

No. 25-1143

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IN THE

**Supreme Court of the United States**

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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.*

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

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**BRIEF OF FIRST AMENDMENT SCHOLARS  
AS *AMICI CURIAE* IN SUPPORT  
OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE***

*Amici* are legal scholars who have a strong interest in promoting a sound interpretation of the First Amendment consistent with the constitutional values served by protecting free expression — including safeguarding the political speech rights of public-school students. *Amici* are concerned that the decision below impermissibly extends the authority of public-school officials to penalize students for expressing political viewpoints in the school environment that are neither sexually explicit or profane, nor disruptive to the learning process. This unwarranted government overreach constraining student speech violates the First Amendment. *Amici* are listed in the Appendix.<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 37.2, the parties were notified of this brief's filing at least 10 days prior to its due date, and have consented to its filing. Pursuant to Rule 37.6, counsel for *Amici* affirm that no counsel for either party in this case authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a half-century, public-school students in the United States have been entitled to express their political views inside the “schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed, this Court lauds public schools as “nurseries of democracy” that train young citizens who need broad exposure to diverse viewpoints. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021); *Tinker*, 393 U.S. at 512. Yet, by affirming the District Court’s decision to defer to a school’s interpretation of a popular phrase mischaracterized as “profane,” the Sixth Circuit authorized broad censorship of nondisruptive student political speech in school based merely on the sensibilities of two school officials. As Judge Bush underscored in dissent, the majority’s approach unnecessarily created circuit splits and deepened confusion regarding the scope of public-school students’ free speech rights. *B.A. v. Tri Cnty. Area Schs.*, 156 F.4th 782, 799, 813 (6th Cir. 2025) (Bush, J., dissenting). The ruling below erodes the core constitutional protection for public-school student speech established in *Tinker*.

The Sixth Circuit erroneously upheld the Tri County Area Schools’ ban on sweatshirts worn by two middle-school students, D.A. and X.A. (“Petitioners”), which featured the political slogan “Let’s Go Brandon.” The District Court’s decision turned on whether the display of the “Let’s Go Brandon” phrase was “closely akin to ‘pure speech,’” like the political expression protected in *Tinker*, or whether it

constituted profane speech, proscribable under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). *D.A. ex rel. B.A. v. Tri Cnty. Area Schs.*, 746 F.Supp.3d 447, 458 (W.D. Mich. 2024). Relying on *Fraser*, the District Court deferred to school administrators’ interpretation of the slogan by prohibiting Petitioners’ from wearing the sweatshirts without need of “showing interference or disruption at the school.” *Id.* at 461.

In reviewing the District Court’s grant of summary judgment to the school district, the Sixth Circuit focused on “whether a phrase that lacks explicitly profane words might still have a vulgar meaning” and “whether a school administrator may prohibit student political speech that has a vulgar message.” *Tri Cnty.*, 156 F.4th at 789. The slogan at issue — which contains no profanity — originated in the public domain on October 2, 2021, after driver Brandon Brown won a NASCAR race.<sup>2</sup> During a post-

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<sup>2</sup> See Annie Linskey, *How ‘Let’s Go Brandon’ Became an Unofficial GOP Slogan*, WASH. POST (Nov. 15, 2021), [https://www.washingtonpost.com/politics/lets-go-brandon-republicans/2021/11/14/52131dda-4312-11ec-9ea7-3eb2406a2e24\\_story.html](https://www.washingtonpost.com/politics/lets-go-brandon-republicans/2021/11/14/52131dda-4312-11ec-9ea7-3eb2406a2e24_story.html); 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-joe-biden-ab13db212067928455a3dba07756a160>; Lindsay Lowe, *‘Let’s Go Brandon’ Explained*, TODAY (Feb. 10, 2022), <https://www.today.com/news/what-does-let-s-go-brandon-mean-t237389>; Blake Hounshell & Leah Askarinam, *‘Let’s Go, Brandon’ Zooms From Vulgar Meme to Campaign Ad*, N.Y. TIMES (Jan. 12, 2022),

race television interview with the winner, spectators audibly chanted “Fuck Joe Biden.”<sup>3</sup> The reporter told viewers that the crowd was chanting “Let’s Go Brandon.”<sup>4</sup> Post-report, the phrase took on a life of its own, becoming entrenched in national political discourse.<sup>5</sup> For over four years, “Let’s Go Brandon” served as a rallying cry, expressing anti-Biden sentiment for some and distrust of liberal media for others.<sup>6</sup>

In evaluating Tri County Area Schools’ decision to ban Petitioners’ “Let’s Go Brandon” sweatshirts, the Sixth Circuit repeated the District Court’s constitutional error by failing to apply *Tinker*’s “substantial disruption” test. As other circuits have recognized, schools must satisfy this evidentiary standard when seeking to prohibit student expression that communicates a political message. *Tinker*, 393 U.S. at 508–09. The Sixth Circuit, however, bypassed this test, relying instead on an unduly expansive reading of *Fraser* that effectively allows public schools to suppress any disapproved viewpoint so long as they claim it could be “reasonably interpreted” as vulgar or profane. *Tri Cnty.*, 156 F.4th at 791–92. By differentially accepting school officials’ interpretation that Petitioners’ “Let’s

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<https://www.nytimes.com/2022/01/12/us/politics/lets-go-brandon-meme-gop.html>.

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

Go Brandon” sweatshirts conveyed an impermissibly profane message, the panel created multiple circuit splits, departed from established public-school student free speech principles, and upheld the censorship of Petitioners’ political message. The First Amendment prohibits this outcome.

The Sixth Circuit’s decision compounds the confusion in student speech doctrine. This Court should grant *certiorari* to clarify that *Fraser* does not confer broad authority on public school districts to censor nondisruptive political speech that is not facially vulgar or profane; such speech is regulable only upon a showing of “material disruption” that satisfies *Tinker*.<sup>7</sup>

## ARGUMENT

### I. *Tinker*’s “Material Disruption” Standard Governs Public-School Student Political Expression Within The “Schoolhouse Gate”

In the landmark *Tinker* case, students wore black armbands to school to oppose America’s involvement in the Vietnam War. 393 U.S. at 504. Aware in advance of this protest, school administrators prohibited students from wearing an

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<sup>7</sup> *Fraser*’s rationale has been criticized for lacking clarity. Scott A. Moss, *The Overhyped Path from Tinker to Morse: How the Student Speech Cases Show the Limits of Supreme Court Decisions – For the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1425 (2011) (describing *Fraser* as a “Rorschach precedent.”).

armband to school. *Id.* The peaceful protestors were suspended under this regulation. *Id.* Invalidating their suspensions, the *Tinker* Court held that wearing the armbands involved “direct, primary First Amendment rights akin to ‘pure speech.’” *Id.* at 508. Absent evidence that the armbands had “materially and substantially interfere[d]” with school discipline or infringed on other students’ rights, *Tinker* determined their display was protected by the First Amendment. *Id.* at 509, 514.

*Tinker’s* standard governs students’ political speech, barring its censorship “unless it would materially and substantially disrupt classwork and discipline in the school.” *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006). Importantly, “the mere desire to avoid ‘discomfort’ or ‘unpleasantness’ is not enough to justify restricting student speech under *Tinker*.” *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (Alito, J.). Because *Tinker* abides no carveout for “controversial, offensive, or disfavored views[,]” the decision below should be reversed. *L.M. v. Town of Middleborough*, 145 S. Ct. 1489, 1493 (2025) (Alito, J., dissenting from denial of *certiorari*).

## **II. *Fraser* Is Limited to Sexualized or Profane Speech That Risks Being Associated With The School**

### **A. *Fraser’s* Rationale Applies Only in a Narrow Context.**

The Sixth Circuit’s opinion hinges on a decontextualized interpretation of *Fraser*. According to the Sixth Circuit, *Fraser* “leave[s] it to the school”

to “regulate speech that conveys an obscene or vulgar message even when the words used are not themselves obscene or vulgar,” provided that the school’s interpretation of the speech “is not unreasonable.” *Tri Cnty.*, 156 F.4th at 791–92. That is not what *Fraser* holds.

In *Fraser*, a student delivered a speech at a mandatory high school assembly nominating a fellow student for elective office. 478 U.S. at 677. His oratory employed an “elaborate, graphic, and explicit sexual metaphor.” *Id.* at 677–78. The assembly was “part of a school-sponsored educational program in self-government,” and “[a]pproximately 600 high school students” were compelled to attend. *Id.* at 677.

Addressing *Fraser*’s expressive rights, this Court considered a narrow question: “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.” *Id.* Against this backdrop, *Fraser* held that the school district permissibly imposed a three-day suspension in response to the “offensively lewd and indecent speech.” *Id.* at 685. Emphasizing schools’ role in inculcating civic values necessary to democratic society, the Court reasoned that “[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.” *Id.* at 685.

*Fraser*’s holding is cabined by context-dependent factors. First, the student’s speech,

saturated with sexual innuendos, was plainly lewd. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 305 (3d Cir. 2013) (*en banc*) (“*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.”). *Fraser* therefore emphasized that it is “highly appropriate” for public schools to prohibit sexualized language in school settings. 478 U.S. at 683. The Court described the speech as “seriously damaging” to younger students “on the threshold of awareness of human sexuality.” *Id.* Acknowledging a previously recognized “interest in protecting minors from exposure to vulgar and offensive spoken language,” the Court held that the First Amendment did not prevent public schools from restricting a “sexually explicit monologue” to an impressionable audience compelled to listen.<sup>8</sup> *Id.* at 684–85.

Second, *Fraser*’s speech was delivered at a school-controlled event. Without penalizing *Fraser*’s speech, the district may have appeared to condone its language.<sup>9</sup> Thus, schools may “disassociate”

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<sup>8</sup> *Fraser* cited *FCC v. Pacifica Foundation*, which authorized the FCC to regulate an afternoon radio broadcast of George Carlin’s “Filthy Words” monologue that, while explicit, fell short of being obscene. 438 U.S. 726, 729 (1978). There, this Court highlighted how radio broadcasts were “uniquely accessible to children” and “prior warnings” could not “completely protect the listener or viewer from unexpected program content” since listeners could tune in at any moment. *Id.* at 748–49. *Pacifica*’s reasoning informed *Fraser*’s holding.

<sup>9</sup> Thus, Matthew *Fraser*’s punishment also served to instruct fellow students about appropriate boundaries for civil discourse. Emily Gold Waldman, *No Jokes About Dope*: *Morse v.*

themselves from speech reasonably perceived as school-sponsored, particularly “to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the ‘fundamental values’ of public school education.” *Fraser*, 478 U.S. at 685–86; *see also Mahanoy*, 594 U.S. at 182 (noting that *Fraser* applies to regulate “‘indecent,’ ‘lewd,’ or ‘vulgar’ speech uttered during a school assembly on school grounds,” an arguably more context-restrictive reading).

Accordingly, *Fraser* holds that schools may ban plainly sexualized or profane speech in school-sponsored settings.<sup>10</sup> It does not authorize schools to ban facially non-vulgar speech, as the Sixth Circuit erroneously held here.

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Frederick’s *Educational Rationale*, 81 UMKC L. REV. 685, 690 (2013) (“[T]he punishment would serve as a lesson to this student-speaker — and other student-listeners — about ‘the habits and manners of civility as values in themselves.’”) (citation omitted) (emphasis supplied)).

<sup>10</sup> Legal scholars have emphasized the narrowness of *Fraser*’s holding. *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 104 (2010) (“*Fraser* holds that three factors are important for schools to assert jurisdiction over student speech: (1) there must be a captive audience; (2) the speech must involve lewd or indecent sexual content; and (3) the school must have a need to disassociate itself from the speech.”).

**B. By Reviving *Boroff*, *Tri County*  
Departed from This Court’s Public-  
School Student Speech Doctrine.**

The Sixth Circuit majority relied on *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), a widely criticized decision, to support its overbroad reading of *Fraser* and deference to school authorities. *Tri Cnty.*, 156 F.4th at 791–92. In *Boroff*, a public high school barred a student from wearing Marilyn Manson t-shirts. 220 F.3d at 470. The principal objected to the t-shirts’ promotion of “destructive conduct and demoralizing values that [were] contrary to the educational mission of the school.” *Id.* at 469. Although the speech was neither lewd nor profane, the majority upheld the ban, reasoning that the school’s prohibition of the apparel as “offensive” was reasonable in light of the school’s “educational mission” “to be respectful of others and others’ beliefs.” *Id.* at 469–70.

The *Tri County* majority accepted *Boroff* in concluding that “schools have significant latitude to find that speech” may be proscribed to further their educational mission when it is reasonably understood as vulgar. 156 F.4th at 792. This misplaced reliance on *Boroff* ignores this Court’s decision in *Morse v. Frederick*, 551 U.S. 393 (2007). *Morse* clarified that “plainly offensive” as used in *Fraser* “should not be read to encompass any speech that could fit under some definition of ‘offensive’” because this would violate the First Amendment. 551 U.S. at 409. If *Fraser* permitted such broad regulation, *Morse* recognized that “much political and religious speech

might be perceived as offensive” and prohibited by school authorities. *Id.*

*Morse* leaves no constitutional room to apply *Fraser* in a way that grants school officials broad discretion to regulate student speech deemed offensive because of its perceived incompatibility with the school’s educational mission. Indeed, Justice Alito repudiated this approach as “strik[ing] at the very heart of the First Amendment.” *Morse*, 551 U.S. at 423 (Alito, J., concurring). Because the “educational mission” of public schools “can easily be manipulated in dangerous ways” to suppress student speech deemed offensive or unacceptable by school authorities, it amounts to a license for censorship irreconcilable with the First Amendment.<sup>11</sup> *Id.* If *Fraser* allowed regulation whenever officials deemed speech profane or offensive, a wide swath of expression — including political and social speech unassociated with the school — could be restricted. The risk to expressive liberty posed by such an approach counsels against this reading of *Fraser*.

The tension between *Boroff* and this Court’s ruling in *Morse* was recognized well before *Tri County*. See, e.g., *DePinto v. Bayonne Bd. of Educ.*, 514 F.Supp.2d 633, 644 (D.N.J. 2007) (“*Boroff* stands

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<sup>11</sup> Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1089 (2008) (“As Justice Alito recognized in his *Morse* concurrence, however, giving schools broad authority to suppress speech in the name of promoting their educational mission is dangerous. Given that public students already face compulsory attendance laws, the risk of improper governmental indoctrination is high.” (citation omitted)).

alone” in adopting a broad reading of *Fraser* and “must now be called into question” after *Morse*). Other circuits have likewise rejected *Boroff’s* approach. *Guiles*, 461 F.3d at 329 (declining to adopt *Boroff’s* broad reading of *Fraser*); *see also Hawk*, 725 F.3d at 316; *L.M. v. Town of Middleborough*, 103 F.4th 854, 878 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1489 (2025). The Sixth Circuit’s rule — permitting schools to prohibit political speech adjudged inconsistent with their educational mission so long as the decision is “not unreasonable” — stands alone and in violation of the First Amendment.

By ignoring *Morse* and following *Boroff*, *Tri County* departs from core public-school student speech principles. *Boroff* enables school districts beholden to majoritarian constituencies to define their educational mission by reference to prevailing political and social views. *See Morse*, 551 U.S. at 423 (Alito, J., concurring). If such norms set the baseline for what is “inappropriate for the school environment,” substantial student expression will be chilled. *Tri Cnty.*, 156 F.4th at 786. This Court should repudiate *Boroff’s* rationale as impermissible under the First Amendment.

**C. D.A.’s and X.A.’s “Let’s Go Brandon”  
Sweatshirts Were Neither Sexually  
Explicit Nor Profane.**

The Sixth Circuit agreed with the District Court’s reasoning that if “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.” *Id.* at 788. This analysis cannot be reconciled with *Fraser*, which limits protection of in-school student speech only when it describes sexual acts or is profane. Noting that “many people understand that slogan to mean ‘Fuck Joe Biden,’” the Sixth Circuit impermissibly deferred to school officials’ subjective interpretation of the implicit message Petitioners’ sweatshirts purportedly conveyed. *Id.* at 791, 794. In effect, the school district was allowed to punish Petitioners not for the language they actually used, but for the language they chose *not* to use.<sup>12</sup>

To justify its interpretation, the Sixth Circuit misread *Fraser* in another fundamental way. It asserted that *Fraser* was “not just concerned with regulation of vulgar words but the regulation of vulgar speech” because Fraser’s speech, while “obviously vulgar,” “didn’t use any explicitly vulgar words.” *Id.* at 792. Thus, the majority found that *Fraser* supports school regulation of “speech that conveys an obscene or vulgar message even when the words used are not themselves obscene or vulgar.” *Id.* at 791. But “[t]he First Amendment is no word game[,]” and the Sixth Circuit’s extrapolation from *Fraser* goes too far. *Chiles v. Salazar*, 146 S. Ct. 1010, 1023 (2026). Chief Justice Burger highlighted that

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<sup>12</sup> Treating a euphemistic political slogan as identical to the uncensored expletive it alludes to collapses a linguistic distinction. Speakers use euphemisms to avoid direct profanity. Disregarding that distinction lets schools punish students not for the words they used, but for harsher language officials attribute to them.

Fraser's speech was an "elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 678. Indeed, the *only* way the oration in *Fraser* could be understood was as referencing sexual conduct. See *Hawk*, 725 F.3d at 304; *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Guiles*, 461 F.3d at 328.

Not so here. As Judge Bush recognized in dissent, "Let's Go Brandon" contains none of George Carlin's "Filthy Words" or other profanity. See *Pacifica*, 438 U.S. at 729. Indeed, "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." *Tri Cnty.*, 156 F.4th at 813 (Bush, J., dissenting).

Testimony in the record from Defendants, which the Sixth Circuit omitted, exposes the danger of deferring to school administrators' "reasonable" interpretations of speech rather than relying on *Fraser's* "per se" standard. School district officials testified that the sweatshirts were "vulgar, profane, and pornographic." Appellants' Br. at 13, *Tri Cnty.*, 156 F.4th 782 (No. 24-1769). But nothing about the "Let's Go Brandon" slogan is remotely sexual, let alone pornographic, so it cannot be considered "plainly lewd" as required under *Fraser*. See *Guiles*, 461 F.3d at 328.

Consider also the range of controversial student speech about sexuality and gender identity, which exemplifies the First Amendment danger of deferring to administrators' "reasonable"

interpretations of speech as profane or offensive. One school district may assert that promoting LGBTQ themes is offensive for religious reasons and ban students from wearing clothing with pride flags. *See, e.g., Young v. Giles Cnty. Bd. of Educ.*, 181 F.Supp.3d 459, 461 (M.D. Tenn. 2015) (considering a school’s ban on a t-shirt stating “Some People Are Gay, Get Over It”). A school the next town over may assert that a student’s traditional perspective about sexuality and gender identity constitutes harassment. *See, e.g., L.M.*, 103 F.4th at 861 (examining a school’s prohibition of a t-shirt featuring the phrase “There Are Only Two Genders”). If the Sixth Circuit is correct that public schools may ban anything school officials deem plainly offensive, each of these bans would be permissible.

**D. D.A. and X.A. Engaged in Individual,  
Not School-Associated, Expression.**

Unlike in *Fraser*, the school had no need here to disassociate itself from the expression on Petitioners’ sweatshirts for the simple reason that “no one could reasonably believe that the [school] was somehow involved in the morning fashion decisions of a few students.” *Hawk*, 725 F.3d at 321. The message here was personal to the speakers, conveyed on a private article of clothing, and not reasonably understood as associated with or endorsed by the school. This is perhaps the most overlooked factor required under *Fraser*, absent which there is no reason for “trusting school administrators’ self-serving observations.” *L.M.*, 145 S. Ct. at 1496 (Alito, J., dissenting). Just as a school need not disassociate

itself from student speech unconnected to a school-controlled event, there is no need for a school to disassociate itself from clothing a student chooses to wear — especially when it communicates political speech and was received as a holiday gift from parents.<sup>13</sup>

Indeed, like the armbands in *Tinker*, Petitioners' message was "displayed in a manner commonly used to convey . . . political opinion." *Chandler*, 978 F.2d at 530. There was little risk it would be perceived as school-endorsed, and any interest in regulating the expression was attenuated far beyond *Fraser's* mandatory assembly context. The Sixth Circuit ignored the critical First Amendment distinction between a student's expressive activities reasonably perceived as school-sponsored and "a student's personal expression that happens to occur on the school premises" such as Petitioners' sweatshirts, which falls outside *Fraser's* scope. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 271 (1988). This, too, was constitutional error.

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<sup>13</sup> Tomain, *supra* note 10, at 118 ("A school has no need to disassociate itself from off-campus student speech that is not part of a school-sponsored event because no one could reasonably associate a school with such speech.").

### III. The Sixth Circuit's Misapplication of *Fraser* Creates Two Circuit Splits

#### A. No Other Circuit Grants Deference to School Administrators to Punish Nondisruptive Political Speech.

By erroneously reading *Fraser*, the Sixth Circuit stands alone in insisting that the punishment of students' nondisruptive political speech that is not graphically sexual nor profane is permissible under the First Amendment. As Judge Bush highlighted, the Sixth Circuit's interpretation of *Fraser* creates "splits with the Third and Ninth Circuits." *Tri Cnty.*, 156 F.4th at 813 (Bush, J., dissenting).

The Third Circuit has consistently emphasized that *Fraser* applies only to sexualized or profane speech. In *Saxe v. State College Area School District*, plaintiffs challenged the constitutionality of a public school's anti-harassment policy, which would have restricted Christian students from speaking about and distributing literature on their religious beliefs regarding homosexuality. 240 F.3d at 203. The majority noted that *Fraser* permitted restrictions only on "lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school," emphasizing that *Fraser* only prohibits "offensive" language that conveys an obscene meaning. *Id.* at 213. The Third Circuit dismissed *Fraser*'s applicability because the school's anti-harassment policy did not "confine itself merely to vulgar or lewd speech." *Id.* at 216. *Saxe* therefore rejected a broad reading of *Fraser* that would allow

schools to prohibit speech because they view the speech as offensive for reasons unrelated to obscenity.

More recently, in *B.H. ex rel. Hawk v. Easton School District*, the Third Circuit addressed *en banc* the “novel question” of what speech a public school could restrict under *Fraser*. *Hawk*, 725 F.3d at 298 (“The scope of a school’s authority to restrict lewd, vulgar, profane, or plainly offensive speech under *Fraser* is a novel question left open by the Supreme Court, and one which we must now resolve.”). There, the court found that a school’s prohibition of “I ♥ boobies! (KEEP A BREAST)” bracelets by invoking *Fraser* violated the First Amendment. *Id.* at 320. The Third Circuit again emphasized the narrow scope of *Fraser*, explaining that because “Fraser’s speech met the obscenity-to-minors standard, the Court necessarily implied that his speech could not be interpreted as having ‘serious’ political value.” *Id.* at 306 (citation omitted).

The Ninth Circuit has similarly rejected a broad reading of *Fraser*, applying it to permit restrictions only on plainly sexual or profane speech. *Chandler*, 978 F.2d at 530 (limiting *Fraser*’s scope to restricting only “*per se* vulgar, lewd, obscene, or plainly offensive” speech (emphasis supplied)).

In addition to the splits Judge Bush identified, the decision below creates a sharp split with the Second Circuit’s decision in *Guiles*. There, plaintiff sought an injunction prohibiting his middle school from enforcing a dress code that required him to cover up parts of a t-shirt that, “through an amalgam of

images and text,” criticized then-President George W. Bush “as a chicken-hawk” and “accuse[d] him of being a former alcohol and cocaine abuser.” 461 F.3d at 321. Like the Third Circuit, the Second Circuit noted that “*Fraser* permits schools to censor student speech that is ‘lewd,’ ‘vulgar,’ ‘indecent,’ or ‘plainly offensive.’” *Id.* at 327. The court then reviewed each category of speech listed in *Fraser*, concluding that *Fraser*’s reference to “plainly offensive” speech must be “synonymous[] with and as part and parcel of speech that is lewd, vulgar, and indecent — meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity.” *Id.* at 328. If *Fraser*’s reference to “plainly offensive” speech could sweep more broadly, *Guiles* reasoned that “the rule of *Tinker* would have no real effect.” *Id.*

In contrast to the Sixth Circuit, the Second, Third, and Ninth Circuits narrowly confine *Fraser*’s application to sexualized or profane speech. The inconsistent application of *Fraser* by the circuit courts underscores the urgency of this Court’s review to clarify its scope.<sup>14</sup>

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<sup>14</sup> David L. Hudson, Jr. & John E. Ferguson, Jr., *The Court’s Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002) (“The lower courts have applied [*Fraser*] in different ways to reach different outcomes. [Most] courts have cited *Fraser* in such a way as to give public school officials free reign to censor vulgar, lewd, or plainly offensive student speech. Some courts have gone a step further and prohibited student speech that contains offensive ideas.”).

**B. Other Circuits Apply *Tinker* to Students’ Facially Non-Profane Political Speech.**

The Sixth Circuit applied *Fraser* to non-profane political apparel. This creates splits with at least five other circuits, which apply *Tinker* when schools seek to prohibit wearable ideological symbols and slogans. The panel majority ignored the obvious: “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*.” *Tri Cnty.*, 156 F.4th at 812–13 (Bush, J., dissenting).

The First Circuit recently analyzed suppression of potentially offensive political speech under *Tinker*. *L.M.*, 103 F.4th 878–79. Although the panel affirmed the school’s prohibition of a t-shirt stating “There Are Only Two Genders,” it held that *Tinker* governed its analysis. *Id.*

In the Second Circuit, school administrators tried to prohibit a student’s anti-Bush t-shirt. *Guiles*, 461 F.3d at 329. The court recognized that applying *Fraser* to potentially offensive political speech eviscerated *Tinker*. *Id.*

In the Third Circuit, school administrators prohibited a breast cancer awareness campaign’s bracelets bearing “I ♥ boobies! (KEEP A BREAST).” *Hawk*, 725 F.3d at 297–98. *Fraser* did not permit the prohibition of ambiguously lewd speech that could “plausibly be interpreted as commenting on a social

or political issue.” *Id.* at 319–20. Instead, *Tinker* supplied the correct test. *Id.* at 321.

The Fourth Circuit struck down a school dress code that prohibited images of guns. *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 253 (4th Cir. 2003). Refusing to apply *Fraser* to analyze a student’s National Rifle Association t-shirt depicting firearms, the court analyzed the restriction under *Tinker*. *Id.* at 259.

In the Seventh Circuit, Judge Posner analyzed a school’s ban of a t-shirt featuring “Be Happy, Not Gay” under *Tinker*. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 675 (7th Cir. 2008). He acknowledged the “play on words” but found that the school needed to show material disruption. *Id.* at 675–76.

The Sixth Circuit’s application of *Fraser* to facially non-profane student political expression conflicts with the above decisions and undercuts *Tinker*. This Court should clarify that the standard for evaluating non-profane political expression in a public school is *Tinker*, not *Fraser*.

#### **IV. A First Amendment Rule Protecting Students' Non-Disruptive Political Speech Will Prevent Broad School Censorship**

##### **A. Ambiguously Sexual Student Speech Offering Commentary on Political and Social Issues Cannot Be Punished in the Absence of a *Tinker* Disruption.**

This Court should clarify that public-school student expression employing non-explicit language<sup>15</sup> to comment on a political or social issue is protected under the First Amendment unless it would cause a material disruption under *Tinker*.<sup>16</sup> See *Hawk*, 725 F.3d at 315. Under *Tinker* and Justice Alito's directive in *Morse*, the First Amendment protects nondisruptive student speech on political and social

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<sup>15</sup> This rule does not extend to speech whose profane meaning is functionally direct, even if conveyed through masking or character substitution. Expressions such as "Fuçk Trump" or "Biden is a cvck," like the speech in *Fraser*, remain outside this rule and subject to proscription without need of satisfying *Tinker*'s disruption requirement.

<sup>16</sup> To address ambiguous student speech that bears both potentially vulgar and political meanings, Calvert proposes narrowing *Fraser* in light of the principle emphasized by Justice Alito's concurrence in *Morse*. Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion Fraser*, 90 DENV. U. L. REV. 131, 167–68 (2012). Under this approach, facially non-profane expression commenting on politically and socially relevant matters receives First Amendment protection unless it causes disruption under *Tinker*'s test. *Id.*

issues when it is not overtly sexual or profane. See *Morse*, 551 U.S. at 422–23 (Alito, J., concurring). By adopting this rule, the Court will ensure that polysemic student speech with a plausible political meaning “is protected under the First Amendment and may only be regulated if a school meets the *Tinker* standard.” See *Barr v. Lafon*, 538 F.3d 554, 569 n.7 (6th Cir. 2008) (noting that *Tinker*’s “substantial disruption” standard, not *Fraser*’s “vulgar” or “plainly offensive” standard, governed regulation of Confederate flag t-shirts). This rule harmonizes *Tinker*, *Fraser*, and *Morse* by ensuring that schools can continue to protect their function-sensitive educational interests without suppressing nondisruptive political speech that contributes to students’ participation in our democracy.<sup>17</sup> It thereby promotes student engagement with controversial political and social ideas, speech which “lies at the heart of the First Amendment’s protection[.]” *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring).

Other circuits endorse this approach when evaluating students’ crass political expression. *Hawk*, 725 F.3d at 315; *Guiles*, 461 F.3d at 330. When the speech consists of a student’s own expression that merely “happens to occur on school grounds,” *Tinker* governs. *Guiles*, 461 F.3d at 325, 327. Accordingly, the Constitution does not entrust school administrators with the final authority to determine which

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<sup>17</sup> See Calvert, *supra* note 16, at 168–70 (illustrating how this rule would protect student apparel with politically or socially relevant messages while allowing schools to ban distasteful apparel worn purely for humor or shock value).

viewpoints may be expressed.<sup>18</sup> That constitutional judgment belongs to Article III courts applying *Tinker*, which requires proof of “material and substantial” disruption. *Id.* at 330–31. Applied to a student’s own expression, *Fraser*-style deference would supplant *Tinker*’s material-disruption requirement with administrative discretion.

In *Hawk*, the Third Circuit recognized that this rule protects speech at “the heart of the First Amendment[]” — nondisruptive political speech — while allowing schools to prevent “the evil to be restricted” in the form of plainly lewd, vulgar, or profane speech. 725 F.3d at 314, 316. But the court emphasized that this determination is not left to bureaucrats: “It remains the job of judges . . . to determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive.” *Id.* at 308. This Court can likewise protect students from school officials who, under community pressure, suppress controversial viewpoints.

Schools are not empowered to act as ideological gatekeepers or to exercise an “Orwellian ‘guardianship of the public mind’” by suppressing

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<sup>18</sup> Exercising non-deferential judicial review, *Tinker* placed the burden on school officials to satisfy its “substantial disruption” test. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1773, 1778 (1987) (“In effect . . . the Court in *Tinker* held that the constitutionality of the school’s regulation would be determined by *independent judicial review* of whether the regulation was necessary for the attainment of the school’s educational objectives.” (emphasis supplied)).

expression that challenges political orthodoxy. *Hazelwood*, 484 U.S. at 280, 286 (Brennan, J., dissenting). The First Amendment forecloses public-school officials from assuming such a role because the Framers understood that “every person must be his own watchman for truth,” and no government can be trusted with the ultimate decision-making authority “to separate the true from the false for us.” *Thomas v. Collins*, 323 U.S. 516, 545–46 (1945) (Jackson, J., concurring). That constitutional imperative requires independent judicial review of school censorship. Granting broad deference to school officials clashes with the First Amendment because it invites viewpoint discrimination by administrators who may punish unorthodox speech under the guise of enforcing a school’s “educational mission.” *Tri Cnty.*, 156 F.4th at 809–10 (Bush, J., dissenting); *Castorina, ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001); *Chiles*, 146 S. Ct. at 1024 (“viewpoint restrictions . . . represent ‘an egregious form of content discrimination’ where First Amendment concerns are at their most ‘blatant.’”).

Under this proposed rule, schools retain the ability to protect legitimate pedagogical interests that justify in-school restrictions on student speech. If a student’s political message is substantially disruptive, schools would be justified in prohibiting it under *Tinker*. They cannot, however, merely hypothesize about what language seems too offensive for a student to wear on a sweatshirt and have that judgment rubber-stamped by a reviewing court. The Sixth Circuit’s approach not only defies *Tinker* but “demands that a federal court abdicate its

responsibility to safeguard students' First Amendment rights and instead defer to school officials' assessment of the meaning and effect of speech." *L.M.*, 145 S. Ct. at 1496 (Alito, J., dissenting).

**B. D.A.'s and X.A.'s Nondisruptive Political Message Is Protected Under *Tinker*.**

This case is controlled by *Tinker*, which requires Tri County Middle School officials to justify their banishment of the "Let's Go Brandon" sweatshirts on the grounds that they created or reasonably might have created a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In *Tinker*, the Court emphasized that there was "no indication that the work of the schools or any class was disrupted." *Id.* at 508. Despite students directing hostile remarks to the armband-bearing protestors, "there were no threats or acts of violence on school premises." *Id.*

The district agrees there is no evidence the "Let's Go Brandon" sweatshirts disrupted the educational environment during or after the four months Petitioners wore them to school. *See Tri Cnty.*, 156 F.4th at 800 (Bush, J., dissenting). There was no showing that teachers altered lessons due to the sweatshirts, the slogan did not cause altercations among students, and the school never received complaints about the apparel. *See Pls.' Mot. Summ. J. Br.* at 12, *Tri Cnty.*, 746 F.Supp.3d 447 (No. 23-cv-423). Thus, like the protestors in *Tinker*, D.A.'s and X.A.'s message neither "intrude[d] upon the work of

the school[] [n]or the rights of other students.” *Tinker*, 393 U.S. at 508. When Petitioners wore their sweatshirts, they expressed a political opinion without disrupting the school environment. Communication of their message is therefore squarely protected by *Tinker*.

The *only* reason proffered by the school district for demanding removal of the sweatshirts was that two school officials considered “Let’s Go Brandon” vulgar and profane. *Tri Cnty.*, 746 F. Supp. 3d at 453. While this may indicate the administrators’ personal feelings of “discomfort and unpleasantness” provoked by speech they found objectionable, the school made no showing that the sweatshirts caused any in-school disruption, much less a “substantial” or “material” one. *Tinker*, 393 U.S. at 509. Thus, the school failed to demonstrate a constitutionally valid reason for prohibiting Petitioners’ political speech. *Id.* at 511.

## CONCLUSION

For the reasons stated herein, *Amici* respectfully urge this Court to grant Petitioners’ petition for a writ of *certiorari*.

Respectfully submitted,

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