

No. 25-1143

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, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

**BRIEF OF NATIONAL COALITION AGAINST
CENSORSHIP AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

Matthew Kudzin
Counsel of Record
Samuel Crimmins
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
mkudzin@cov.com

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Interest of the <i>Amicus Curiae</i>	1
Summary of the Argument	2
Argument.....	4
I. The First Amendment Protects the Rights of Public School Students, Subject Only to Narrow Exceptions.	4
II. The Sixth Circuit’s Deferential Standard Gives School Administrators Nearly Unfettered Discretion to Restrict Political Speech.	8
III. School Administrators Are Misapplying This Court’s Precedents to Restrict Student Speech on Controversial Subjects.	12
Conclusion	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>B.A.P. v. Overton Cnty. Bd. of Educ.</i> , 600 F. Supp. 3d 839 (M.D. Tenn. 2022)	14
<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986).....	2, 3, 6, 7, 9, 11, 13, 14
<i>Boroff v. Van Wert City Bd. of Educ.</i> , 220 F.3d 465 (6th Cir. 2000).....	10, 11, 12
<i>Carey v. Brown</i> , 447 U.S. 455 (1980).....	2
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988).....	7, 8
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589, 603 (1967).....	3, 5
<i>Mahanoy Area Sch. Dist. v. B. L.</i> , 594 U.S. 180 (2021).....	3, 5
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	4
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007).....	7, 12, 13
<i>N.Y. Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	11

<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	18
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969).....	5, 7, 8, 13, 14
<i>Walker v. Texas Div., Sons of Confederate Veterans, Inc.</i> , 576 U.S. 200 (2015)	8
Other Authorities	
Band of Brothers, <i>Currahee</i> (HBO, aired Sep. 9, 2001)	10
Band of Brothers, <i>Sobel Inspecting Easy Company</i> (YouTube, July 8, 2009),	10
Mahmoud Bennett, <i>Florida’s New License Plate Features Gadsden Flag, ‘Sends a Clear Message’</i> , Straight Arrow News (Aug. 10, 2022)	16
Jackie Calmes, <i>Top 10 Reasons Not to Vote For Donald Trump</i> , L.A. Times (Oct. 20, 2024)	12
Carisa Cegavske, <i>Roseburg High School’s Rejection of ‘Virginity Rocks’ T-Shirt Becomes Social Media Phenomenon</i> , The News-Review (Apr. 13, 2018),	14
Vivian Chow, Chip Yost, & Rachel Menitoff, <i>Temecula School Board Approves Controversial Flag Policy</i> , KTLA (Sep. 13, 2023)	15

<i>Gadsen Flag</i> , Encyclopedia Britannica	16
Briana Koeneman, <i>Hillary Clinton Allies Polled Voters About Obama's Cocaine Use in 2008</i> , Scripps News (Oct. 17, 2016)	12
Natasha Korecki, <i>No Malarkey? Biden's Old-School Slogan Gets Mocked and Praised in Iowa</i> , Politico (Dec. 2, 2019).....	10
Jerry Lambe, <i>Two Oklahoma Boys Removed From Elementary School Classrooms Over 'Black Lives Matter' Shirts Banned 'When the George Floyd Case Blew Up'</i> , Law & Crime (May 10, 2021)	17
<i>Malarkey</i> , Cambridge Dictionary	10
Harrison McCarty, <i>Southern California School District Bans Pride and Other Flag Displays; Opponents Allege Anti-LGBTQ+ Intent</i> , Georgetown Univ.: The Free Speech Project (Nov. 15, 2023).....	15
NCAC Criticizes Pennsylvania School for Stifling Student's Political Speech by Prohibiting "Let's Go Brandon" T-Shirt, NCAC (Mar. 16, 2022)	13
New London, Minnesota, Student Forbidden from Wearing "Let's Go Brandon" T-Shirt, NCAC (Apr. 21, 2023).....	13

Barack Obama, <i>Dreams from My Father: A Story of Race and Inheritance</i> (2004)	12
Carrie Robison & Aaron Terr, <i>Colorado Public School to Allow Student to Display Gadsden Flag Patch-As Long as Nobody Complains</i> , FIRE (Sep. 1, 2023)....	15, 16
Pierce Sharpe, <i>San Diego High School Reverses Humiliating Free Speech Decision to Suspend Student Over Pro-ICE Poster</i> , N.Y. Post (Apr. 6, 2026)	16, 17
Zachary B. Wolf, <i>People Are Calling Trump A Fascist. What Does That Mean?</i> , CNN (Oct. 24, 2024)	12

INTEREST OF THE *AMICUS CURIAE*¹

The National Coalition Against Censorship (“NCAC”) is an alliance of more than sixty national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. Founded in 1974, NCAC’s purpose is to promote freedom of thought, inquiry, and expression and to oppose all forms of censorship. NCAC engages in direct advocacy and education to support free expression rights of students, authors, readers, publishers, booksellers, teachers, librarians, artists, and others.

NCAC is committed to supporting the First Amendment rights of students. Through its Student Advocates for Speech Leadership Program, NCAC trains and connects a nationwide network of student leaders to address free speech and censorship issues in their communities and their schools. NCAC also organizes the Right to Read Network, a national grassroots network of local community organizers who advocate in front of school boards and local public library boards to fight book bans, expand access to information, and raise awareness about the harms of censorship.

Through its advocacy efforts, NCAC has observed the continuing and widespread censorship of student speech, due in part to misapprehension or misapplication of the Supreme Court’s precedents and, in particular, due to an unduly broad reading of

¹ No party or party’s counsel authored or financially supported the authoring of any part of this brief. Counsel of record for all parties received timely notice of NCAC’s intent to file this brief.

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986). Given the importance of political speech in public schools to the inculcation of democratic values, the teaching of political pluralism and dissent, and the cultivation of active participants in our public discourse, any exception to the First Amendment’s protection of student speech should be narrowly construed. NCAC has an interest in a clear articulation of the robust political speech rights of public school students.

SUMMARY OF THE ARGUMENT

“Let’s Go Brandon” is a political slogan that, as the Sixth Circuit acknowledges, has been “firmly established in the national lexicon.” App. 5a. The phrase is commonly used to express disapproval of President Biden’s administration and his policies. App. 4a. It has also become a symbol of perceived media bias and a belief that some news outlets were downplaying, or refusing to report on, the deep dissatisfaction with President Biden. *Id.* It is a comment on significant public issues of national importance and therefore “rest[s] on the highest rung of the hierarchy of First Amendment values.” *Carey v. Brown*, 447 U.S. 455, 467 (1980).

“Let’s Go Brandon” is neither vulgar nor profane. It has been used in floor speeches in both the Senate and the House of Representatives. It is regularly used in public broadcasts, both on television and radio. During the 2024 presidential campaign, President Biden attempted to coopt the phrase, converting it into a “Dark Brandon” meme. App. 4a.

The decision of the court of appeals misapprehends the critical role that public education plays in American self-governance. “America’s public schools are the nurseries of democracy.” *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 190 (2021). The role of education is not merely to transmit sanctioned and sanitized information; it is to help young citizens to develop the skills and habits of mind necessary to participate in a democratic society. Students must learn to participate in “that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). That lesson cannot be learned from a book or a lecture. It must be modeled throughout the day, by encouraging students to express, consider, and debate controversial ideas—not just in the classroom, but in the cafeteria, the playground, and the hallway.

According to the court of appeals, schools have broad discretion to regulate euphemisms on the grounds they “convey[] an obscene or vulgar message even when the words used are not themselves obscene or vulgar.” App. 14a. Students cannot be faulted for using euphemistic language, especially in the context of political speech. As part of a civic education, we expect students to learn the “appropriate form of civil discourse and political expression.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). In a political climate in which politicians regularly resort to vulgar attacks and commentators use profanity as part of routine political debate, euphemism serves an important function. It can transform that which might be profane into something appropriate for a broader audience. Using euphemistic language gives students

the tools to engage in political speech without causing disruption or using profanity. In many cases, there would be no way for students to engage with that political dialogue without the use of euphemism. Far from being disciplined, D.A. and X.A. should be lauded for finding a peaceful, non-disruptive way to engage in the political process and express their opinions, without resorting to vulgarity.

The court of appeals would “leave it to the school to decide what is vulgar or profane so long as the decision is not unreasonable.” App. 14a–15a. Under this highly deferential standard, the subjective opinion of a school administrator is dispositive, “even when there are other plausible interpretations of the same speech.” App. 15a. Not only is this decision contrary to this Court’s precedents, it gives school administrators nearly unfettered discretion to limit debate on controversial subjects and to prohibit speech with which the administrators disagree. The decision below not only undermines core First Amendment protections, it also diminishes the vital role public education plays in fostering open inquiry and robust debate.

ARGUMENT

I. The First Amendment Protects the Rights of Students, Subject Only to Narrow Exceptions.

Over one hundred years ago, in *Meyer v. Nebraska*, this Court recognized that public school students are protected by the Constitution’s guarantee of “certain fundamental rights which must be respected.” 262 U.S. 390, 401 (1923). That basic

principle has been reiterated time and again so that, by 1969, “[i]t [could] hardly be argued that either students or teachers 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).

Tinker establishes the baseline standard. A student may “express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.” *Tinker*, 393 U.S. at 513 (cleaned up). This readily applicable standard strikes the appropriate balance, protecting students’ rights to engage in political speech while recognizing the practical need to maintain order and discipline in schools.

Tinker is a “demanding standard.” *Mahanoy*, 594 U.S. at 193. Student speech that “neither interrupt[s] school activities nor s[ee]ks to intrude in the school affairs or the lives of others” must be permitted. *Tinker*, 393 U.S. at 514. The freedom of speech—*especially* student speech—is more than a personal right; it is a public good “of transcendent value” to all of society. *Keyishian*, 385 U.S. at 603. As such, this Court has been careful to permit limitations on student speech only when, and to the extent, necessary. “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Id.* at 603 (cleaned up).

The Court's post-*Tinker* cases are largely based on *Tinker*'s disruption-focused logic, even if the mode of analysis differs. In *Bethel Sch. Dist. No. 403 v. Fraser*, the Court held that a school could discipline a student who had given a speech featuring "an elaborate, graphic, and explicit sexual metaphor." 478 U.S. 675, 678 (1986). The Court emphasized the extreme nature of the student's conduct, focusing on the impact that the speech had on other students and on the school as a whole. Not only was the speech "plainly offensive," but "[b]y glorifying male sexuality," "the speech was acutely insulting to teenage girl students" in the audience, casting them as objects acted upon in its extended sexual metaphor. *Id.* at 683. As Justice Brennan explained, the decision did not "limit what students should hear, read, or learn about." *Id.* at 689 (Brennan, J., concurring). Rather, "the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given to a high school assembly." *Id.*

Unlike the black armbands symbolizing a staunch opposition to the Vietnam War, one of the premier political issues of the time, the student in *Fraser* engaged in profane speech at a school assembly. *Fraser*, 478 U.S. at 677. The Court emphasized this distinction, noting that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." *Id.* at 685. Read properly, *Fraser* did nothing to contravene *Tinker*'s standard in the context of students expressing their beliefs on issues of national importance.

The Court has emphasized the narrowness of *Fraser*'s holding. In *Morse v. Frederick*, the Court rejected the school's argument that *Fraser* authorized schools to ban speech merely because it was "offensive." 551 U.S. 393, 409 (2007). "After all, much political and religious speech might be perceived as offensive to some." *Id.* The Court also rejected the argument that *Fraser* "permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Id.* at 423 (Alito, J. concurring). Schools are free to define their "educational mission" however they want. *Id.* But to adopt a subjective standard and defer to the school's judgment "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.*

In *Morse*, the Court held that schools could proscribe speech promoting illegal drug use. 551 U.S. at 403. But the decision was not based on deference to the school's editorial preferences or policies. Rather, the Court found that such speech could be regulated because it was a threat to student safety, finding that the dangers of drug use are both "serious and palpable." *Id.* at 408. Thus, "detering drug use by schoolchildren is an important—indeed, perhaps compelling interest." *Id.* at 407 (cleaned up). The decision in *Morse* did not alter the standard in *Tinker* as to political speech, but determined that a school could prevent the "severe and permanent damage" caused by drug abuse." *Id.*

Finally, in *Hazelwood Sch. Dist. v. Kuhlmeier*, the Court held that a school could regulate the content of

school-sponsored publications that members of the public “might reasonably perceive to bear the imprimatur of the school.” 484 U.S. 260, 271 (1988). That decision flows from the basic and well-established principle that “when government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Thus, educators can ensure that “the views of the individual speaker are not erroneously attributed to the school.” *Kuhlmeier*, 484 U.S. at 271.

The Court has thus departed from *Tinker* only with respect to certain limited and defined areas of student speech, where the propensity of the speech in question to cause disruption or manifest harm was apparent or all but inevitable, or where a reasonable person might think the school had adopted the student’s views. *Tinker* remains the standard for whether a school can mute a student’s political speech: it can do so only when the speech materially interferes with the functioning of the school.

II. The Sixth Circuit’s Deferential Standard Gives School Administrators Nearly Unfettered Discretion to Restrict Political Speech.

The *Tinker* Court cautioned that “free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.” 393 U.S. at 513. The Court’s prescient warning accurately describes the decision of the court of appeals. The Sixth Circuit would “leave it to the school to decide

what is vulgar or profane so long as the decision is not unreasonable.” App. 14a–15a. Such a deferential standard would make a fundamental constitutional guarantee contingent on the subjective judgment of every administrator and would only protect speech that provokes no disagreement.

It is undisputed that “Let’s Go Brandon” is core political speech. The court of appeals acknowledged that it is “a shibboleth to express antipathy toward the then-President and his policies.” App. 4a. The slogan therefore expresses a political opinion on serious issues of national importance. As such, a school cannot prevent a student from silently expressing their political views unless the school can meet *Tinker’s* “demanding standard” by showing that the tee shirt materially and substantially interfered with school discipline.

The decision below is also in tension with *Fraser*. The *Fraser* Court did not defer to a school’s determination that the speech was vulgar. App 14a. To the contrary, the Court applied an objective standard, evaluating the contents of the speech *de novo* and concluding that it was “plainly offensive to both teachers and students—indeed to any mature person.” *Fraser*, 478 U.S. at 683. While *Fraser* noted that the school has a role in determining “what manner of speech in the classroom or in school assembly is inappropriate,” *id.*, public schools are still arms of the state, and their decisions are limited by the First Amendment.

Allowing school administrators to impose their own subjective opinions as to what is “vulgar” would

enable schools to restrict large swaths of political speech. During the 2020 presidential campaign, for example, Joe Biden adopted the phrase “No Malarkey” as a campaign phrase and emblazoned it on the side of his campaign bus.² While the Cambridge Dictionary defines “malarky” as “silly behaviour or nonsense,”³ many people, including some of President Biden’s own supporters, believe that the word means “bullshit.”⁴ The popular media has promoted this idea, with the “Band of Brothers” television miniseries claiming that “Malarkey’s slang for bullshit.”⁵ The actual origins and etymology of “malarkey” are unknown. But under the Sixth Circuit’s standard, the word’s actual meaning is irrelevant. A school administrator could ban “No Malarkey” tee shirts based on his own personal opinion as to what the word “conveys.”

The Sixth Circuit’s own precedents, including those cited in the opinion below, illustrate just how slippery a slope the court has headed down. In *Boroff v. Van Wert City Board of Education*, the principal of Van Wert High School prohibited students from

² Natasha Korecki, *No Malarkey? Biden’s Old-School Slogan Gets Mocked and Praised in Iowa*, Politico (Dec. 2, 2019), <https://perma.cc/HSY7-G8SS>.

³ *Malarkey*, Cambridge Dictionary, <https://perma.cc/9AL2-D4B8>.

⁴ Korecki, *supra* note 2.

⁵ Band of Brothers, *Currahee*, at 9:52–56 (HBO, aired Sep. 9, 2001) (“Malarkey, Malarkey’s slang for bullshit isn’t it?” “Yes sir.”); *see also* Band of Brothers, *Sobel Inspecting Easy Company*, at 1:07–17 (YouTube, July 8, 2009), <https://youtu.be/kGFkENuVki8?t=67>.

wearing Marilyn Manson tee shirts. 220 F.3d 465 (6th Cir. 2000). Marilyn Manson is a “goth’ rock performer” who wears “black clothes, heavy silver jewelry, black eye make-up and lipstick, and often pale face make-up.” *Id.* at 466. The principal instituted the ban because he did not like the artist or his music. *Id.* at 469–70. (“I find some of the Marilyn Manson lyrics and some of the views associated with Marilyn Manson as reported in articles in the news and entertainment press offensive to our basic educational mission.”).

The Sixth Circuit affirmed the principal’s decision because it was not “manifestly unreasonable.” *Id.* at 470. In the court’s view, once the principal concluded that “this particular rock group promotes disruptive and demoralizing values,” *id.* at 471, the school could ban all clothing associated with Marilyn Manson, regardless of its content. Even a shirt that “simply displayed illustrations of Marilyn Manson largely unadorned by text” could be banned. *Id.*

Boroff is untethered from *Fraser*’s narrow holding. The Sixth Circuit has stretched the concept of vulgarity to include the name or the likeness of anyone who does not live up to the principal’s moral standards. By that standard, school administrators would have almost unfettered discretion to restrict any speech with which they disagree, including political speech. Political debate often involves “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Using the last election cycle as an example, President Trump was routinely called a “fascist” and compared

to Adolph Hitler.⁶ He was likewise called “unfit to be president,” a “threat to national security” and “a pathological liar.”⁷ By the Sixth Circuit’s reasoning, if the principal believes such claims, it would not be “manifestly unreasonable” to conclude that President Trump “promotes disruptive and demoralizing values.” *Boroff*, 220 F.3d at 470, 471.

The Sixth Circuit also suggested that Marilyn Manson tee shirts were unacceptable because “he is also widely regarded as a user of illegal drugs, which he has not denied.” *Boroff*, 220 F.3d at 466. But by that standard, the school could also ban tee shirts of President Obama who, in his memoir, “admitted to experimenting with cocaine and marijuana when he was young.”⁸

III. School Administrators Are Misapplying This Court’s Precedents to Restrict Student Political Speech.

In his *Morse* concurrence, Justice Alito warned of the dangers of adopting subjective standards for student speech. *Morse*, 551 U.S. at 423 (Alito, J., concurring). Permitting schools to ban speech

⁶ See Zachary B. Wolf, *People Are Calling Trump A Fascist. What Does That Mean?*, CNN (Oct. 24, 2024), <https://perma.cc/8TRU-7DHQ>.

⁷ Jackie Calmes, *Top 10 Reasons Not to Vote For Donald Trump*, L.A. Times (Oct. 20, 2024), <https://perma.cc/3GQU-L9HH>.

⁸ Briana Koeneman, *Hillary Clinton Allies Polled Voters About Obama’s Cocaine Use in 2008*, Scripps News (Oct. 17, 2016), <https://perma.cc/7S8H-P8QK>; see also Barack Obama, *Dreams from My Father: A Story of Race and Inheritance* (2004).

contrary to the school’s subjectively-defined “educational mission,” for example, would give school officials “a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed.” *Id.* A school could, for example, “define[] its educational mission to include solidarity with our soldiers and their families” and, on that basis, prohibit Tinker’s armband. *Id.*

Based on its work with student groups, NCAC can attest that Justice Alito’s concerns are justified. This Court has been clear that student speech cannot be restricted out of “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S at 509. But far too many schools have latched on to the narrow exceptions identified in cases like *Fraser* and *Morse* to do exactly that. Schools across the country have adopted policies that severely limit student speech on political and social issues. Respondents are not the only ones that have prohibited students from wearing “Let’s Go Brandon” apparel. The Port Allegany School District in Pennsylvania⁹ and the New London-Spicer School District in Minnesota¹⁰ have adopted similar policies. But the problem is not limited to this one political slogan.

⁹ See *NCAC Criticizes Pennsylvania School for Stifling Student’s Political Speech by Prohibiting “Let’s Go Brandon” T-Shirt*, NCAC (Mar. 16, 2022), <https://perma.cc/W2Z8-648L>.

¹⁰ See *New London, Minnesota, Student Forbidden from Wearing “Let’s Go Brandon” T-Shirt*, NCAC (Apr. 21, 2023), <https://perma.cc/N9VX-LRKP>.

Many schools have adopted policies that prohibit students from engaging in speech related to human sexuality, even when the speech is not in any way vulgar or obscene. A student at Roseburg High School in Oregon was prohibited from wearing a “Virginity Rocks” tee shirt.¹¹ Although there was no evidence that the shirt would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” *Tinker*, 393 U.S. at 509, the School District Superintendent justified the ban on the grounds that “the only appropriate place on campus for conversations about reproduction is in health class.”¹²

A student at Livingston Academy in Tennessee was taken out of class because she wore a shirt stating that “homosexuality is a sin - 1 Corinthians 6:9-10.” *B.A.P. v. Overton Cnty. Bd. of Educ.*, 600 F. Supp. 3d 839, 843 (M.D. Tenn. 2022). According to the School District’s dress code, “[c]lothing with offensive messages, including . . . sexual connotations . . . is unacceptable.” *Id.* at 844. Based on the principal’s subjective interpretation of the dress code, the policy was not limited to *Fraser*’s “elaborate, graphic, and explicit sexual metaphor.” *Fraser*, 478 U.S. at 678. Any reference to sex, even in a Bible verse, is prohibited.

In 2023, the Temecula Valley Unified School District in southern California banned the display of

¹¹ Carisa Cegavske, *Roseburg High School’s Rejection of ‘Virginity Rocks’ T-Shirt Becomes Social Media Phenomenon*, The News-Review (Apr. 13, 2018), <https://perma.cc/V3PN-ULU5>.

¹² *Id.*

any flag other than those of the United States of America and the state of California.¹³ Although the policy included exceptions for “country, state or United States military flag[s] used solely for educational purposes within the adopted curriculum,” the policy prohibited displaying LGBTQ flags and Pride flags.¹⁴ The same school district had previously rejected a social studies textbook because it included a section discussing gay rights activist Harvey Milk.¹⁵ According to a supporter of the flag ban, “we’re not anti-LGBTQ, we’re not anti-anything, but a classroom is not a place for your personal political beliefs.”¹⁶

Schools have also restricted explicitly political speech. In 2023, a middle school student in Colorado Springs, Colorado was pulled out of class when a teacher noticed a Gadsden Flag patch on his backpack.¹⁷ The bright yellow flag, featuring a coiled rattlesnake and the motto “Don’t Tread on Me,” dates back to the American Revolution, when it was used by

¹³ Vivian Chow, Chip Yost, & Rachel Menitoff, *Temecula School Board Approves Controversial Flag Policy*, KTLA (Sep. 13, 2023), <https://perma.cc/SV4M-B6TM>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Harrison McCarty, *Southern California School District Bans Pride and Other Flag Displays; Opponents Allege Anti-LGBTQ+ Intent*, Georgetown Univ.: The Free Speech Project (Nov. 15, 2023), <https://perma.cc/43V4-TXE2>.

¹⁷ Carrie Robison & Aaron Terr, *Colorado Public School to Allow Student to Display Gadsden Flag Patch—As Long as Nobody Complains*, FIRE (Sep. 1, 2023), <https://perma.cc/RfV5-XKHN>.

the United States' first naval commander in chief.¹⁸ More recently, the flag has been used as a symbol by Nike and a Major League Soccer team.¹⁹ Twelve states currently offer specialty license plates featuring the flag. But under the Sixth Circuit's deferential standard, the historical meaning of the flag would be trumped by the school's view that the flag had also been associated with "hate groups."²⁰ Although the school ultimately relented, the student could wear the patch only if no other student complained, allowing a heckler's veto to silence the student's free expression.²¹

Moreover, granting such unfettered discretion to school administrators inevitably leads to viewpoint discrimination. Earlier this year, hundreds of students at San Dieguito High School in San Diego, California staged an anti-ICE walk out. The student protestors carried signs exclaiming "If You're an I.C.E. Agent Ya Mom's a Hoe!!" and "ICE is KKK spelled differently."²² The school allowed the protest and none of the students were disciplined. But a few weeks later, a student posted flyers around the school

¹⁸ *Gadsden Flag*, Encyclopedia Britannica, <https://perma.cc/7YPT-EL46>.

¹⁹ Mahmoud Bennett, *Florida's New License Plate Features Gadsden Flag, 'Sends a Clear Message'*, Straight Arrow News (Aug. 10, 2022), <https://perma.cc/8Z3C-X82U>.

²⁰ Robison & Terr, *supra* note 17.

²¹ *Id.*

²² Pierce Sharpe, *San Diego High School Reverses Humiliating Free Speech Decision to Suspend Student Over Pro-ICE Poster*, N.Y. Post (Apr. 6, 2026), <https://perma.cc/K429-NTA8>.

with the opposite message: “We ♥ I.C.E. – Real Americans.”²³ The student was suspended for his allegedly “demonizing and hateful” speech.²⁴

Some administrators have gone so far as to exercise their “discretion” to ban *all* political speech. In 2021, school officials in Ardmore, Oklahoma, removed two black elementary school students—ages 8 and 5—from their classrooms for wearing “Black Lives Matter” T-shirts.²⁵ The students were not permitted to return to class unless they turned their shirts inside out or changed their clothes. According to the principal, after George Floyd’s death, “politics will not be allowed at school.”²⁶ The school superintendent justified the dress code as a neutral restriction because it applied to all political apparel, saying “I don’t want my kids wearing MAGA hats or Trump shirts to school either because it just creates, in this emotionally charged environment, anxiety and issues that I don’t want our kids to deal with.”²⁷

Teen sexuality, gay rights, ICE, the death of George Floyd, and MAGA are—without question—controversial subjects. But the Vietnam War was equally controversial in the 1960s when this Court

²³ *Id.*

²⁴ *Id.*

²⁵ Jerry Lambe, *Two Oklahoma Boys Removed From Elementary School Classrooms Over ‘Black Lives Matter’ Shirts Banned ‘When the George Floyd Case Blew Up’*, Law & Crime (May 10, 2021), <https://perma.cc/W2JQ-YTX3>.

²⁶ *Id.*

²⁷ *Id.*

upheld the rights of students to engage in peaceful, non-disruptive protest. The Court recognized then, and should reaffirm now, that controversial ideas are not a threat to education; they are its substance. The First Amendment exists precisely to protect discourse that challenges prevailing norms. If students may only engage with ideas deemed safe or orthodox, they are denied the opportunity to test arguments, confront disagreement, and refine their own beliefs. To deny students the freedom to express, discuss, and debate controversial ideas is to substitute civic education with indoctrination.

CONCLUSION

Student speech is indispensable to the functioning of a democratic society because it cultivates the values of open inquiry, dissent, and civic participation necessary for self-government. Students should be encouraged to express themselves in peaceful, non-disruptive ways, as D.A. and X.A. have done. As this Court has recognized, “First Amendment freedoms need breathing space to survive.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). Any restrictions on student speech should therefore be based on clear, bright-line standards, not an administrator’s subjective opinion as to what the student’s speech might—or might not—convey. Providing students the “breathing space” to engage with American political discourse should be a feature, not a bug, of public education.

19

Respectfully submitted,

Matthew Kudzin

Counsel of Record

Samuel Crimmins

COVINGTON & BURLING LLP

850 Tenth Street, NW

Washington, DC 20001

(202) 662-6000

mkudzin@cov.com

May 1, 2026

Counsel for Amicus Curiae