *See, e.g.*, *Weekend Update: A Guy Named Brandon on "Let's Go Brandon,"* Saturday Night Live (NBC television broadcast, Nov. 6, 2021), available at https://www.nbc.com/saturday-night-live/video/weekend-update-aguy- named-brandon-on-lets-go-brandon/603909528.

"seven words you can never say on television" appears in it.[4] Instead, the phrase has been used to advance political arguments, primarily in opposition to President Biden's policies and secondarily to complain about the way liberal-biased media treats conservatives.[5] It serves as a coded critique—a sarcastic catchphrase meant to express frustration, resentment, and discontent with political opponents. The phrase has been used by members of Congress during debate.[6] And even President Biden himself, attempting to deflect criticism, "agreed" with the phrase.[7]

We cannot lose sight of a key fact: the students' sweatshirts do not say "F*ck Joe Biden." Instead, they

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4. George Carlin, *Seven Words You Can Never Say on Television*, *on* Class Clown (Little David Records 1972).

5. *See* Jonathan Turley, *Yankee Doodling the Media: How 'Let's Go Brandon' Became a Rallying Cry Against News Bias*, The Hill (Nov. 3, 2021), https://thehill.com/opinion/technology/579771-yankee-doodling-themedia-how-lets-go-brandon-became-a-rallying-cry/.

6. *See* Colleen Long, *How 'Let's Go Brandon' Became Code for Insulting Joe Biden*, Associated Press (Oct. 30, 2021), https://apnews.com/article/lets-go-brandon-what-does-it-mean-republicans-joebiden-ab13db212067928455a3dba07756a160 ("Republican Rep. Bill Posey of Florida ended an Oct. 21 House floor speech with a fist pump and the phrase "Let's go, Brandon!").

7. *See* Matthew S. Schwartz, *Man Who Said 'Let's Go, Brandon' to Biden on Christmas Eve Says He Was Only Joking*, NPR (Dec. 26, 2021), https://www.npr.org/2021/12/26/068173175/man-who-said-lets-go-brandon-tobiden- on-christmas-eve-says-he-was-only-joking (reporting that President Biden said "Let's Go Brandon, I agree").

bear a sanitized phrase made famous by sports reporter Kelli Stavast while interviewing NASCAR race winner Brandon Brown at the Talladega Superspeedway. The reporter said the crowd behind them was yelling "Let's go, Brandon!" She did not report the vulgar phrase that was actually being chanted. The Majority even concedes Stavast may have used the sanitized phrase to "put a fig leaf over the chant's vulgarity." Majority Opinion at 2. That is telling.

The misreporting thus became an original and curious meme that went viral.[8] "Let's Go Brandon!" caught on in the public sphere as a national inside joke. To some it alluded in memorable fashion to President Biden's level of performance in office.[9] The phrase became like "Where's the Beef?"—the 1984 Wendy's slogan that former Vice President Walter Mondale sed to highlight the lack of substance of a fellow presidential contender, Senator Gary Hart.[11]

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8. *See* Jake Lahut, *'Let's Go, Brandon': The Right's New Anti-Biden Chant Comes From a NASCAR Broadcast Where NBC Sports Didn't Want to Drop an F-Bomb*, Business Insider (Oct. 13, 2021), https://www.businessinsider.com/lets-go-brandon-chant-origin-video-what-does-it-mean-2021-10.

9. *See* Anthony Zurcher, *How 'Let's Go Brandon' Became an Anti-Biden Conservative Heckle*, BBC (Oct. 11, 2021), https://www.bbc.com/news/world-us-canada-58878473 (calling the Brandon phenomenon "a simple vessel for transmitting invective at a politician" and "raw frustration of a political movement").

11. George Lardner Jr. & Dan Balz, *Mondale Turns Combative, Clashes with Hart in Debate*, Wash. Post (Mar. 12,

And its meaning had nothing to do with accusing President Biden of sexually inappropriate conduct, unlike "Ma. Ma. Where's My Pa?"—widely used in the 1884 campaign to reference presidential candidate Grover Cleveland's out-of-wedlock child.[12] "Let's Go Brandon!" just cheekily expressed criticism of a president's leadership capabilities.

II.

Harsh verbal and written attacks on presidents have precedents throughout American history. Since Washington, Americans have mocked their leaders. *See* Rufus W. Wilmot, *The Republican Court: Or, American Society in the Days of Washington* 122–23 (1854) (quoting April 7, 1789 letter from John Armstrong to General Horatio Gates anticipating ceremonial reception of Washington as elected president and noting that a "caricature has already appeared, called 'The Entry,' full of very disloyal and profane allusions"); Stephen Hess & Milton Kaplan, *The Ungentlemanly Art: A History of American Political Cartoons* 61 (1968) ("[The Entry] is known to have shown Washington riding on a donkey, led by his aide, David Humphreys. The accompanying couplet read: 'The glorious time shall come to pass/When David shall conduct an ass.'"). Whether dubbing John

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1984), https://www.washingtonpost.com/archive/politics/1984/03/12/mondale-turns-combative-clasheswith-hart-in-debate/e004fc40-8aee-48d7-81fc-4e1b9d62b61c/.

12. Michael F. Holt, *By One Vote: The Disputed Presidential Election of 1876* 224 (2008).

Adams "His Rotundity"[13] to emphasize both his portly figure and his monarchical leanings (as seen in his support for aristocratic titles like "His Highness" and the Sedition Acts)[14] or labeling Andrew Jackson "King Andrew the First" to protest his veto of the Second Bank and his autocratic enforcement of the Trail of Tears, Americans have long expressed their politics through crude characterizations.[15] William Henry

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13. *See* John R. Howe, *The Changing Political Thought of John Adams* 26 (1966) (highlighting Ralph Izard of South Carolina giving John Adams the title "His Rotundity").

14. Consider the Sedition Act of 1798—part of the broader Alien and Sedition Acts—which made it a crime to write, print, or speak any criticism of the federal government. *See* Sedition Act, 1 Stat. 596 (1798); *see also Ludecke v. Watkins*, 335 U.S. 160, 172 n.18 (1948); *New York Times Co. v. Sullivan*, 376 U.S. 254, 273–74 (1964). The Act was heavily criticized at the time as unconstitutional, with leading figures like Thomas Jefferson and James Madison drafting the Virginia and Kentucky Resolutions in response. *See* Wayne D. Moore, *Reconceiving Interpretive Autonomy: Insights from the Virginia and Kentucky Resolutions*, 11 Const. Comment. 315 (1994). Though the Supreme Court never ruled on the Act's validity before it expired in 1801, later courts and commentators have widely condemned it as inconsistent with the First Amendment. *See Sullivan*, 376 U.S. at 276. Congress eventually repaid the fines imposed under the Act, and President Jefferson pardoned those convicted, reflecting a broad consensus that the law unconstitutionally suppressed criticism of government and public officials. *Id.*

15. *King Andrew the First* (1833), lithograph, Library of Congress, available at https://www.loc.gov/item/2008661753/, depicts a caricature of Jackson, in regal costume, standing before a throne in a "pose reminiscent of a playing-card king," holding "a 'veto' in his left hand and a scepter in his right." The "Federal Constitution and the arms of Pennsylvania (the United States

Harrison was mockingly nicknamed "Old Granny" because of his old age, and his political allies tried to repurpose the phrase to show his experience.[16] Martin Van Buren was dubbed the "Machiavellian Belshazzar"—a nod to his reputation as a cunning political operator and a recognition that his self-serving leadership during the Panic of 1837 mirrored the downfall of Babylon's last king who led his nation toward ruin.[17] And Abraham Lincoln was called "The Dictator" by Southern secessionists and "Copperheads" alike after he suspended habeas corpus and exiled political opponents like Clement Vallandigham to try to preserve the Union.[18]

Bank was located in Philadelphia) lie in tatters under his feet." A book saying "Judiciary of the U[nited] States lies nearby. Around the border of the print are the words 'Of Veto Memory,' 'Born to Command' and 'Had I Been Consulted.'"

16. Robert Gray Gunderson, *Log Cabin Campaign* 74, 220 (1957); *Montgomery's Tippecanoe Almanac* 49– 50 (1841) ("In 1812, when war was declared against Great Britain, this 'old granny' was placed in command of a large number of volunteers to protect the Indiana territory, and was afterwards appointed Commander-in-chief of the' Northwestern army. 'His conduct of that war—his turning the tide of disaster, and raising in triumph and victory the sinking flag of his country, the recovery of Michigan, the battle of the Thames, which destroyed the British army of Upper Canada, were also thought very considerable services for an 'old granny.'").

17. *See* Thomas A. Bailey, *Presidential Saints and Sinners* 56 (1981).

18. *See* Dennis J. Hutchinson, *Lincoln the Dictator*, 55 S.D. L. Rev. 284, 289 (2010).

Some presidents have received more criticism than others.[19] But the public square spares no president of ridicule, no matter his party. And since the beginning, presidents have been expected to "be prepared to meet the attacks of both" those who "grumble" at them and those who "will laugh" at them, "with firmness and good nature." Wilmot, *supra*, at 123. Critiquing presidents, regardless the degree, always has been and continues to be a prevalent political practice—even for young Americans.

The liberty to criticize the president is not a freedom that stops at the schoolhouse door. Students wishing to engage in politics are largely confined to do so through speech, considering their legal and institutional constraints. As mentioned, the students in *Tinker* wore black armbands in 1965 to protest President Johnson's Vietnam War policies. 393 U.S. at 504. By the 2000s, President George W. Bush became the target of students' political ire. One Michigan student wore a shirt displaying a photograph of the former president with the caption "International Terrorist" to express his feelings about President Bush's foreign policy and the imminent war in Iraq.

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19. George Washington, for example, garnered less critique than, say, Thomas Jefferson. *Compare* William Murrell, 1 *A History of American Graphic Humor, 1747–1938* 34 (1933) ("Cartoons in which George Washington figures are for some obscure reason exceedingly rare . . . . It is probable that all cartoons reflecting on him have long since been destroyed by some of our too ardent patriots."), *with id.* at 49 ("Jefferson . . . also came in for many virulent graphic attacks"); Bailey, *supra*, at 126 (noting "no one-term President has ever accumulated so many pejorative nicknames" as Martin Van Buren).

Barber ex rel. Barber v. Dearborn Pub. Schs., 286 F. Supp. 2d 847, 849 (E.D. Mich. 2003). Another student in Vermont wore a T-shirt calling President Bush a "Chicken-Hawk-In-Chief" and accusing him of being a former alcohol and cocaine abuser. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 322 (2d Cir. 2006). In these cases, federal courts protected the students' speech.

We can credit the First Amendment for this longstanding American right to insult the president. The Free Speech Clause of the First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. This Amendment, standing "as a sentry over one of the Nation's most indispensable freedoms through a proclamation clear and uncompromising," means Americans need not pull punches. *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 538 (E.D. Ky. 2024). Political boxing, particularly when it comes to presidents, is not governed by any Marquess of Queensbury Rules.

At the time of ratification of the First Amendment in 1791, free speech was understood to encompass the right to speak freely as to one's honest beliefs. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 251–53 (2017). And since *Gitlow v. New York*, the Supreme Court has recognized that, by virtue of the Fourteenth Amendment, this same right of honest expression disallows censorship of such speech by the states and their subsidiary entities, such as the school district here. 268 U.S. 652 (1925). Given this context, courts have been protective of political speech, including

pointed words about presidents, even when such words are communicated in a school setting.

III.

That history calls for application of *Tinker* to this case. Time and time again, the Supreme Court has reinforced as a first principle that students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Of course, those rights are not absolute. *See, e.g.*, *Fraser*, 478 U.S. at 682. The constitutional rights afforded to students are not always coextensive with those enjoyed by adults in other forums. *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007) (quoting *Fraser*, 478 U.S. at 682). But even so, the Court has made clear that the special characteristics of the school environment do not justify the suppression of student speech in all circumstances. *See Tinker*, 393 U.S. at 508.

Tinker reflects this principle well. There, school officials banned the anti-war armbands and suspended the students who wore them even though the students had engaged in a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance . . . ." *Id.* at 508. Like the school officials here, the school district in *Tinker* did not ban all forms of political expression but singled out a particular opinion. *Id.* at 510–11. The Supreme Court held that prohibiting political speech in this way is unconstitutional unless the speech causes "material and substantial interference with schoolwork or discipline . . . ." *Id.* at 511.

Since *Tinker*, this circuit has applied the substantial interference test to all cases involving student political speech. Indeed, we have consistently applied *Tinker* to student expression that is arguably more "plainly offensive" than the phrase here. For example, in *Barr*, a school banned the wearing of Confederate flag apparel because racial tensions at the school were high. 538 F.3d at 557. We held that *Tinker* governed "because by wearing clothing depicting images of the Confederate flag students engage in pure speech not sponsored by the school." *Id.* at 564 (citing *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 539–40 (6th Cir. 2001)); *see also Spiva*, 625 F.3d at 333. Record evidence included incidents such as "racist graffiti that made general threats against the lives of African-Americans, graffiti containing 'hit lists' of specific students' names, physical altercations between African-American and white students, and a police lockdown at the school." *Id.* at 557. In light of that evidence, we held that, consistent with *Tinker*, the school's ban was justified because the "school officials could reasonably forecast that permitting students to wear clothing depicting the Confederate flag would cause disruptions to the school environment." *Id.* at 566.

Similarly, in *McCrumb*, we applied *Tinker* to evaluate a school's decision to restrict a student from wearing a baseball cap bearing a white star, an image of an AR-15 style rifle, and the capitalized phrase "COME AND TAKE IT." 135 F.4th at 1059, 1061–62. We held that *Tinker* applied "in light of the special characteristics of the school environment" and because the speech did not concern vulgarity or illegal drug

use. *Id.* at 1062. Considering the then-recent Oxford shooting, the *McCrumb* court held that the school was justified in restricting the wearing of the hat. *Id.* at 1067–68.

Other circuits have likewise applied *Tinker* to student political speech cases. In *Guiles*, as noted, the Second Circuit held that a shirt calling President Bush a "chicken-hawk president," "Lying Drunk Driver," and "Cocaine Addict," and showing his image with alcohol, drugs, and war imagery, was protected political speech under *Tinker* because the court determined that it was not "plainly offensive," did not cause substantial disruption, and was clearly political. 461 F.3d at 321, 322, 327–28. The Second Circuit in *Guiles* also explicitly declined to apply *Fraser*, cautioning the district court against expanding *Fraser*'s reach because *Fraser* only applies to speech that is "plainly offensive." *Id.* at 327–28.

In *L.M. v. Town of Middleborough*, the First Circuit considered whether a public middle school could prohibit a student from wearing a shirt stating, "There Are Only Two Genders." 103 F.4th 854, 860 (1st Cir. 2024). The school justified its ban under a dress code barring speech that demeaned students based on protected characteristics, including gender identity. *Id.* at 861. Although the shirt was viewed by some as offensive or exclusionary, the court held that *Tinker*, not *Fraser*, governed the analysis because the speech was ideological (or social) in nature—not lewd or vulgar. *Id.* at 873–74.

In *Taylor v. Roswell Independent School District*, students belonging to a pro-life religious group passed

out rubber fetuses designed to represent the "actual size and weight of a '12 week old baby,' that is, a fetus at 12 weeks of gestation." 713 F.3d 25, 30 (10th Cir. 2013). After finding that the students "meant to convey a religious and political message," the Tenth Circuit held that the students' speech could be regulated by school officials but only after concluding that regulation was justified based on *Tinker*'s requirements. *Id.* at 35.

In each of these cases, students engaged in arguably offensive political speech. And in each case, the circuit court applied *Tinker*. I offer no opinion on the outcomes of these cases, but the standard of review is uniform—*Tinker* provides the applicable test.

IV.

The Supreme Court has carved out only three narrow exceptions to *Tinker*'s otherwise general rule. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187–88 (2021). *First*, schools may prohibit "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds." *Id.* (quoting *Fraser*, 478 U.S. at 683, 685). *Second*, schools may exercise editorial control over school-sponsored speech—such as in a school newspaper—"that others may reasonably perceive as 'bearing the imprimatur of the school,'" so long as the regulation is "reasonably related to legitimate pedagogical concerns." *Id.* at 188 (cleaned up); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Though often grouped with student speech cases, this exception is more accurately understood as an application of the government's

broader authority over speech it directly sponsors. *See Kuhlmeier*, 484 U.S. at 271. And *third*, schools may restrict student speech that "a reasonable observer would interpret as advocating illegal drug use," so long as that speech cannot "plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422 (Alito, J., concurring); *see also id.* at 403 (majority opinion) ("[T]his is plainly not a case about political debate over the criminalization of drug use or possession.").

What do these three exceptions have in common? *First*, they are grounded in widely shared social norms about categories of speech that are inherently inappropriate in the school context and may be restricted without any showing of disruption. *Second*, and crucially, each exception reflects the Court's ongoing effort to strike a balance between preserving order in schools and safeguarding students' expressive rights.

While recognizing the role of schools in "teach[ing] by example the shared values of a civilized social order," *Fraser*, 478 U.S. at 683, the Court has consistently emphasized the importance of protecting the rights of students to express views on political or controversial issues. *See, e.g.*, *Morse*, 551 U.S. at 403–04; *Tinker*, 393 U.S. at 511; *see also Kulhmeier*, 484 U.S. at 271–72; *Fraser*, 478 U.S. at 680–81. Consequently, the exceptions to *Tinker* must be construed narrowly and applied cautiously, with full awareness of that constitutional tradition.

In each instance, the Court permitted regulation not because the speech was merely controversial or

unpopular, but because the nature of the speech reflected a type of expression that society generally agrees is unsuitable for the educational environment.

That consensus is absent here. "Let's Go Brandon!"—regardless its origin—has evolved into a widely recognized political slogan used to express opposition to a now-former president. It is not vulgar on its face, nor so socially deviant that it must be sanitized from student expression. It has become a political hallmark entitled to the First Amendment protection described in *Tinker*. The majority disagrees and holds that *Fraser* governs this case and that the vulgarity exception allows the school to censor the students' political speech. Majority Opinion at 7–8. Respectfully, the majority is wrong.

A.

The majority's reading of *Fraser* conflicts with what that case said, and ignores how this court and our sister circuits have interpreted *Fraser*.

Fraser was not a case about political speech or political viewpoint. The Court upheld discipline for lewd and sexually suggestive speech at a school assembly, grounding its decision in the speech's pervasive sexual nature and its clear offensiveness to students and teachers alike. *See Fraser*, 478 U.S. 682–83. Crucially, the Court emphasized the "marked distinction" between *political* expression, like the silent protest in *Tinker*, and the "sexual content" of Fraser's speech. *Id.* at 680–81. Unlike *Tinker*, "the penalties imposed in [*Fraser*] were unrelated to any

political viewpoint." *Id.* at 685. The Court criticized the lower court for giving "too little weight" to that difference, and then framed its analysis around that crucial distinction. *Id.*

Here, the district court, affirmed by the majority, failed to recognize that same distinction. A student wearing a "Let's Go Brandon!" sweatshirt is not engaging in the kind of "offensively lewd" or sexually explicit speech in the way *Fraser* contemplated. *Id.* Although the phrase may carry a controversial or provocative undertone, it is fundamentally political—not plainly lewd or vulgar. *See id.* Even if some interpret the phrase as alluding to a vulgar sentiment, no one can argue that it stands for having sex, like the Court found objectionable in *Fraser* and therefore punishable consistent with the First Amendment. *See* 478 U.S. at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. . . . The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

Unlike *Fraser*, "Let's Go Brandon!" is not *plainly* lewd. At most, the phrase indirectly references the use of the word "f*ck" as an intensifier in the Talladega crowd's chant—a word the students themselves never used. The words "f*ck" or "f*cking," along with other swear words, are commonly used today to convey emphasis or strong emotion, rather than for their

literal, sexual meaning.[20] The Federal Circuit recently discussed the word "f*ck" in relation to a potential trademark and agreed with the Trademark Trial and Appeal Board that the word "has acquired a multitude of recognized meanings since its first recorded use," and it now serves as an expression "to convey a wide range of recognized concepts and sentiments." *In re Brunetti*, No. 2023-1539, 2025 WL 2446503, at *5 (Fed. Cir. Aug. 26, 2025) (cleaned up). That's why many people, including prominent politicians, increasingly use such swear words when speaking to the media.[21]

One bemoans the regression of public discourse. But for many people, "f*ck" is used simply as a rhetorical tool to capture attention for what they have to say. The crowd did not chant the word at Talladega to advocate having sex with the former President. And, again, the students here did not even use the word. That makes their political message look more like the type of political expression that the Court has historically afforded greater constitutional protection

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20. Melissa Mohr, *Holy Sh*t: A Brief History of Swearing* 6–7 (2016).

21. *See* Adrienne Vogt, *Cory Booker On Gun Violence Reform: We Need More Than 'Thoughts and Prayers,'* CNN, May 11, 2019, at A1; Sudiksha Kochi, *Trump Normalized Politicians Swearing in Public. Why it Matters*, USA Today, March 24, 2024 ("But inflammatory rhetoric and the use of expletives in politics – once considered scandalous to use in public – has now become the norm among lawmakers and political candidates."); Adam Wren et al., *'Potty Mouth' Democrats Have Some New Fighting Words We Can't Put in This Headline*, Politico, March 9, 2025, at A1 ("Democrats are cursing up a storm.").

under *Tinker*, than an expression of vulgarity that may summarily be banned under *Fraser*.

The majority relies on *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000), to defend the school's decision to ban "Let's Go Brandon!" apparel. Majority Opinion at 11. According to the majority, *Boroff* affirms that *Fraser* gives schools broad discretion to define what is vulgar or profane, "so long as the decision is not unreasonable." *Id.* But this reading oversimplifies *Boroff*, ignores its specific context, and simply cannot be squared with our circuit's own student speech cases, much less Supreme Court precedent. If anything, our precedent—including *Boroff*—points in the opposite direction by supporting the application of *Tinker* in a case like this, where the speech is overtly political and lacks any plainly lewd or profane content.

Start with what *Boroff* actually held—and why. There, we upheld a school's decision to prohibit students from wearing a Marilyn Manson T-shirt because school officials reasonably determined that the conveyed message conflicted with the school's basic educational mission. *Id.* at 470. Relying on *Fraser* and *Kuhlmeier*, the *Boroff* court held that schools need not tolerate student expression inconsistent with their pedagogical goals, even absent evidence of substantial disruption. *Id.* And so, under those circumstances, the court concluded that the school did not act in a "manifestly unreasonable manner" in enforcing its dress code. *Id.*

However, *Boroff* involved a different kind of student expression—one that lacked any political (or

religious) viewpoint and was widely associated with messages that the school considered harmful to its educational mission. *Id.* As the court noted, the record was "devoid of any evidence" that the shirt conveyed a political or religious message. *Id.* It instead featured imagery and slogans linked to a performer who was commonly portrayed "as having a 'pro-drug persona'" and known to "promote[] drug use"—arguably, anticipating *Morse*. *Id.*

This case presents just the opposite situation. "Let's Go Brandon!" is quintessentially political. Whatever else it may be, it is not a slogan devoid of political meaning or rooted in values hostile to education. Unlike *Boroff*, the record here contains no evidence that the sweatshirt's message promotes drug use, violence, or any other category of speech the Court has held to be categorically regulable in schools. The absence of plainly lewd or vulgar language, plus the political valence, takes the case outside the scope of *Fraser* and thereby makes *Tinker* the proper analytical framework.

Even if the student's speech in *Fraser* could be construed as political, we have never interpreted *Fraser* so broadly to encompass euphemistic speech that *might* offend. When our cases have concerned political speech, we have interpreted the *Fraser* exception narrowly and applied the general rule, *Tinker*. In *Barr*, we read *Fraser* to allow schools to limit speech "in the interest of protecting children, especially those in captive audiences, from *sexually explicit*, vulgar, and offensive spoken language," emphasizing Fraser's use of "an elaborate, graphic,

and explicit sexual metaphor." 538 F.3d at 563 (quoting *Fraser*, 478 U.S. at 677–78) (emphasis added). *Barr* limited *Fraser*'s holding to spoken language and did not allow school administrators to read in their own interpretations of non-explicit speech. *Id.*

Similarly, in *McCrumb*, we read *Fraser*'s holding narrowly as pertaining to "*distractingly* vulgar or lewd" speech. 135 F.4th at 1062 (emphasis added). We did not apply *Fraser* to either Confederate flag T-shirts or a hat depicting an AR-15, both of which carried political messages, and arguments could be made that these messages are more plainly offensive than any message associated with "Let's Go Brandon!"

Other circuits agree that *Fraser* should be read as a narrow exception to *Tinker*. In *Guiles*, for example, the Second Circuit declined to apply *Fraser* to a T-shirt insulting President Bush. 461 F.3d at 327. The district court here diminished *Guiles* by saying that "the undeniable connection between Let's Go Brandon and F*** Joe Biden distinguishes Plaintiffs' apparel from the shirt in [*Guiles*] calling President George W. Bush a crook, cocaine addict, draft dodger and lying drunk driver." Op., R. 56, PageID 937. That distinction is superficial at best. In fact, it undermines a key principle in *Guiles*: even blunt, harsh, or impolite criticism of public officials is protected when it is political speech that does not disrupt the school environment. Arguably, the *Guiles* shirt was far more offensive than "Let's Go Brandon!"—yet it was protected. The *Guiles* reasoning applies with equal force no matter which piece of apparel more greatly offends. The Second Circuit rightly held that *Fraser*

should not be read to encompass all offensive speech; otherwise the rule in *Tinker* would be swallowed completely. *Guiles*, 461 F.3d at 327–28.

That's just what the majority's rule does here. If the only standard for banning speech as vulgar is whether the school administrator's determination was reasonable or not, without any showing of school disruption, then *Barr*, *Guiles*, and even *Tinker* look completely different. Could we really find unreasonable a school administrator's summary decision to ban Confederate flag T-shirts as plainly offensive given the racist underpinnings of the Confederacy? Could we really say that, during the Vietnam War, black armbands could not reasonably be viewed by a school administrator as offensive, given their hurtful impact on fellow students whose relatives served in the military and who considered the war an honorable and just cause? What's left of *Tinker*'s First Amendment protections in schools when we now must defer to school administrators in these decisions without any showing of disruption of school operations? Majority Opinion at 12. The answer: less than what the Constitution requires. In our country, First Amendment protection "is the default and censorship the exception." *L.M ex rel. Morrison v. Town of Middleborough, Mass.*, 145 S. Ct. 1489, 1495 (2025) (Alito, J., dissenting from denial of cert.). The majority holds the reverse.

B.

The *Fraser* exception does not apply for a second reason. The school here punished these students for

expressing a disfavored political viewpoint, not for expressing a vulgarity. The district court held that the speech restriction was justified under *Fraser* because "Defendants have established that a reasonable interpretation of the phrase Let's Go Brandon is that it conveys a profane and vulgar message." Op., R. 56, PageID 931. The district court then reasoned that because a school can "certainly prohibit" students from wearing apparel displaying "F*** Joe Biden," it may also necessarily sensor clothing "that can reasonably be interpreted as profane." *Id.* at PageID 932–33. The majority agrees, stating that there is something so unique about this facially non-vulgar speech that it warrants bypassing *Tinker* for *Fraser*. The speech, says the majority, can be regulated under the *Fraser* exception because it can be reasonably seen as vulgar—even if it is not plainly vulgar. *See* Majority Opinion at 11.

But "F*ck Joe Biden" and "Let's Go Brandon!" are not functional equivalents. One is censored; the other is not. And that, simply put, is why *Tinker*—not *Fraser*—governs this case.

The district court and the majority stretch *Fraser* too far. They improperly expand *Fraser* to encompass speech that is not itself lewd or vulgar but merely associated with a political message that could be interpreted as offensive by some. In other words, the majority's reasoning would allow schools to regulate speech simply because some might assign a vulgar or profane meaning to a political phrase, even when others would reasonably see no such meaning. This grants schools unrestrained authority to suppress

speech based on subjective interpretations, opening the door for viewpoint discrimination without any need for schools to justify their regulations.

And this case shows why these fears are reasonable. The "Let's Go Brandon!" sweatshirts were censored because of their political message, not because of their vulgar content. The majority rejects this premise and instead attempts to distinguish the armbands in *Tinker* by claiming that the sanctions here are linked to the vulgar content alluded to by "Let's Go Brandon!" and not the political content. Majority Opinion at 18. But the phrase itself is innocuous when divorced from the political message. Imagine a football player named Brandon making a big play, or a young student named Brandon winning a schoolyard race. Expressions of "Let's Go Brandon!" in those situations—whether written on a sign or cheered by the crowd—would be understood as expressions of encouragement and support. Surely the school would not prevent students from making signs with this message and bringing them to an upcoming game, or even wearing sweatshirts with the phrase to support Brandon the football star. The phrase can be used in everyday speech without any vulgar connotation. It only becomes "vulgar" once the political message is assigned to it. The supposed vulgarity in "Let's Go Brandon!" comes from its euphemistic association with a criticism of a political official. Without the political viewpoint attached to the words, no school administrator could possibly view the words "Let's Go Brandon!" as vulgar. Unlike in *Fraser*, the double meaning behind these words is a political one, not a sexual one—so instead of deserving less

protection, it deserves more. Under the majority's rule, school officials now have the unrestrained discretion to declare speech vulgar as soon as it is imbued with a political message, so long as the school administrator could reasonably understand the message to include an offensive connotation.

The inextricable link between the political viewpoint being expressed by the sweatshirts and the determination of vulgarity shows that it is not the vulgar content of the words themselves, but the political content that is actually being censored. This reality exposes a fundamental flaw in the majority's stated rule. The majority adheres to the principle that schools are entitled to broad discretion in determining what constitutes lewd or vulgar speech, provided their judgments are not unreasonable. However, if the phrase is treated as vulgar only because of its political implications—and not because of the actual words used—then the restriction is not really about lewdness at all. It is, presumably, about viewpoint in some form or fashion.[22] That distinction is constitutionally significant. The school cannot justify censorship by

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22. The evidence shows that the school allows students to wear political clothing, and I don't dispute that. Indeed, the evidence shows that students wore clothing endorsing candidates from both of the major political parties. But the same was true in *Tinker* and the Supreme Court held that against the school. 393 U.S. at 510–11. Allowing other forms of political expression highlights that the school singled out this message for prohibition and "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." *Id.*

labeling speech as "vulgar" when, in reality, it is being restricted because of the message.

In these circumstances, we cannot—consistent with *Tinker*—delegate to school officials unfettered discretion to censor student speech, especially when that speech carries such clear political overtones. Accordingly, we must apply the *Tinker* standard and conclude that the school's actions were not justified by actual or reasonably forecasted disruption to school operations.

C.

The Third Circuit's decision in *B.H. ex rel. Hawk v. Easton Area School District* reinforces why *Fraser* must be read narrowly, and why *Tinker* governs here. 725 F.3d 293 (3d Cir. 2013) (en banc). That case involved student bracelets reading "I ❤ boobies! (KEEP A BREAST)," worn to promote breast cancer awareness. *Id.* at 297–98. Although the message addressed a social issue, it was far more sexualized than the political euphemism at issue here, and thus much closer to the type of speech *Fraser* was meant to reach.

The court recognized *Fraser*'s uncertain limits. *Id.* at 302 ("The mode of analysis employed in *Fraser* is not entirely clear.") (quoting *Morse*, 551 U.S. at 404)); *see also Guiles*, 461 F.3d at 330 (acknowledging uncertainty in the Supreme Court's student-speech cases and noting that the "exact contours of what is plainly offensive [under *Fraser*] are not so clear"). Yet drawing on *Fraser*, *Morse*, and the Supreme Court's

broader student speech jurisprudence, the court articulated a three-tiered framework it understood *Fraser* to establish. Under its approach: (1) schools may categorically restrict plainly lewd speech, regardless of message; (2) they may restrict ambiguously lewd speech unless it plausibly comments on political or social issues; but (3) schools may not categorically restrict speech that is not plainly lewd and that could be seen as political or social commentary. *Id.* at 298, 301.

The bracelets, although potentially viewed as lewd to some because of their sexually suggestive nature, fell into the second category. *Id.* at 302. They addressed an important social and health issue and bore "no resemblance to Fraser's 'pervasive sexual innuendo.'" *Id.* at 320. The court thus rejected the school's ban and explicitly cabined *Fraser* to in-school speech that is overtly vulgar or sexually explicit. *See id.* at 307 ("*Fraser* addressed only a school's power over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non-lewd.").

That framework is relevant here, except that this case is easier. Unlike in *Hawk*, the phrase "Let's Go Brandon" is not even ambiguously lewd, let alone plainly so. Unlike "boobies," a term widely understood as referencing a sexual body part, the phrase at issue here is a euphemism for political criticism. It contains no sexual content, no graphic imagery, and no actual profanity. To the extent that it implies an offensive phrase, it does so obliquely—by design.

Even so, the Third Circuit's approach to reading *Fraser* narrowly makes good sense. The Supreme Court has issued no directive that calls for expanding this exception. Nothing in *Fraser* or any subsequent Supreme Court decision suggests that this exception should be extended to encompass political or euphemistic expression that is not overtly profane.

To that point, the Third Circuit's approach honors foundational First Amendment principles by preserving protections for student speech on issues of public concern, whether that be political, social, religious, or otherwise controversial speech. It avoids inviting school officials to engage in subjective judgments about the perceived impropriety or inferred meaning of student expression—judgments that risk devolving into viewpoint discrimination. By cabining *Fraser* to in-school, sexually explicit or plainly vulgar speech, the Third Circuit ensured that the core holding of *Tinker* remains intact: that students retain the constitutional right to express themselves on matters of public concern, so long as their expression does not materially disrupt the educational environment. That balance best reflects the Supreme Court's consistent message that student speech is not a constitutional afterthought, but a protected and essential component of democratic discourse. *See Mahanoy*, 594 U.S. at 190 ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will.").

And more still, the Third Circuit's reading of *Fraser* also makes particular sense in cases like this one where the doctrine of *in loco parentis* is ill-suited to justify the school's disciplinary authority. Historically, *in loco parentis* presumed that schools acted in place of parents with the tacit or express consent of those parents. *See id.* at 192. But where, as here, the parent *wants* her sons to wear a non-vulgar sweatshirt to convey a political message, that foundational premise collapses. *Tinker* itself involved a similar fact pattern: students engaged in peaceful political expression with their parents' knowledge and approval. 393 U.S. at 504. There, parental endorsement stripped away the traditional justification for treating the school's authority as standing in for the parents'. The same holds true here.

Indeed, the Court in *Kuhlmeier* acknowledged that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials . . . ." 484 U.S. at 273. But that deference assumes alignment, or at least not conflict, between the interests of parents and those of school administrators. When those interests diverge—as they do here— courts should be skeptical of extending deference to the school over the parents. The Third Circuit's approach reflects that principle: it respects the constitutional rights of both students and the parents who support their children's expression, and it resists vesting unilateral authority in school officials to override those rights under a broad reading of *Fraser*.

The majority, however, criticizes *Hawk* for "creating a new protected category of ambiguously

vulgar political speech." Majority Opinion at 21. It argues that the Third Circuit wrongly treated Justice Alito's concurrence in *Morse* as controlling and built its framework around it. Majority Opinion at 19. Even assuming *Morse* reflects Justice Alito's narrow view, the majority contends it should not be read to limit *Fraser*, because *Fraser* and *Morse* establish separate exceptions to *Tinker*: *Fraser* governs vulgar speech, *Morse* governs drug advocacy, and conflating the two, according to the majority, creates doctrinal confusion.

But that argument overlooks what *Morse* reveals about *Fraser*. If *Fraser* were broad enough to authorize censorship of any speech seen as "inappropriate" or "offensive," the Court in *Morse* could have relied on it. As could our cases analyzing speech involving Confederate flag and AR-15 apparel. Instead, the *Morse* Court declined to do so, affirming that *Fraser* does not reach all controversial or provocative speech. 551 U.S. at 409. Justice Alito's concurrence, which emphasized that *Morse* should not be used to restrict political or social commentary, helps clarify the outer bounds of any school authority to suppress student speech. The *Morse* Court created a distinct and narrowly tailored exception to *Tinker*, grounded in the government's compelling interest in deterring illegal drug use among students. And the *Morse* Court's refusal to resolve the case under *Fraser* confirms that *Fraser* does not give schools a roving license to suppress expression they may view negatively. *Fraser* instead represents a limited carveout for plainly lewd or profane speech delivered in the school context.

The Third Circuit's approach does not confuse these precedents—it preserves them. It treats *Fraser* and *Morse* as distinct, limited carveouts and reaffirms *Tinker* as the baseline rule. What it properly rejects is the idea that school officials may suppress political expression by loosely labeling the speech as vulgar and defying their burden to justify their regulation. That view not only distorts *Fraser*, it opens the door to viewpoint discrimination and undermines the First Amendment's core protection for political speech. *Hawk* honors those constitutional boundaries by cabining *Fraser* to plainly lewd or sexualized expression, ensuring that *Tinker* remains the governing rule for political speech in schools.

V.

By reaching the holding it does today, the majority creates a split with other circuits on two issues. *First*, the majority creates a split with the First and Second Circuits by applying *Fraser*, rather than *Tinker*, to student speech that expresses an ideological slogan (*L.M.*) and criticizes a president (*Guiles*). The First and Second Circuits have applied *Tinker* when faced with these types of speech. *See L.M.*, 103 F.4th at 873–74; *Guiles*, 461 F.3d at 327–28. Only the majority has applied *Fraser*. By applying *Fraser*, the majority ignores what is obvious to these other circuits: political speech expressed through facially non-obscene apparel looks much closer to the armbands in *Tinker* than it does to the sexually explicit speech in *Fraser*.

Second, the majority's interpretation of *Fraser* that expands its scope to political and not "plainly

lewd" speech splits with the Third and Ninth Circuits. *See Hawk*, 725 F.3d at 298; *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992). Those circuits apply *Fraser* only when the speech at issue is "per se vulgar, lewd, obscene, or plainly offensive," and not just "ambiguously lewd" like the speech here. *Hawk*, 725 F.3d at 308; *Chandler*, 978 F.2d at 530. "Let's Go Brandon!" can be said without any vulgar or offensive undertones, so it cannot possibly meet the standard of being per se vulgar. This is no problem for the majority. Whether something is actually vulgar or just vulgar in the mind of the school administrator makes no difference; the only question is whether a deferential court thinks the administrator had a reasonable belief that it might be. The other circuits apply a more manageable and constitutionally faithful rule "grounded in bedrock First Amendment principles . . . ." Recent Case, B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) (en banc)*, 127 Harv. L. Rev. 1049, 1049 (2014). But, given the split, "the Supreme Court itself must ultimately clarify, and ideally limit, *Fraser*'s reach." *Id.* at 1050.

VI.

The majority fails to give due weight to our precedents and the message's political significance, both of which call for *Tinker* analysis to apply here. I agree with the Supreme Court in *Kuhlmeier* that educating "the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 484 U.S. at 273. But federal judges still bear a responsibility—to ensure that those "state and local officials" do not

trample the free speech rights of students while accomplishing their educational mission. Because the majority favors the mission of the officials over the rights of the students, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

D.A. a minor, by and through his mother B.A., and X.A., a minor, by and through his mother, B.A.,
Plaintiffs,

-v-

TRI COUNTY AREA SCHOOLS, et al.,
Defendants.

No. 1:23-cv-423
Honorable Paul L. Maloney

AMENDED OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, two students at the Tri County Middle School in Newaygo County, Michigan, wore sweatshirts to school bearing the phrase "Let's Go Brandon." A school official had the students take off the sweatshirts because the official interpreted the phrase as having a profane meaning. Plaintiffs sued, asserting that the phrase enjoyed First Amendment protection as political speech. The parties filed cross motions for summary judgment. The Court finds that

school officials reasonably interpreted the phrase as containing a profane message and will grant Defendants' motion.

I.

A trial court should grant a motion for summary judgment only in the absence of a genuine dispute of any material fact and when the moving party establishes it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the burden of showing that no genuine issues of material fact exist. *Celotex Crop. v. Catrett*, 477 U.S. 317, 324 (1986). To meet this burden, the moving party must identify those portions of the pleadings, depositions, answers to interrogatories, admissions, any affidavits, and other evidence in the record, which demonstrate the lack of genuine issue of material fact. Fed. R. Civ. P. 56(c)(1); *Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 627-28 (6th Cir. 2018). The moving party may also meet its burden by showing the absence of evidence to support an essential element of the nonmoving party's claim. *Holis v. Chestnut Bend Homeowners Ass'n,* 760 F.3d 531, 543 (6th Cir. 2014).

When faced with a motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Pittman*, 901 F.3d at 628 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). The court must view the facts and draw all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018) (citing *Matsushita Elec. Indust. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 587 (1986)). In resolving a motion for summary judgment, the court does not weigh the evidence and determine the truth of the matter; the court determines only if there exists a genuine issue for trial. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

II.

The parties generally agree about the relevant material facts. The parties disagree about the proper interpretation of legal authority and application of the legal principles to the facts.

Before summarizing the specific events underlying the causes of action in this lawsuit, the Court offers the following background story for context. In October 2021, Brandon Brown won a NASCAR race in Talladega, Alabama. Shortly after the race, Brown appeared live on camera with a reporter for the television network covering the event. The crowd in the background could be heard shouting "F*** Joe Biden." The reporter stated that the crowd was chanting "Let's Go Brandon." The reporter's inaccurate description subsequently appeared on all sorts of merchandise including bumper stickers and clothing.

The events giving rise to this lawsuit occurred during the 2021-2022 school year, more specifically in

the spring semester of 2022. At that time, D.A. and X.A. both attended Tri County Middle School (TCMS) in the sixth and eighth grades respectively. B.A. is D.A. and X.A's mother. For Christmas in 2021, D.A. and X.A. received, as gifts from B.A., sweatshirts with the phrase Let's Go Brandon written across the front (ECF No. 39-6 B.A. Dep. at 7 PageID.599.) B.A. acknowledged seeing the video of the interview with Brandon Brown before giving the sweatshirts to her children (*id*. at 7-8 PageID.599).

D.A. and X.A. wore their sweatshirts to school on separate occasions. In February 2022, D.A. wore his sweatshirt to school. Defendant Andrew Buikema, then the assistant principal, approached D.A. in the hallway. Buikema testified that he first asked D.A. if D.A. knew what the phrase meant, to which D.A. replied "no" (ECF No. 38-4 Buikema Dep. at 67 PageID.433).[1] After explaining the meaning of the phrase to D.A., Buikema informed D.A. that he would have to take the sweatshirt off (*id*.).[2] And, because D.A. wore a t-shirt with the same phrase under the sweatshirt, Buikema directed D.A. to get another shirt from the school social worker (*id*.). At his deposition,

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1. At his deposition, D.A. acknowledged that he had seen the video of the Brandon Brown interview before he received the sweatshirt as a gift. (ECF No. 38-2 D.A. Dep. at 11 PageID.404).

2. D.A. testified that Buikema told D.A. to take off the sweatshirt before explaining the meaning of the phrase to D.A. (D.A. Dep. at 12 PageID.404). The discrepancy in the testimony about the chronological order of the inquiry and the directive do not make a material difference for the purpose of the cross motions.

D.A. admitted that he thought the phrase was funny because it meant F*** Joe Biden (ECF No. 38-2 D.A. Dep. at 11-12 PageID.404.) D.A. complied with Buikema's instructions (Buikema Dep. at 67 PageID.433). No one from the school called D.A.'s mother (*id*.). D.A. did not receive any discipline and did not miss any school (*id*.; D.A. Dep. at 13 PageID.405).

D.A. wore the sweatshirt to school a second time. Wendy Bradford, a teacher at TCMS, saw D.A. in the hall and suggested to D.A. that he might want to take the sweatshirt off (ECF No. 38-5 Bradford Dep. at 33-34 PageID.445-46). She pointed out that assistant principal Buikema was down the hallway (*id*. at 34 PageID.446). Bradford had concerns that D.A. did not know what the phrase on the sweatshirt meant, but she did not ask D.A. about his knowledge of the phrase (*id*. at 36 PageID.446). At his deposition, D.A. initially testified that he was asked to remove the sweatshirt but then testified that could not remember exactly what Bradford said (D.A. Dep. at 14 PageID.405). D.A. testified that he did end up taking the sweatshirt off (*id*. at 14-15 PageID.405).

X.A. wore his sweatshirt to TCMS sometime in the spring of 2022. X.A. testified that during the first hour he was called to the principal's office (ECF No. 38-3 X.A. Dep. at 10 PageID.412). X.A. recalled that Buikema stated that X.A. should not be wearing the sweatshirt and asked X.A. if X.A. would take the sweatshirt off (*id*.) X.A. did take the sweatshirt off (*id*.). Buikema testified that he explained to X.A. that the phrase had a profane double meaning (Buikema

Dep. at 66 PageID.433).[3] At his deposition, X.A. admitted to viewing the Brandon Brown interview video before receiving the sweatshirt as a gift (X.A. Dep. at 8 PageID.411). He agreed that he thought the phrase was funny because it meant F*** Joe Biden (*id.* at 9 PageID.411). X.A. did not receive detention, was not suspended, and did not miss any school as the result of his interaction with Buikema (*id.* at 10-11 PageID.411).

Buikema testified that students can wear clothing with political messages at TCMS (Buikema Dep. at 19 PageID.421.) He recalled one student wearing a MAGA hat (*id.*). Bradford recalled seeing students wear Biden shirts and Trump shirts (Bradford Dep. at 11 PageID.440). D.A. recalled seeing at least one person at school wearing Make America Great Again clothing (D.A. Dep. at 15 PageID.405). X.A. also recalled seeing MAGA clothing and Trump 2024 clothing at school (X.A. Dep. at 11 PageID.412).

On May 27, 2022, through counsel, Plaintiffs sent a cease and desist letter to the Tri County School District (ECF No. 39-38 PageID.711). The letter asserted that the staff at TCMS had violated D.A.'s and X.A.'s First Amendment rights by restricting their ability to display political messages on clothing (*id.* at 712). The letter further demanded that the School District issue a public statement clarifying the dress

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3. X.A. denies that Buikema asked X.A. if he knew what the phrase on the sweatshirt meant (X.A. Dep. at 10 PageID.411). The discrepancy in the testimony does not create a genuine issue of material fact for the purpose of the cross motions.

policy or, if necessary, amend the dress policy to respect the First Amendment rights of students (*id.*).

On June 9, 2022, through counsel, the School District responded by letter (ECF No. 39-29 PageID.715). The letter explained that the School District prohibits vulgar or profane clothing (*id.*). The letter further explained that the phrase Let's Go Brandon has a commonly understood meaning that contains profanity (*id.*). The School District insisted that it could, consistent with the First Amendment, restrict clothing displaying offensive, vulgar or profane messages, including messages that contain transparent codes for profanity (*id.*). The School District declined to issue any public statement or to amend the Code of Conduct or Dress Code policy (*id.* PageID.718).

In April 2023, Plaintiffs filed this lawsuit. Plaintiffs sued the Tri County Area Schools and Buikema and Bradford in their individual capacities. The complaint includes five causes of action. In Count I, Plaintiffs plead a violation of the freedom of speech under the First Amendment and seek damages. Both Plaintiffs bring the claim against Buikema and D.A. also brings the claim against Bradford. In Count II, Plaintiffs plead a Monell claim and seek to hold the Tri County Area Schools liable for a violation of Plaintiffs' First Amendment rights. In Count III, Plaintiffs seek injunctive and declaratory relief against Tri County Area Schools for a violation of Plaintiffs' First Amendment rights. In Count IV, Plaintiffs seek injunctive and declaratory relief against the Tri County Area Schools and assert a vagueness claim

under the First and Fourteenth Amendments. Specifically, Plaintiffs assert a facial challenge to a portion of the dress code that prohibits apparel that is disruptive to the environment by calling undue attention to oneself. Finally, in Count V Plaintiffs seek injunctive and declaratory relief under the First Amendment and assert an overbreadth claim to the same disruptive and undue attention provision.

III.

Defendants advance three reasons to dismiss part or all of the lawsuit unrelated to the merits of Plaintiffs' claims.

A.

Defendants argue that the Court should dismiss the lawsuit for lack of jurisdiction. Defendants assert that Plaintiffs did not seek leave to proceed under pseudonyms. Defendants cite *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 636-37 (6th Cir. Jan 3, 2005).

The Court denies Defendants' request to dismiss this lawsuit for lack of jurisdiction. The Federal Rules of Civil Procedure instruct that when parties file documents that include the name of a minor, the filing should use only the minor's initials. Fed. R. Civ. P. 5.2(a)(3). The use of initials for the two minors satisfies the requirement in Rule 10(a) that the title of the complaint must name all of the parties. The Sixth Circuit has declined to extend the outcome in *Marsh*—which did not involve an underaged party—to

a lawsuit where the plaintiffs were minors. *See Doe v. Boland*, No. 21-3517, 2022 WL 2053256, at *2 (6th Cir. Mar. 2, 2022).

The Court declines to dismiss the lawsuit because the mother, B.A., failed to seek leave to proceed anonymously. In a recent unpublished opinion, the Sixth Circuit at least questioned the legal rule in *Marsh* (also an unpublished opinion) that a party's failure to seek leave to proceed anonymously deprives the court of jurisdiction. *Koe v. Univ. Hosps. Health Sys., Inc.*, No. 22-3952, 2024 WL 1048184, at *3 (6th Cir. Mar. 8, 2024). A court's subject matter jurisdiction derives from the case or controversies language in Article III § 2 of our constitution. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 102 (1998). Neither the *Marsh* opinion nor the authority cited in that opinion provides a coherent rational for why the sort of party anonymity involved in this lawsuit implicates a court's constitutional power to resolve cases and controversies. In this lawsuit, Defendants know the identities of the minors and their mother. If the anonymity issue implicates this Court's subject matter jurisdiction, the matter cannot be waived and could be raised at any time. *See Ammex, Inc. v. Cox*, 351 F.3d 697, 702 (6th Cir. 2003). But, if the anonymity issue implicates some other fairness or privacy concern, that issue might be waivable.

District courts have discretion to permit a party to proceed anonymously. *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004). By proceeding anonymously, B.A. protects the privacy of her children. Plaintiffs informed Defendants of the identity of both minors and their

mother shortly after filing the lawsuit (ECF No. 44-2 PageID.819). Defendants have not identified any prejudice resulting from the use of initials for the mother. Defendants have deposed both minors and their mother. The Court finds Defendants waived any objection to B.A. proceeding anonymously.

B.

Defendants argue Plaintiffs lack standing and also argue that some of the relief requested by Plaintiffs has become moot. Defendants contend that Plaintiffs lack standing to seek declaratory or injunctive relief against a ban on Let's Go Brandon apparel because no such ban exists. Concerning the provision of the dress code that Plaintiffs identify for their overbreadth and vagueness causes of action, Defendants argue that Plaintiffs lack standing to bring the claim and that the claims are moot.

1.

In the prayer for relief, Plaintiffs seek a "permanent injunction enjoining the School District from enforcing a categorical ban on 'Let's Go Brandon' apparel" and also a declaration that "the School District's ban on 'Let's Go Brandon' apparel violates the First Amendment" (ECF No. 1 PageID.27-28). For Count III, Defendants assert Plaintiffs lack standing to seek this relief because no such ban exists.

The Court concludes Plaintiffs have standing to seek a declaration and an injunction concerning their ability to wear apparel with the phrase Let's Go

Brandon. Without dispute, D.A. and X.A. wore Lets Go Brandon apparel and were asked or instructed to remove the apparel by a member of the school administration. Plaintiffs contend that the First Amendment prohibits the school from making that request or demand. Should Plaintiffs prevail, the Court could enter a declaration and an appropriate injunction reflecting the evidence presented during this litigation.

Plaintiffs do not dispute Defendants' argument that the School District does not have a categorical ban on Let's Go Brandon apparel. In their response, Plaintiffs insist that the lack of a written policy banning Let's Go Brandon apparel does not undermine standing for their ability to seek declaratory and injunctive relief (ECF No. 44 PageID.811). Plaintiffs assert their injuries were caused by Defendants' enforcement of the dress code and seek appropriate relief tailored to Plaintiffs' injuries. To the extent Plaintiffs seek injunctive and declarative relief from a categorical ban, Plaintiffs have abandoned that particular prayer for relief.

2.

Plaintiffs seek "a permanent injunction against the School District's policy prohibiting apparel 'disruptive to the teaching and/or learning environment by calling undue attention to oneself'" (ECF No. 1 PageID.28). Plaintiffs also seek a declaration that the same provision violates the First and Fourteenth Amendments (*id.*).

In their motion, Defendants argue that the relevant causes of action and these prayers for relief are moot. On March 11, 2024, the School District's Board approved a revised version of the dress code that removed the disputed language (ECF No. 38-10 Mar. 3, 2024, minutes PageID.517-18). Defendants attach the 2023-2024 student handbook that contains a revised dress code effective March 2024 (ECF No. 38-9 PageID.508). Plaintiffs do not address this mootness argument in their response to Defendants' motion.

Plaintiffs have waived any cause of action and prayer for relief based on the disruptive and undue attention language. Defendants properly raised the mootness argument in their motion for summary judgment. By not addressing the argument in their response, Plaintiffs waive the argument. *See Alexander v. Carter,* 733 F. App'x 256, 261 (6th Cir. 2018) ("When a plaintiff fails to address a claim in response to a motion for summary judgment, the claim is deemed waived.") (internal quotation marks and edits omitted) (citing *Haddad v. Sec'y, U.S. Dept. of Homeland Sec.*, 610 F. App'x 567, 568-69 (6th Cir. 2015)); *see, e.g., Notredan, LLC v. Old Republic Exchange Facilitator Co.*, 531 F. App'x 567, 569 (6th Cir. 2013) ("Notredan's response to the motion to dismiss did not address this argument. This failure amounts to a forfeiture of the fiduciary-duty claim.").

The Court will dismiss Counts IV and V as moot.

IV.

Both parties seek summary judgment on Plaintiffs' claim that Defendants' actions violated the First Amendment.

Our Supreme Court has offered guidance for First Amendment free speech claims brought by students.[4] The opinions do not address all possible factual scenarios but the combination of the opinions offers lower courts a place to begin their analysis.[5] In *Morse v. Frederick*, 551 U.S. 393 (2007), Chief Justice John

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4. The specific holdings in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), which involved school newspaper and school sponsored speech, and *Mahanoy Area School District v. B.L.*, 594 U.S. 180 (2021), which involved off-campus student speech, do not implicate the factual situation here.

5. The Second Circuit noted the "ambiguity in the Supreme Court's jurisprudence" for student speech and wrote that "'[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges.'" *Radwan v. Manuel,* 55 F.4th 101, 120 (2d Cir. 2022) (citation omitted). In a footnote in an en banc opinion, the Fourth Circuit commented that "the Supreme Court's student-speech jurisprudence might fairly be described as opaque." *B.H. v. Easton Area Sch. Dist*., 725 F.3d 293, 302 n.7 (4th Cir. 2013) (en banc) (citations omitted). Also in an *en banc* opinion considering qualified immunity for school principals, the Fifth Circuit described the relevant jurisprudence as "a complicated body of law that seeks, often clumsily, to balance a number of competing First Amendment imperatives." *Morgan v. Swanson*, 659 F.3d 359, 365 (5th Cir. 2011) (en banc). The Seventh Circuit found that "[m]any aspects of the law with respect to student speech, … , are difficult to understand and apply[.]" *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005).

Roberts offered a succinct summary of the basic legal framework for student speech.

> Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). At the same time, we have held that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986), and the rights of students "must be 'applied in light of the special characteristics of the school environment,'" *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988) (quoting *Tinker, supra,* at 506).

Id. at 396-97. In each situation, a court must consider both the First Amendment interests of the students and the educational mission of the schools. *See Tinker*, 393 U.S. at 507; *see, e.g., Melton v. Young*, 465 F.2d 1332, 1334 (6th Cir. 1972) ("This is a troubling case; on the one hand we are faced with the exercise of the fundamental constitutional right to freedom of speech, and on the other with the oft conflicting but equally important, need to maintain decorum in our public schools so that the learning process may be carried out in an orderly manner.").

Tinker involved a situation where students engaged in political expression. School officials learned

that students intended to wear black armbands as a form of protest against this country's involvement in the military conflict in Vietnam. The principals of the schools adopted a policy that any student wearing an armband would be asked to remove it and, if the student refused, the student would be suspended and could return to school only without the armband. Two days later, the schools sent home the three plaintiffs, two high school students and one middle school student, who wore black arm bands to school. The Court found that "school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance …." *Tinker*, 393 U.S. at 508. The Court also found that the events did "not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.* As a result, the Court found that the wearing of the armbands "was closely akin to 'pure speech'" which was "entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. The Court explained that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511.

In *Fraser*, the student engaged in speech not protected by the First Amendment. *Castorina ex rel. Rewt v. Madison Cty. Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2006). At a high school in Pierce County, Washington, student Matthew Fraser delivered a speech nominating a fellow student for an elected office. Fraser gave the speech at a school assembly. The school required students, some as young as 14

years old, to either attend the assembly or report to study hall. Fraser's speech described the candidate using "an elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 678. The school had a rule against conduct that interfered with the educational process, "including the use of obscene, profane language or gestures." *Id.* The school suspended Fraser, who later sued. The Court reasoned that it had "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language." *Id.* at 684. And, the Court found that "it is a highly appropriate function of a public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* The Court held that "schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct[.]" *Id.* at 683.

In *Morse*, the student displayed a message promoting an illegal activity. The events occurred outside of a high school in Juneau, Alaska. Students were permitted to leave class to observe the Olympic Torch Relay as the torchbearers ran by the school. As the runners and camera crews passed by, several students unfurled a large banner displaying the phrase "BONG HiTS 4 JESUS." The School Board had a policy prohibiting public expression that advocates the use of substances that are illegal for minors. When the principal saw the banner, she demanded the students take it down because she interpreted the banner as encouraging the use of illegal drugs. All students involved except for the plaintiff complied and

the principal subsequently suspended the plaintiff. The Supreme Court acknowledged that the message on the banner was "cryptic." *Morse*, 551 U.S. at 401. Nevertheless, the Court held that the principal's interpretation, that the banner promoted illegal drug use, was "plainly a reasonable one." *Id.* The Court recognized the importance of deterring drug use by children as an "'important—indeed, perhaps compelling' interest." *Id.* at 407 (quoting *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995)). The Court noted that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use." *Id.* at 408. The unique characteristics of the school environment and the government's interest in stopping student drug use "allow schools to restrict student expression they reasonably regard as promoting illegal drug use." *Id.*

A little more than a year after *Morse*, in *Barr v. Lafon,* 538 F.3d 554 (6th Cir. 2008), the Sixth Circuit summarized the guiding principles found in the Supreme Court opinions concerning student speech. First, "under *Fraser*, a school may categorically prohibit vulgar, lewd, indecent, or plainly offensive student speech[.]" *Id.* at 563-64 (citations omitted). Second, "under *Hazelwood*, a school has limited authority to censor school-sponsored student speech in a manner consistent with pedagogical concerns[.]" *Id.* at 564 (citations omitted). Third, "the *Tinker* standard applies to all other student speech and allows regulation only when the school reasonably believes that speech will substantially interfere with schoolwork or discipline[.]" *Id.* (citations omitted).

Then, in 2010 in *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010), the Sixth Circuit called into question the rigidity of the three categories described in *Barr*. Judge Rogers, writing for the majority, suggested that the broad description of the third category— all student expression not covered by the first and second categories—was not necessary to the decision in *Barr*. *Id.* at 341. Reading the combination of Tinker, Fraser, and Morse, Judge Rogers concluded that the Tinker approach is not absolute and schools do not always have to show a substantial disruption in student speech cases. *Id.* at 340, 342. Following *Defoe*, at least in this circuit,

> the general rule is that school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education. *Tinker* provides the exception—schools cannot go so far as to limit nondisruptive discussion of political or social issues that the administration finds distasteful or wrong. Drawing such a line may be difficult, but it must be left as a practical matter first to school administrators, with resort to the courts always available for cases like *Tinker* where the school goes too far.

Id. at 342.

V.

The dispute between the parties, and the issue central to the cross motions for summary judgment,

concerns whether the phrase Let's Go Brandon falls under *Tinker* as "closely akin to 'pure speech,'" *Tinker*, 393 U.S. at 505, or whether the phrase falls under *Fraser* because it constitutes "lewd, indecent, or offensive speech," *Fraser*, 478 U.S. at 683, or somewhere in between the two. For the reasons provided below, the Court concludes the School District can restrict students from wearing Let's Go Brandon apparel.

A.

In school speech cases where a school limits or restricts a student's expression, courts must determine whether the school's interpretation of the expression is reasonable. *Morse*, 551 U.S. at 401. The majority agreed that the message on the banner was "cryptic" and would be offensive to some, humous to others, and for some nonsensical. *Id.* For a school's interpretation to be reasonable, the interpretation must be more than a mere possibility. *Id.* at 402 ("Gibberish is certainly a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores the undeniable reference to illegal drugs."). The student's expression must be considered in the proper context but the student's motivation or subjective intent is irrelevant. *Id.* The court does not substitute its judgment for that of the school administrator. *Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 360 (6th Cir. 2023) (citations omitted). The court's task is to determine if the school's interpretation is reasonable, because the "'determination of what manner of speech in the classroom or school assembly is inappropriate properly

rests with the school board.'" *Parents Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Educ.*, 109 F.4th 453, 462 (6th Cir. 2024) (quoting Fraser, 478 U.S. at 683).

The parties present the Court with two interpretations of Let's Go Brandon. Plaintiffs argue the phrase functions as a way of expressing disagreement with the Biden Administration. Defendants argue the phrase conveys a profane and vulgar message in reference to President Biden.

B.

Defendants argue that TCMS can regulate student apparel bearing the phrase Let's Go Brandon as profane because the phrase means F*** Joe Biden.

Defendants have established that a reasonable interpretation of the phrase Let's Go Brandon is that it conveys a profane and vulgar message with reference to President Joe Biden.[6] The parties agree that TCMS's dress code prohibits clothing with vulgar or profane messages (ECF No. 38 Pl. Brief at 4 PageID.369; ECF No. 39 Pl. Br. at 4 PageID.537). Buikema testified that the dress code prohibits students from wearing attire with messages or illustrations that are lewd, indecent, vulgar or profane

6. The Court does not conclude that Let's Go Brandon can be regulated as offensive speech. *See Morse*, 551 U.S. at 409 (questioning whether student speech can be regulated because the message might be offensive to some). Nor does the Court conclude that the phrase constitutes lewd speech.

(Buikema Dep. at 20 PageID.421). He testified that the prohibition on profane messages refers to inappropriate swear words (*id*. at 30 PageID.424). The parties agree about the origin of Let's Go Brandon (ECF No. 38 at 1 PageID.366; ECF No. 39 at 6 PageID.539). It began as a cheer using a swear word.

The evidence in the record establishes that Plaintiffs and Defendants understood that the phrase referenced the profane chant at the NASCAR event. Before wearing the sweatshirts, both D.A. and X.A. had seen the Brandon Brown video. D.A. and X.A. admitted at their depositions that they thought the shirt was funny because it meant F*** Joe Biden (D.A. Dep. at 11-12 PageID.404; X.A. Dep. at 9 PageID.411). Defendant Buikema testified that he understood Let's Go Brandon to mean F*** Joe Biden (Buikema Dep. at 52 PageID.429). Buikema had the students change their attire because the phrase violated the school's dress code provision concerning profanity (*id*. at 51-52 PageID.429). Defendant Bradford testified that she learned from other teachers that Let's Go Brandon means F*** Joe Biden (Bradford Dep. at 26-27 PageID.444). Bradford also testified that she thought the phrase violated the dress code as lewd, vulgar and profane and generally inappropriate for middle school (*Id*. at 36-38 PageID.446-47).

A school can certainly prohibit students from wearing a shirt displaying the phrase F*** Joe Biden. Plaintiffs concede this conclusion (ECF No. 39 PageID.554; ECF No. 44 PageID.791). Plaintiff must make this concession as the Supreme Court said as much in *Fraser*. *Fraser*, 478 U.S. at 682-83 ("As

cogently expressed by Judge Newman, 'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.") (citing *Thomas v. Bd. of Educ., Grandville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979)).[7] The relevant four-letter word is a swear word and would be considered vulgar and profane. The Sixth Circuit has written that "it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection." *Bonnell v. Lorenzo*, 241 F.3d 800, 821 (2001). Schools have restricted student apparel containing vulgarity and profanity even when the content of the message is consistent with at least part of the schools' educational mission. *See, e.g,. Broussard v. Sch. Bd. of City of Norfolk,* 801 F. Supp. 1526, 1527 (E.D. Va. 1992) (suspending a middle school student for refusing to change out of a New Kids on the Block concert shirt that includes the words "Drugs Suck!"); *Pyle v. South Hadley Sch. Comm.*, 824 F. Supp. 7, 9 (D. Mass. 1993) (involving a t-shirt with the message "See Dick Drink. See Dick Drive. See Dick Die. Don't Be A Dick.").

If schools can prohibit students from wearing apparel that contains profanity, schools can also

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7. In his concurring opinion, Judge Newman referred to a jacket worn by Robert Cohen who was convicted for disturbing the peace by offensive conduct when he wore, to the courthouse, a jacket bearing the words "F*** the Draft." *See Cohen v. California*, 403 U.S. 15, 16 (1971). The Supreme Court reversed the judgment as inconsistent with the First and Fourteenth Amendments. *Id.* at 26.

prohibit students from wearing apparel that can reasonably be interpreted as profane. Removing a few letters from the profane word or replacing letters with symbols would not render the message acceptable in a school setting. School administrators could prohibit a shirt that reads "F#%* Joe Biden." School officials have restricted student from wearing shirts that use homophones for profane words. *See, e.g., Mercer v. Harr,* No. Civ. A. H-04-3454, 2005 WL 1828581 (S.D. Tex. Aug. 2, 2005) (granting summary judgment in favor of the middle school when the school forbid a student from wearing a shirt that read "Somebody Went to HOOVER DAM And All I Got Was This 'DAM' Shirt."). Defendant Bradford recalled speaking to one student who was wearing a hat that said "Fet's Luck" (Bradford Dep. at 15 PageID.441). She thought the hat was inappropriate for school because rearranging the first letters of the two words resulted in a lewd message (*id.* at 15-16 PageID.441). Defendant Buikema testified that he asked a student to change out of a hoodie that displayed the words "Uranus Liquor" because the message was lewd (Buikema Dep. at 23 PageID.422). School officials could likely prohibit students from wearing concert shirts from the music duo LMFAO (Laughing My F***ing A** Off) or apparel displaying "AITA?" (Am I the A**hole?).[8] Both letter

8. The likelihood that a student would wear a LMFAO concert shirt is small as the two musicians stopped performing together in 2012 after appearing at that year's Superbowl's halftime show. However, both LMFAO and LMAO are acronyms frequently used in text messages, something courts have been asked to consider. *See, e.g., In Longoria v. San Benito Consol. Indep. Sch. Dist.*, 942 F.3d 258 (5th Cir. 2019) (involving student

combinations are popular acronyms containing profanity and are frequently used on social media. Courts too have recognized how seemingly innocuous phrases may convey profane messages. A county court in San Diego, California referred an attorney to the State Bar when counsel, during a hearing, twice directed the phrase "See You Next Tuesday" toward two female attorneys.[9]

Because Defendants reasonably interpreted the phrase as having a profane meaning, the School District can regulate wearing of Let's Go Brandon apparel during school without showing interference or disruption at the school. *See Morse*, 551 U.S. at 405 ("Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*."); *Defoe*, 625 F.3d at 338; *Barr*, 538 F.3d at 563 (citing *Tinker*, 393 U.S. at 509).

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text messages and resolving the First Amendment claim on qualified immunity grounds). AITA? is a popular forum on the Reddit website. The Court is unaware of any court opinions involving AITA? apparel but notes that shirts with the acronym are available for purchase on multiple websites.

9. *See* https://www.calbar.ca.gov/portals/0/documents/Minute-Order-Scott.pdf (last visited August 16, 2024). The first two words of the four-word phrase sound like the letters "C" and "U." Adding the first two letters of the last two words in the phrase creates a four-letter vulgar insult.

C.

Plaintiffs assert that the phrase has taken on a different meaning. Plaintiffs argue that the phrase has become a "cleaned up [political] slogan to express displeasure with President Biden and his administration" citing a November 15, 2021, article from the Washington Post written by Annie Linskey titled "How 'Let's Go Brandon' became an unofficial GOP slogan" (ECF No. 39 PageID.539). Plaintiffs offer evidence to show widespread use of the phrase including use of the slogan on a variety of merchandise, use of the phrase by three members of the House of Representatives, and its use on both television and radio. D.A. testified that he thought the sweatshirt was funny because "it was a respectful way of saying that you dislike the current president" (D.A. Dep. at 11 PageID.404). Both D.A. and X.A. submitted affidavits stating that they thought they "want to use the slogan to respectfully express opposition to President Biden and his administration without using profanity or vulgarity" (ECF No. 39-2 D.A. Aff. PageID.580; ECF No. 39-3 X.A. Aff. PageID.584).

Plaintiffs have not established that Let's Go Brandon does not mean F*** Joe Biden. More specifically, Plaintiffs have not established that Buikema's and Bradford's interpretation of Let's Go Brandon was not reasonable. Most of what Plaintiffs reference in their briefs establishes that people use the phrase. The slogan's popularity, however, does not provide much, if any, insight about the intended meaning of the phrase by its users or how the audience interprets the phrase.

Importantly, none of the examples offered by Plaintiffs concern the display or use of the phrase in a school setting. In its student speech opinions, the Supreme Court has emphasized the legal principle that "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.'" *Morse*, 551 U.S. at 404-05 (quoting *Fraser*, 478 U.S. at 682). Part of a public education includes "inculcat[ing] the habits and manners of civility[.]" Fraser, 403 U.S. at 681 (citation omitted). The freedom to express "unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interests in teaching students the boundaries of socially appropriate behavior." *Id.* Specifically, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. Consistent with the First Amendment, a school may prohibit student apparel bearing "symbols and words that [ ] are patently contrary to the school's educational mission[.]" *Boroff v. Van Wert City Bd. of Educ.,* 220 F.3d 465, 471 (6th Cir. 2000) (affirming a decision granting summary judgment in favor of the school defendants who prohibited a student from wearing Marilyn Manson t-shirts to school because the music group promoted destructive conduct and demoralizing values). The examples of the use of Let's Go Brandon outside of the school setting does not undermine the reasonableness of Defendants' interpretation of the phrase.

The only evidence Plaintiffs offer to support the conclusion that the phrase has taken on a different

meaning is found in the article from the Washington Post.[10] The article quotes former press secretary Sean Spicer who says that the slogan can be used to express all of the frustrations people have about the Biden Administration. But, Spicer admits that the phrase has several meanings. The author observes that the phrase is an "inside joke" used to "insult the administration" using "language designed to conceal an expletive." The author notes that at least one company removes the phrase from users' online profiles because the phrase is divisive. The article likely offers more support for the reasonableness of Defendants' interpretation of the phrase than it does for Plaintiffs' interpretation. D.A.'s and X.A.'s intent to be respectful and avoid the use of profanity does not change the outcome. Their intent does not establish how the message would be interpreted by others. And, in *Morse*, the Supreme Court rejected the plaintiff's motive as controlling when the principal's interpretation of the banner was reasonable. *Morse*, 551 U.S. at 401.

Plaintiffs have not persuaded the Court that Defendants cannot restrict use of the disputed phrase because none of the three words, considered separately, are profane. The Court declines to read *Fraser* so narrowly. Matt Fraser's speech was lewd through his use of "pervasive sexual innuendo." *Fraser*,

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10. https://www.washingtonpost.com/politics/lets-go-brandon republicans/2021/11/14/52131dda-4213-11ec-9ea7-3eb2406a2e24_story.htm. For the purpose of this opinion only, the Court sets aside any concerns about the admissibility of this article at a trial, including any of the statements made in the article.

478 U.S. at 683. The audience understood his message was not really about supporting a candidate for student vice president. Plaintiffs must concede that the disputed phrase requires interpretation. The phrase means something other than the dictionary definition of the three words. D.A. and X.A. are not enthusiastic supporters of someone named Brandon. Albeit using different words, Let's Go Brandon, means F*** Joe Biden, a personal insult containing a swear word. Defendants both interpreted the phrase as having a profane meaning. Both D.A. and X.A. thought the phrase was funny because it meant a profanity. When students use language in a school setting that can reasonably be interpreted as inappropriate, courts have permitted schools to discourage students from using that language. *See, e.g. Doniger v. Neihoff*, 527 F.3d 41, 48 (2d Cir. 2008) (involving a student who called school administrators "douchebags"). The undeniable connection between Let's Go Brandon and F*** Joe Biden distinguishes Plaintiffs' apparel from the shirt in *Guiles ex rel. Guiles, v. Marineau*, 461 F.3d 320, 322 (2d Cir. 2006) calling President George W. Bush a crook, cocaine addict, draft dodger and lying drunk driver.

Plaintiffs' restrictive interpretation of the holding in *Fraser* ignores how language works and how courts have treated messages with profane meanings. Words constitute profanity because of the meaning conveyed, not because of the specific letters used to form the word. Under Plaintiff's approach, a school could not discipline a student for calling a teacher a "cretinous onager" or for telling the principal to "ingest fecal matter and pass away." Neither combination of words contains a swear word, but both word combinations

would convey profane content. And directing the words toward a political figure instead of a teacher or principal does not make the content less profane.

Finally, Plaintiffs urge the Court to follow the Third Circuit's holding in *B.H. v. Easton School District*. Restricting the scope of the holding in Fraser, the Third Circuit identified a novel category of student speech protected by the First Amendment: "We hold that, under *Fraser*, a school may also categorically restrict speech that—although not *plainly* lewd, vulgar, or profane—could be interpreted by a reasonable observer as lewd, vulgar, or profane so long as it could not also plausibly be interpreted as commenting on a political or social issue." *Id.* at 302. The Court declines Plaintiffs' invitation. For the reasons explained above, Defendants' reasonably interpreted Let's Go Brandon as having a profane meaning. In a middle school, the phrase enjoys no more First Amendment protection that Matt Fraser's nominating speech—none at all.

In the more than ten years since the *B.H.* opinion issued, no other circuit court has adopted the Third Circuit's new category of student speech. The Third Circuit relied on Justice Alito's concurring opinion to reach its holding. *Id.* at 309-15; see also Morgan, 659 F.3d at 403 (referring to Justice Alito's concurrence as the "controlling opinion"). The Seventh Circuit, however, has rejected the argument that Justice Alito's concurrence controls the proper interpretation of *Morse*. *See Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008). And, as pointed out by the dissent in *B.H.*,

> nine of ten appellate courts have cited as its holding the following standard articulated by Chief Justice Robers in his opinion for the Court: "[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use," *Morse*, 551 U.S. at 403. Not one of these courts indicated that Justice Alito's concurrence controls, or that his dicta regarding "political or social speech" altered or circumscribed the Court's holding in *Morse*.

B.H., 725 F.3d at 328 (Hardiman, J. dissenting); *see, e.g., Defoe,* 625 F.3d at 332-33.

This Court agrees that political expression, the exchange of ideas about the governance of our country, deserves the highest protection under the First Amendment. *See Snyder v Phelps*, 562 U.S. 443, 452 (2011). But Plaintiffs did not engage in speech on public issues. Defendants reasonably interpreted Let's Go Brandon to F*** Joe Biden, the combination a politician's name and a swear word—nothing else. Hurling personal insults and uttering vulgarities or their equivalents towards one's political opponents might have a firm footing in our nation's traditions, but those specific exchanges can hardly be considered the sort of robust political discourse protected by the First Amendment. As a message, F*** Joe Biden or its equivalent does not seek to engage the listener over matters of public concern in a manner that seeks to expand knowledge and promote understanding. When

teachers and officials at a middle school reasonably determine that a message conveys profanity, Morse requires deference to that interpretation.

D.

Accordingly, the Court finds that Defendants did not violate D.A.'s or X.A.'s First Amendment rights when Defendants restricted Plaintiffs' ability to wear Let's Go Brandon apparel. The clothing contained a message with a profane meaning. Applying the reasonable interpretation standard in *Morse* with the school's authority to restrict profane messages in *Tinker*, Defendants are entitled to summary judgment on Counts I and III.[11] Defendants are also entitled to summary judgment on Count II. For a *Monell* claim, "there can be no liability … without an underlying constitutional violation." *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014).

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11. Having found no constitutional violation, Defendants' request for qualified immunity becomes moot. *See Adams v. City of Auburn Hills,* 336 F.3d 515, 520 (6th Cir. 2003) ("Because the Fourth Amendment is not implicated, Adams has not alleged a constitutional violation to support a § 1983 claim. Without an underlying constitutional violation, the question of whether Backstrom is entitled to qualified immunity is moot."); *Ahlers v. Schebil*, 188 F.3d 365, 374 (6th Cir. 1999) ("As we hold that sufficient probable cause existed, this necessarily means that the arrest complied with constitutional requirements and that Ahlers was not deprived of a constitutional right. As a result, there is no claim under § 1983, and Defendants have no need for a qualified immunity defense.").

VII.

In school settings, profanity does not enjoy First Amendment protection. Directing profanity toward a political figure does not transform the utterance to protected speech. Indisputably, the phrase Let's Go Brandon originated as a profane personal insult directed at President Joe Biden. When Plaintiffs wore sweatshirts bearing the phrase to their middle school, school officials reasonably interpreted the phrase as having a profane meaning. The school officials then enforced the dress code and had Plaintiffs change their attire. The school's actions did not violate Plaintiffs' First Amendment rights.

ORDER

For the reasons outlined in the accompanying Opinion, the Court GRANTS Defendants' motion for summary judgment (ECF No. 38) and DENIES Plaintiffs' motion for summary judgment (ECF No. 39). IT IS SO ORDERED.

Date: August 23, 2024

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

APPENDIX C

No. 24-1769

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 26, 2025
KELLY L. STEPHENS, Clerk

B. A., mother of minors D. A. and X. A.,
Plaintiff,

D. A. and X. A., minors, by and through their mother, B. A.,
Plaintiffs-Appellants,

v.

TRI COUNTY AREA SCHOOLS; ANDREW BUIKEMA and WENDY BRADFORD, in their individual capacities,
Defendants-Appellees.

O R D E R

BEFORE: MOORE, BUSH, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Bush would grant rehearing for the reasons stated on his dissent.

ENTERED BY ORDER OF THE COURT
/s/
Kelly L. Stephens, Clerk