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;
ANDREW BUIKEMA, IN HIS INDIVIDUAL CAPACITY;
WENDY BRADFORD, IN HER INDIVIDUAL CAPACITY,
Respondents.

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

BRIEF OF *AMICUS CURIAE* DEFENDING EDUCATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

Defending Education is a national, nonprofit, grassroots association. Its members include many parents with school-aged children. DE uses advocacy, disclosure, and litigation to combat the increasing politicization and indoctrination of America's youth.

This case directly implicates DE's mission, and its outcome will have real-world consequences for DE's members. Students have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Sixth Circuit's legal errors affect the free-speech rights of students and thus the children of DE's members. If the Sixth Circuit's decision is upheld, then K-12 students throughout the Sixth Circuit will be hindered in speaking on important political topics of our day. DE's mission is to prevent such outcomes.

SUMMARY OF ARGUMENT

Public schools in the United States are supposed to be "the nurseries of democracy" and "protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021). And students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

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[*] Per Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Tinker, 393 U.S. at 506. Public schools thus must "ensur[e] 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. That sentiment is especially true for issues of public concern, like politics.

But it is not true in Tri County Area Schools. There, the school district prohibited students from wearing apparel with the political slogan "Let's Go Brandon," even though such speech is political speech that is normally at the very heart of the First Amendment. The district court and the Sixth Circuit upheld the school district's speech restriction not because the phrase isn't a political slogan, but because the phrase's origin is "associat[ed] with a vulgar expression." App.20a, 93a.

The Sixth Circuit's decision was wrong, and it created a circuit split. The court relied on this Court's decision in *Bethel School District No. 403 v. Fraser*, which allows schools to restrict plainly profane, vulgar, and lewd speech. 478 U.S. 675 (1986). But the phrase "Let's Go Brandon" is at worst a euphemism—one that members of Congress have said during floor speeches and broadcast television has aired without censoring. *See* App.4a. The phrase is so ubiquitous that the students' mom bought them sweatshirts emblazoned with it for Christmas. App.5a. The students' speech is core political speech that addresses a matter of public concern—speech that a public school can rarely, if ever, restrict. *See, e.g.*, *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring); *Morse v. Frederick*, 551

U.S. 393, 403 (2007). Treating this now-commonplace phrase as vulgarity for the purposes of applying *Fraser* splits the Sixth Circuit from several others.

ARGUMENT

I. The school district has joined the growing trend of schools using speech codes to punish student speech on topics of public concern.

The performance of political figures is a "sensitive political topi[c]" that is "undoubtedly [a] matte[r] of profound value and concern to the public." *Janus v. AFSCME*, 585 U.S. 878, 914 (2018) (cleaned up); *accord, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"). The First Amendment gives both sides the freedom to promote their beliefs in the marketplace of ideas, without the government tipping the scales. "[L]earning how to tolerate speech … of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022). Indeed, "tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). This is especially true where, as here, the "speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus*, 585 U.S. at 914 (cleaned up).

Yet there is a growing trend of schools adopting speech codes prohibiting controversial speech. In general, speech codes prohibit expression that would be constitutionally protected outside school, punishing students for unpopular speech by labeling it "harassment," "bullying," "hate speech," "incivility," etc. *See Spotlight on Speech Codes 2021*, Foundation for Individual Rights in Education (FIRE) at 10, perma.cc/S22E-76Q3. These policies are facially unconstitutional—imposing overbroad and often viewpoint-based restrictions on speech. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-16 (3d Cir. 2001) (Alito, J.) (K-12 speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech").[1] Such policies are often wielded broadly against expressive speech that administrators don't like.

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[1] *See also, e.g.*, *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668-69 (8th Cir. 2023) (K-12 policy prohibiting "intentional and/or persistent refusal ... to respect a student's gender identity" was unconstitutional); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-04 (W.D. Pa. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 990, 995 (E.D. Mich. 2003) (speech policy prohibiting "verbal assault" was overbroad because it allowed "curtailment of speech that questions the wisdom or judgment of school administrators and their policies, or challenges the viewpoints of [other] students"); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely unconstitutional).

Not only do schools chill speech when adopting speech codes, but they have also used these speech codes to censor speech on important issues of our day, including politics. To give a few examples:

- A student was punished for wearing a t-shirt that said, "There Are Only Two Genders." *L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1489 (2025).
- Two students were punished for wearing a shirt that said, "Save Girls' Sports" and "It's Common Sense. XX ≠ XY." Joseph, *California School Official Compared 'Save Girls Sports' Shirt to Swastika, Rebuked Girls Wearing It: Lawsuit*, Fox News (Nov. 20, 2024), perma.cc/GR2H-YWBU; *T.S. ex rel. Starling v. Riverside Unified Sch. Dist.*, No. 5:24-cv-2480, Doc.1 (C.D. Cal. Nov. 11, 2024).
- A student was punished for promoting the view "All Lives Matter." *See B.B. v. Capistrano Unified Sch. Dist.*, 169 F.4th 953 (9th Cir. 2026); Schow, *First Grader Punished After Drawing 'BLM' With 'Any Life' Underneath*, DailyWire (Mar. 21, 2024), perma.cc/MV9F-LJKK.
- A student was prohibited from wearing a sweatshirt that contained a picture of an AR-15 firearm with the word "Essential" written underneath, which expressed his view on the Second Amendment. *See C.G. v. Oak Hills Loc. Sch. Dist.*, 2023 WL 4763458 (S.D. Ohio Jul. 26) (no First Amendment violation).

- A student was reprimanded for having a "Don't Tread on Me" patch on his backpack. *See* Griffin, *Colorado Middle-Schooler Kicked Out of Class for 'Don't Tread on Me' Patch That Teacher Claims Originated with Slavery*, N.Y. Post (Aug. 30, 2023), perma.cc/Y6EJ-EZDB.

- And many more students have been punished for expressing views on topics of public concern. *E.g.*, Gstalter, *Principal Told Teen to Remove Trump 'MAGA' Apparel on School's 'America Pride Day*,' The Hill (Apr. 13, 2019), perma.cc/7X3M-D2PJ; Luca, *Colusa Teacher Threatens to Kick Student Out of Virtual Class Over 'Trump 2020' Flag*, ABC10 (Sept. 23, 2020), perma.cc/BKR4-658R; Daley, *High School Cheerleaders on Probation for Holding MAGA Sign at Football Game*, WCNC (Sept. 16, 2019), perma.cc/5SRL-6938; Passoth, *Clark County School District Sued by Pro-Life Students Over Alleged First Amendment Violations*, Fox5 (Oct. 4, 2022), perma.cc/T5PQ-QWBJ.

Tri County Area Schools is part of this unfortunate trend. It punished students for wearing clothing with the political slogan "Let's Go Brandon" because that phrase's origin is connected to profanity or vulgarity. In doing so, the school district punished speech at the heart of the First Amendment without a sufficient justification.

II. The Sixth Circuit grievously erred in concluding that the school district didn't unconstitutionally suppress the students' speech.

The school district violated the First Amendment by forbidding the students to wear clothing that said, "Let's Go Brandon." The framers designed the Free Speech Clause of the First Amendment to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative*, 600 U.S. at 584. They did so because "they saw the freedom of speech 'both as an end and as a means.'" *Id.* "An end because the freedom to think and speak is among our inalienable human rights," and "[a] means because the freedom of thought and speech is indispensable to the discovery and spread of political truth." *Id.* (cleaned up). "'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with an uninhibited marketplace of ideas." *Id.* at 584-85 (cleaned up). The First Amendment thus protects "an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up).

Students, too, have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker*, 393 U.S. at 506. America's public schools are "the nurseries of democracy," and "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. Schools must "ensur[e] 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.'" *Id.*

Given these bedrock principles, this Court has recognized only four "specific categories of speech that schools may regulate in certain circumstances," *id.* at 187:

(1) "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds," *id.* (quoting *Fraser*, 478 U.S. at 685);

(2) "speech, uttered during a class trip, that promotes 'illegal drug use,'" *id.* at 187-88 (quoting *Morse*, 551 U.S. at 408);

(3) "speech that others may reasonably perceive as 'bearing the imprimatur of the school,' such as that appearing in a school-sponsored newspaper," *id.* at 188 (alteration marks omitted) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); and

(4) on-campus and some off-campus speech that "'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker*, 393 U.S. at 513).

Neither the school district nor the court below argued that categories two through four justify the school district's speech restriction. That is, the school district did not claim the students' speech promotes illegal drug use, can be reasonably seen as school-sponsored, or meets the *Tinker* standard by materially

disrupting the school environment or invading the rights of others. Nor did the Sixth Circuit rest on those grounds. App.9-10a.

Instead, the school district argued, and the Sixth Circuit agreed, that the prohibition satisfied the first category from *Bethel v. Fraser* about "vulgar" and "profane" speech. Though the court agreed that "political speech is 'at the core of what the First Amendment is designed to protect,'" App.21a (quoting *Morse*, 551 U.S. at 403), it held that "vulgarity trumps the political aspect of speech at school," App.22a. And it held that "Let's Go Brandon" was "an obscene or vulgar message," even though "the words used are not themselves obscene or vulgar." App.14a. In so holding, the Sixth Circuit "stretche[d] *Fraser* too far." *Morse*, 551 U.S. at 409. The Sixth Circuit's decision was wrong, gives too much deference to the school district, and creates a circuit split.

A. The Sixth Circuit's determination that *Fraser* applies here was wrong. The school district's only conceivable justification for prohibiting the phrase "Let's Go Brandon" is "the school's interest in teaching good manners" by "punishing the use of vulgar [or profane] language." *Mahanoy*, 594 U.S. at 191. But contra the Sixth Circuit, that justification is virtually nonexistent—or easily outweighed—here. That's because the speech is political speech and at worst a euphemism.

To start, *Fraser* does not cover a political slogan with a euphemism. "Political speech … is 'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403. Because the students' speech

"lies at the heart of the First Amendment's protection," "the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous," which is why such speech "is almost always beyond the regulatory authority of a public school." *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring).

But even if the phrase "Let's Go Brandon" could be understood to be *connected* to a phrase with vulgarity, the speech here is not akin to vulgarity because it is not "delivered in a lewd or vulgar manner" but through a euphemism. *Morse*, 551 U.S. at 422-23 (Alito, J., concurring). As the Sixth Circuit acknowledged, "Let's Go Brandon" is "a euphemism." App.12a & n.1. It has "quickly entered common usage, appearing in broadcast television, the Congressional record, and even President Biden's NORAD Santa tracker call-in on C-SPAN." App.4a. There is thus no doubt that "Let's Go Brandon" is meaningfully less crude than using actual vulgarity. *Cf. Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) (criticizing the idea that "euphemism is to be the only permitted mode of expressing a controversial opinion" in the public-school setting). Though the slogan originated as a substitute for another phrase that contains vulgarity, that does not make it an equivalent of the vulgar phrase. To put it succinctly: "One is censored; the other is not." App.53a (Bush, J., dissenting). Plus, for a term to be vulgar or profane, it must "play no real part in the expression of ideas." *Iancu v. Brunetti*, 588 U.S. 388, 400 (2019) (Alito, J., concurring). But there's no meaningful dispute that every

word in the phrase "Let's Go Brandon" plays a significant part in the expression of an idea. The political slogan itself is thus not vulgarity or profanity.

B. Despite acknowledging the lack of vulgarity or profanity on the face of the phrase "Let's Go Brandon," App.11a-13a, and the political message inherent in it, App.21a, the Sixth Circuit decided *Fraser* applied. The panel majority reasoned that the school district's determination that the phrase was vulgar was not unreasonable, and the school board was entitled to "discretion" to make such a determination. App.13a-14a, 16a. But such discretion runs right up against the First Amendment. *Cf. Tinker*, 393 U.S. at 509 (explaining that it is the state's burden to "justify prohibition of a particular expression of opinion"). The panel majority gave two reasons for such deference to the school district, neither of which work.

First, the Sixth Circuit said *Fraser*'s "core holding [is] that determinations of what is impermissibly vulgar, lewd, indecent, or plainly offensive should be left in the hands" of the school. App.16a. But *Fraser* held no such thing. "The majority's reading of *Fraser* conflicts with what that case said." App.46a (Bush, J., dissenting). The Court did not ground its decision in the discretion of the school district to interpret the speech. *Contra* App.16a. Instead, the Court explained on its own that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." *Fraser*, 478 U.S. at 683; *see also Tinker*, 393 U.S. at 509 (perform-

ing an "independent examination of the record" to determine whether school authorities' concerns were right).

Second, the Sixth Circuit reasoned that such deference was consistent with the historical understanding of student speech rights, including the doctrine of *in loco parentis*. App.17a. But "[t]he doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." *Mahanoy*, 594 U.S. at 189. As Judge Bush explained in dissent, giving deference to the school district's ideas of what is appropriate at school "assumes alignment, or at least not conflict, between the interests of parents and those of school administrators." App.59a (Bush, J., dissenting). It is especially "ill-suited to justify the school's disciplinary authority" in a case like this, where "the parent *wants* her sons to wear a non-vulgar sweatshirt to convey a political message." *Id.* (Bush, J., dissenting).

This Court has consistently sought to "balanc[e]" students' "freedom to advocate unpopular and controversial views in schools and classrooms" against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681; *see also Morse*, 551 U.S. at 396-97. The Sixth Circuit's broad deference to the school district eviscerates that balance. Giving the government the discretion not only to regulate profanity and vulgarity, but also to define what it is, allows the *Fraser* exception to swallow the First Amendment rule. But

the rule is that "free speech is the default and censorship is the exception," *see L.M. ex rel. Morrison v. Town of Middleborough*, 145 S. Ct. 1489, 1495 (2025) (Alito, J., dissenting from denial of cert.), not the other way around.

C. The Sixth Circuit's holding creates a circuit split on how to apply *Fraser*. Other circuits have applied *Fraser* to "per se" vulgar, lewd, or profane speech, not to "ambiguously lewd" speech like "Let's Go Brandon," and they have declined to apply it to speech that involved political views. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 306-07 (3d Cir. 2013) (en banc); *Guiles v. Marineau*, 461 F.3d 320, 327-28 (2d Cir. 2006).

For example, in *B.H. ex rel. Hawk*, the school banned middle schoolers from wearing "bracelets bearing the slogan 'I ♥ boobies! (KEEP A BREAST)' as part of a nationally recognized breast-cancer-awareness campaign," claiming "the bracelet ban [w]as an exercise of its authority to restrict lewd, vulgar, profane, or plainly offensive student speech under *Fraser*." 725 F.3d at 298, 300. The Third Circuit disagreed. Per the Third Circuit, *Fraser* and *Morse* "set[] up the following framework": (1) "plainly lewd[, vulgar, or profane] speech, which offends for the same reasons obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues"; (2) "speech that does not rise to the level of plainly lewd[, vulgar, or profane speech] but that a reasonable observer could interpret as lewd[, vulgar, or profane] may be categorically restricted as

long as it cannot plausibly be interpreted as commenting on political or social issues"; and (3) "speech that does not rise to the level of plainly lewd[, vulgar, or profane speech] and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted." *Id.* at 298. The Third Circuit held that because the bracelets were "not *plainly* lewd" and "comment[ed] on a social issue," the school could not rely on *Fraser* to justify its speech restriction. *Id.* at 298 (emphasis added).

The decision below goes the other way. Even though the phrase "Let's Go Brandon" is not vulgarity, let alone "*plainly*" vulgarity, *see Fraser*, 478 U.S. at 683 (emphasis added), the Sixth Circuit held that *Fraser* applied. It believed that "it was reasonable" for the school district to "classify the phrase as vulgar" simply because of its "association with a vulgar expression." App.20a. Instead of the narrow exception for vulgarity applied by the Third Circuit, the Sixth Circuit adopted a broad one encompassing any phrase any listener might reasonably associate with vulgarity.

Similarly, in *Guiles*, a school punished a middle schooler for wearing a t-shirt criticizing President George W. Bush; specifically, the shirt called the president a "Chicken-Hawk-In-Chief"; "Crook"; "Cocaine Addict"; "AWOL, Draft Dodger"; and "Lying Drunk Driver" next to images of "alcohol" and "cocaine." 461 F.3d at 322-23. The school claimed *Fraser* justified banning the shirt, but the Second Circuit disagreed. In the Second Circuit's view, *Fraser* only "applies to the 'manner of the speech,'" namely "speech containing sexual innuendo and profanity." *Id.* at 328. The

shirt didn't meet that standard because, even though the shirt's message and "images of a martini glass, alcohol, and lines of cocaine … may cause school administrators displeasure and could be construed as insulting or in poor taste," they were not expressly vulgar, obscene, profane, or offensive. *Id.* at 329. That the speech was "part of an anti-drug political message" reinforced the court's conclusion that *Fraser* didn't apply. *Id.*

Again, the decision below goes the other way. Though the phrase "Let's Go Brandon" might give the school district "displeasure," it is neither "plainly offensive as the sexually charged speech considered in *Fraser*" nor "as offensive as profanity used to make a political point." *Id.* If anything, the students' "Let's Go Brandon" apparel is far less vulgar than the shirt in *Guiles* and just as much of a political message. By broadly applying the *Fraser* exception to speech that does not actually include profanity or sexually charged language, the Sixth Circuit's rule conflicts with the Second Circuit's decision in *Guiles*.

* * *

In short, the Sixth Circuit's decision goes far beyond the lewd speech in *Fraser*. In doing so, it joins the growing number of cases in which the state has been allowed to elide the First Amendment rights of students, not to promote decency and order in the classroom, but to censor political speech administrators disagree with.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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