No. 25-1143

In the Supreme Court of the United States

D.A., A MINOR, BY AND THROUGH HIS MOTHER, B.A., ET AL.,
PETITIONERS,

v.

TRI COUNTY AREA SCHOOLS, ET AL.,
RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petition states the question presented as:

Whether *Fraser* permits schools to censor nondisruptive political speech that is not plainly profane or lewd.

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INTRODUCTION

While many adults enjoy using profane, lewd, and vulgar speech or donning adult-humor apparel, these topics have no place in public schools. It has been settled for decades that schools may categorically ban "lewd, indecent, or offensive speech." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). In other words, kindergartners should not be exposed to the concept of oral or anal sex in school hallways. Sixth graders should not flaunt their disagreements with teachers, students, or politicians by telling them to go F*** themselves. Nor

should high schoolers be inundated with messages about BDSM.

This case involves a school's decision to prohibit two middle schoolers from wearing sweatshirts emblazoned with "Let's Go Brandon" to express the message "F*** Joe Biden." The petition asks this Court to decide if *Fraser* applies to "political speech that is not plainly profane or lewd." Pet. i. According to petitioners (at 20-21), because "Let's Go Brandon" is a "euphemism[]" and "sanitized expression[]," it is irrelevant that the phrase's only evident meaning *is* plainly lewd and vulgar.

This is demonstrably incorrect. Almost all lewd speech comes in sanitized code, innuendo, and double meaning. Take the number 69. Although on its face it is just a number innocently falling between 68 and 70, many understand it to refer to a sexual position. Thus, one could understand 69 as plainly lewd speech or, instead, coded speech that is sanitized on its face but has a plainly lewd meaning. Either way, *Fraser* applies.

Respondents apologize for the use of offensive language and images in this brief. But these examples vividly illustrate the harms petitioners' approach would inflict on children and the ease with which enterprising students could circumvent petitioners' artificial rule. Consider, for example, a world where first graders may wear these shirts:

App.5a, 15a-16a, 18a-19a. All these shirts have a lewd meaning. But on petitioners' view, students can wear them on the first day of class, so long as the lewd meaning is sufficiently couched in code. And everyone—school administrators, courts, children, and parents—would be left to guess if and why any shirt crosses the line. Petitioners extol public schools as "nurseries of democracy." Pet. 1 (citation omitted). But petitioners' approach would transform those nurseries of democracy into nurseries of debauchery.

This Court should deny review. The decision below is clearly correct, does not implicate any circuit split, and would be an inappropriate vehicle in all events.

STATEMENT

A. Factual Background

In 2021, the crowd at a NASCAR race began chanting "F*** Joe Biden." Pet.App.3a-4a. A reporter, who was interviewing racecar driver Brandon Brown when the chants broke out, suggested that the crowd was instead chanting "Let's Go Brandon." Pet.App.4a. The video clip went viral, and "Let's Go Brandon" became synonymous with "F*** Joe Biden." Pet.App.4a.

That same year, petitioners D.A. and X.A. received "Let's Go Brandon" sweatshirts from their mother for Christmas. Pet.App.5a. Both children had watched Brown's interview and knew that the phrase "Let's Go Brandon" means "F*** Joe Biden." D. Ct. Dkt. 38-2 at 6; D. Ct. Dkt. 38-3 at 5-6. Indeed, both boys admitted that they thought the sweatshirts were "funny" because they meant "F*** Joe Biden." D. Ct. Dkt. 38-2 at 6; D. Ct. Dkt. 38-3 at 5-6.

D.A. and X.A. attended Tri County Middle School. Pet.App.5a. Tri County is located in Howard City, Michigan, which is a "strongly conservative," rural town. *See Howard City, MI Voting*, BestPlaces, https://tinyurl.com/95sxt5xa. Respondent Tri County Area Schools covers three counties—two of which voted for Donald Trump in the 2024 election and one of which voted for Kamala Harris. *Community*, Tri Cnty. Area Schs., https://tinyurl.com/57y7mysu; Zach Montellaro, *Donald Trump Flips Michigan*, Politico (Nov. 6, 2024), https://tinyurl.com/4ztcpan8. Tri County students reflect this political diversity by regularly wearing apparel supporting Trump, MAGA, Biden, other candidates, and various political parties to school. Pet.App.6a; D. Ct. Dkt. 38-4 at 8; D. Ct. Dkt. 38-5 at 6; D. Ct. Dkt. 38-6 at 8.

Sixth grader D.A. wore his "Let's Go Brandon" sweatshirt to school in February 2022. Pet.App.5a. Respondent Assistant Principal Andrew Buikema asked D.A. to remove the sweatshirt "since the phrase 'means the F-word.'" Pet.App.5a (citation omitted). D.A. took off his sweatshirt and was sporting a matching "Let's Go Brandon" t-shirt underneath; he removed that too and changed into school-provided clothing. Pet.App.5a. Undeterred, D.A. wore his sweatshirt to school again. Pet.App.5a. Respondent teacher Wendy Bradford said to him, "[y]ou might want to take that off, otherwise Mr. Buikema is right down the hallway, you can talk to him." Pet.App.5a (citation omitted). D.A. complied by removing his sweatshirt for the remainder of the day. Pet.App.5a.

Eighth grader X.A. wore his sweatshirt to school in May 2022. "Buikema called him to the front office and told him to remove the sweatshirt because the slogan had a 'profane double meaning.'" Pet.App.5a-6a (citation omitted). Buikema also referenced the school's dress code, which prohibited "[a]ttire with messages or illustrations that are lewd, indecent, vulgar, or profane, or that advertise any product or service not permitted by law to minors." Pet.App.6a (alteration in original) (citation omitted).

Tri County teachers and administrators had enforced this dress code in the past, including by asking students to remove coded lewd apparel like a "Fet's Luck" hat and "Uranus Liquor" hoodie. D. Ct. Dkt. 38-5 at 7; D. Ct. Dkt. 38-4 at 9. But the dress code did not "prevent the students from wearing clothing that expressed political statements so long as it didn't [otherwise] violate the dress code." Pet.App.6a.

B. Procedural Background

1. In May 2022, petitioners sent a cease-and-desist letter to the school district, claiming that the school had violated the brothers' First Amendment rights. Pet.App.7a. Petitioners also demanded that the school amend or clarify the dress code. Pet.App.69a-70a. The school responded that "Let's Go Brandon" could be restricted because it was vulgar or profane and declined to modify the dress code. Pet.App.7a, 70a.

2. Petitioners followed up by filing suit in April 2023. Pet.App.7a. Petitioners brought five causes of action against respondents under the First and Fourteenth Amendments that sought injunctive and declaratory relief, unspecified damages, and attorneys' fees. Pet.App.7a, 70a; D. Ct. Dkt. 1.

Following discovery, the parties filed cross-motions for summary judgment. Pet.App.7a. On August 23, 2024, the district court granted respondents' motion, concluding that respondents "reasonably interpreted the phrase [Let's Go Brandon] as containing a profane message." Pet.App.65a, 95a. The court rejected petitioners' argument that "Let's Go Brandon" is not profane because it is a euphemism. Pet.App.90a-91a. The court explained that "[w]ords constitute profanity because of the meaning conveyed, not because of the specific letters used to form the word." Pet.App.91a. And "[i]n school settings," the court reasoned, "profanity does not enjoy First Amendment protection," even when directed "toward a political figure." Pet.App.95a.

3. The Sixth Circuit affirmed in a split decision. Pet.App.3a-29a. Writing for the majority, Judge Nalbandian observed that the "Constitution doesn't hamstring school administrators when they are trying to limit profanity and vulgarity in the classroom during

school hours." Pet.App.11a. To the contrary, schools "are charged with teaching students the 'fundamental values necessary to the maintenance of a democratic political system,'" which includes "avoiding 'vulgar and offensive terms in public discourse.'" Pet.App.11a (quoting *Fraser*, 478 U.S. at 681, 683).

The court further concluded that the subjectivity of vulgarity and profanity requires school administrators to have some discretion to determine what language fits the bill. Pet.App.11a, 14a-16a, 20a. However, the court cautioned that "this discretion is not limitless," and "courts should be wary of unreasonable definitions of vulgarity, lewdness, indecency, or offensiveness that seem designed to … engage in viewpoint discrimination." Pet.App.16a.

Applying these principles, the court rejected petitioners' argument that "Let's Go Brandon" is not vulgar or profane because it is a "euphemism." Pet.App.13a. The court pointed to *Fraser*, in which the student's speech included a "rather elaborate sexual metaphor instead of explicitly vulgar or obscene words." Pet.App.13a-14a. Yet the Supreme Court described the student's speech as "plainly offensive," which confirms that "school[s] may regulate speech that conveys an obscene or vulgar message even when the words used are not themselves obscene or vulgar." Pet.App.14a (citation omitted). The court held that the same result follows here. "[T]he uncontroverted origin of the slogan [Let's Go Brandon] shows a plainly vulgar meaning"—F*** Joe Biden—making it reasonable for school "administrators to classify the phrase as vulgar based on its association with a vulgar expression." Pet.App.20a.

Nor did the "slogan's political valence" move the needle. Pet.App.21a. In *Fraser*, the student speaker "was delivering a nomination speech in support of a fellow student's candidacy for school vice president—a

quintessentially political act, though one with relatively low stakes." Pet.App.23a. Yet the school could nonetheless restrict the speech because it "was both political and vulgar," and "the school's interest in prohibiting vulgarity predominates over the student's interest in making a political statement in the language of their choosing." Pet.App.23a-24a.

Judge Bush dissented. Pet.App.29a-63a. He would have applied the *Tinker* substantial-disruption standard to petitioners' sweatshirts. Pet.App.30a (discussing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)). In his view, *Fraser* should apply only when speech is vulgar or profane "on its face," and "Let's Go Brandon" is "not plainly lewd or vulgar." Pet.App.30a-31a, 47a. Since the sweatshirts "did not cause a substantial disruption," Judge Bush would have remanded for consideration of "whether the defendants are entitled to qualified immunity." Pet.App.30a.

4. The Sixth Circuit denied petitioners' en banc petition, with only Judge Bush noting dissent for the reasons stated in his dissent from the panel opinion. Pet.App.96a-97a.

REASONS FOR DENYING THE PETITION

Fraser holds that school administrators can restrict speech touching on political topics when that speech is vulgar, profane, or lewd—even when expressed in euphemisms. A contrary rule would allow vulgar, lewd, and profane codewords to flood classrooms and would prevent schools from teaching students how to engage in political discussions with civility.

This case also implicates no circuit split. Only the Third Circuit has adopted petitioners' proposed approach

of distinguishing speech that is "plainly" vulgar from otherwise vulgar speech. Pet. i. But the Third Circuit has never held that coded speech conveying a plainly vulgar message like "Let's Go Brandon"—which petitioners admitted below means "F*** Joe Biden"—is not "plainly" vulgar. And petitioners' citations to the Second and Ninth Circuits are also inapt, since neither has adopted petitioners' proposed test.

Lack of split aside, the petition is also a poor vehicle for answering the question presented, because resolution of that question would not be outcome determinative. As Judge Bush signaled below, respondents would be entitled to qualified immunity because no law from this Court or any other court clearly establishes that school administrators could not regulate the speech at issue given its plainly vulgar meaning.

I. The Sixth Circuit's Decision Is Correct

1. The Sixth Circuit correctly rejected petitioners' claims. To start, there is no dispute that "Let's Go Brandon" has a "plainly vulgar meaning" of "F*** Joe Biden." Pet.App.20a. There was no other reason to wear the shirt. D. Ct. Dkt. 38-2 at 6 (D.A. conceding he thought the sweatshirt "was funny because it means F[***] Joe Biden"); D. Ct. Dkt. 38-3 at 6 (X.A. conceding he "knew that Let's Go Brandon means F[***] Joe Biden"). Nor is there any dispute that the F word is one of the most "distasteful" profane words in the English language. *Cohen v. California*, 403 U.S. 15, 25 (1971).[1]

This case thus falls squarely under *Fraser*. Matthew Fraser delivered a speech to his high-school classmates,

[1] The dissent suggested that the profane "words 'f*ck' or 'f*cking'" are not necessarily "*plainly* lewd" because they "are commonly used

nominating a peer for student-elective office. 478 U.S. at 677. The speech contained not "'plainly' profane and lewd" words, Pet. i, but "sexual innuendo" and "metaphor," 478 U.S. at 678. Fraser called the candidate "firm in his pants" and "firm in his shirt," noted "his character [wa]s firm," and said he was willing to "take an issue and nail it to the wall." *Id.* at 687 (Brennan, J., concurring in the judgment).

The Court was not persuaded by Fraser's defense that the speech lacked "dirty words" and conveyed only "sexual connotations." Resp. Br. 13, *Fraser*, 478 U.S. 675 (No. 84-1667). The Court held that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683. The Court thus upheld the school's decision to treat Fraser's codewords no differently than the lewd words they euphemized. *Id.* at 685.

The Sixth Circuit also correctly held *Fraser* is controlling despite the "political valence" of "Let's Go Brandon." Pet.App.21a. *Fraser* itself involved political speech: Fraser spoke as part of his school's "educational program in self-government," nominating a candidate for student government. 478 U.S. at 677. This Court was unpersuaded by Fraser's contention that any rule about vulgar speech "should not extend to presentation of political speeches." Resp. Br. 26-27, *Fraser*, 478 U.S. 675 (No. 84-1667).

As *Fraser* observed, the First Amendment does not give students the right to wear "Cohen's [F*** the Draft]

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today to convey emphasis or strong emotion, rather than for their literal, sexual meaning." Pet.App.47a-48a. But countless swear words fall into similar categories: "a**h*le," "p***y," and "c**t" being just a few.

jacket," because schools may "prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 682-83 (citation omitted) (discussing *Cohen*, 403 U.S. 15). Schools serve to "teach[] students the boundaries of socially appropriate behavior," since "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Id.* at 681.

2. Petitioners' approach would eviscerate *Fraser*, forcing schools to stand by as the school environment turns vulgar and lewd. Petitioners offer neither schools nor courts (much less students and parents) with any guidance on when *Fraser* would apply to vulgar innuendo and codewords—an ever-evolving language that is native to many teenagers (and foreign to many judges).

For example, what counts as "'plainly' profane and lewd" speech to petitioners? Pet. i. Petitioners agree a student could not wear "Fuck Joe Biden" apparel to school. Pet. 22. But what about "**ck", "***k", or "****" Joe Biden? And what if a student with the opposite ideology wore a t-shirt that said: "I don't know who Brandon is but duck Trump"? *Cf.* App.2a. Would emojis that are innocent on their face but are used to convey sexual meaning do the trick? Could a student wear a pin that reads "Joe Biden loves 🍆"? *Cf.* App.55a.

These questions are not hypotheticals. Consider the shirts available for sale in the Appendix. App.1a-69a. Can students don apparel that reads "Trump too small 👇"? App.3a. Or "Trump can grab my ↓"? App.4a. How many students—or teachers, or judges, or judicial clerks—have

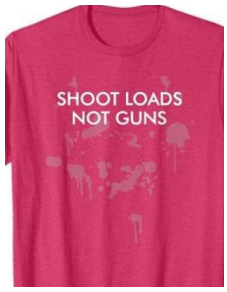
to appreciate the double meaning before the speech counts as "plainly" profane or lewd?

Indeed, the line-drawing problems would be head-spinning. The number of lewd and vulgar codewords is shockingly expansive and ever-changing. Can students use "sanitized" terms for oral sex, like "blumpkin," "bush diving," or "carpet muncher"? *See* Slang for "Oral Sex," *Urban Thesaurus*, https://tinyurl.com/ycyw8dbv. What about yet other sexual terms, like "donkey punch," "corn-hole," "reverse bazooka," "Netflix [a]nd [c]hill," "bumping uglies," "riding the pony," "queening," "eating the peach," and "rusty trombone"? *See, e.g.*, Slang for "Anal Sex," *Urban Thesaurus*, https://tinyurl.com/bdza77r2; Sophie Goulopoulos, *12 Iconic Sex Slang Terms You Need to Know*, Body + Soul (June 29, 2022), https://tinyurl.com/mrh8ms3n; Preston Barnhart, *45 Metaphors for Sex*, Idioms Made Easy, https://tinyurl.com/mwndav67.

Petitioners also do not justify treating political speech differently from speech addressing other important content like art, music, education, medicine, mindfulness, or middle-school angst. Worse still, petitioners would require schools and judges to conduct another line-drawing exercise: determining whether speech is "political." *E.g.*, Pet. 14-15, 22. Petitioners do not provide a definition. Petitioners deem the school-election speech in *Fraser* non-political. *See* Pet. 22; CA6 Dkt. 85 at 15 n.7. Why?

Many shirts in the Appendix clearly refer to political figures. App.1a-22a. But many of the other shirts clearly relate to political and social issues. *See, e.g.*, App.23a-27a.

Consider these shirts that relate to space policy, nonviolence, and firearms regulation:



App.23a, 25a, 27a.

Other shirts relate to yet other political topics. App.28a-69a. Take the following, which explore gender ideology, sexual awareness, and empowerment:

App.28a-29a, 61a.

Or take other cases. Could a student campaign for women's health by wearing a shirt offering that he is "not a gynecologist, but [will] take a look"? App.38a. What about a student campaigning for sexual liberation by announcing she is "moister than an oyster," "like[s] it raw," wants "you to glaze [her] hole," or has "arthritis in the knees but [is] still down to please"? App.37a, 49a, 36a, 68a.

Would slight tweaks make these shirts suitable for school?

Petitioners' approach threatens mayhem in middle and high schools, where kids are in the developmental stage of exploring their sexuality—and experimenting with socially acceptable means of discussing sexual topics. *See Talking to Your Child About Sex*, HealthyChildren.org, https://tinyurl.com/36zvp6ax. Vesting in courts the power to second-guess schools' answers to these questions would risk turning every judgment call by school officials into a federal lawsuit for damages and attorney's fees. And the signal to school officials would be clear: The safe course is to err on the side of not regulating lewd and vulgar speech at all.

The victims of that regime would be children. As *Fraser* explained, "the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech." 478 U.S. at 683. Petitioners would prepare students for adulthood by teaching them that profane and sexual insults are par for the course.

Nor is it clear how *Tinker* could or would apply in this context. *Tinker* asks whether speech causes a substantial disruption *on* campus. 393 U.S. at 514; *Mahanoy Area*

Sch. Dist. v. B.L. ex rel. Levy, 594 U.S. 180, 192-93 (2021). But profane and lewd euphemisms also could cause substantial disruption *off* campus. Many parents prefer to control their children's exposure to sexual discourse until the topics become age-appropriate (if ever). *Cf. Mahmoud v. Taylor*, 606 U.S. 522, 547 (2025). What should schools do if parents call to complain that their children asked, "Mommy, what does F*** mean?", App.2a, "Daddy, why does President Trump love to grab cats?", App.4a-5a, "Grandma, what does BDSM stand for?", App.38a-39a, or "Grandpa, why are kids wearing pictures of beavers, chickens, pumpkins, and roast beef to school?", App.35a, 46a, 50a-51a. How many parents have to complain? Can schools account for the harm arising from students' searching the internet for answers and stumbling onto hardcore pornography websites? There are no easy answers, and petitioners do not even try to offer any.

3. Rather than reckoning with the upheaval their rule would create, petitioners raise a smattering of objections to the Sixth Circuit's decision. None has merit.

First, petitioners say, *Fraser* charges courts to determine vulgarity themselves, using "benchmarks" like "congressional decorum rules." Pet. 22-23. *Fraser* held the opposite: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 478 U.S. at 683; *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). This Court has never suggested that First Amendment rights in the schoolhouse must be the same as in the House of Representatives. Rather, *Fraser* pointed to the existence of congressional decorum rules as evidence that schools, to "educat[e] our youth for citizenship," must prepare students to avoid "expressions

offensive to other participants in [a] debate." *See* 478 U.S. at 682-83.

Petitioners (at 22) also protest that *Fraser* should not often extend beyond "school-sponsored" activities that "members of the public might reasonably perceive to bear the imprimatur of the school" (quoting *Hazelwood*, 484 U.S. at 271). But *Fraser* nowhere points to such a cabined rule. The Court held that schools may prohibit "lewd, indecent, or offensive speech" not only in a "school assembly" but also "in the classroom." 478 U.S. at 683. A contrary rule would make little sense in practice—would students be able to wear vulgar clothing to homeroom so long as they removed it on school trips?

Before the Sixth Circuit, petitioners argued that Justice Alito's concurring opinion in *Morse v. Frederick*, 551 U.S. 393 (2007), "modified" *Fraser* to require their distinction between plainly lewd and sanitized speech. Pet.App.25a. Petitioners appear to retreat from that argument before this Court, and for good reason. Setting aside whether Justice Alito's concurrence even controls under *Marks v. United States*, 430 U.S. 188 (1977), his separate writing simply emphasized concerns that *Morse*'s holding—that a school could restrict a banner reading "BONG HiTS 4 JESUS"—might chill high schoolers from debating "the wisdom of the war on drugs or of legalizing [medical] marijuana." 551 U.S. at 422 (Alito, J., concurring) (citation omitted). Those concerns do not implicate *Fraser*, because *Fraser* allows schools to restrict speech only because of its lewdness—not because of any particular subject matter or political valence. Pet.App.25a-28a.

Petitioners (at 3) further criticize the Sixth Circuit's decision for "open[ing] the door for viewpoint discrimination" by school officials (quoting Pet.App.54a (Bush, J.,

dissenting)). But students retain every right to wear non-vulgar anti-Biden and anti-Trump apparel. Tri County administrators allowed just that, including "Make America Great Again" apparel. Pet.App.6a.

The court's decision also bakes in safeguards against viewpoint discrimination. The court requires that schools' determinations be "reasonable," and it cautions courts to "be wary of unreasonable definitions of vulgarity, lewdness, indecency, or offensiveness that seem designed to misuse *Fraser* to engage in viewpoint discrimination." Pet.App.16a. That sort of reasonableness inquiry is well founded in this Court's school-speech cases. *Tinker*, for instance, asks whether "school officials reasonably" perceived a substantial disruption. *Morse*, 551 U.S. at 403. In that way, the school-speech doctrine leaves room for the on-the-ground judgments school officials must make myriad times each day.

Petitioners (at 24) hypothesize that deferring to school administrators' vulgarity determinations will produce disparate outcomes across different schools. That is a feature, not a bug. Vulgarity and profanity vary by locality. San Francisco schools may have vastly different views of what counts as vulgar than schools in Oklahoma City. That principle underlies the First Amendment doctrines governing obscenity and obscenity as to minors, which are both defined by local "community standards." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 472, 474 (2025). As this Court has explained, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable

in Las Vegas, or New York City." *Miller v. California*, 413 U.S. 15, 32 (1973). The same goes for the schools.

Petitioners' proposed standard would not avoid disparate restrictions anyway. Petitioners would merely grant judges, not schools, primary authority to decide what speech is "plainly" vulgar and "political." Judges would inevitably disagree on those questions. Further, for ambiguously vulgar speech, petitioners' approach would require identifying a "substantial disruption" under *Tinker*, 393 U.S. at 514—an inquiry that almost always turns on school-specific facts. *Tinker* itself cited approvingly two Fifth Circuit opinions issued by "the same panel on the same day" that applied the correct standard and reached "opposite result[s]" over the same speech ("freedom buttons") at two schools in Mississippi. *Id.* at 505 n.1 (citing *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

Finally, petitioners (at 27) worry that the Sixth Circuit's approach will fail to prepare students "for life as an American adult." But petitioners overlook that this case is about whether schools must allow vulgar means of expression. Sixth graders can criticize Joe Biden all they want; they just can't suggest he should go F*** himself. Indeed, there are scores of t-shirts that provide students an outlet for political expression without involving coded vulgarity, as these two examples show.

Redbubble, https://tinyurl.com/5yextz5c; *TeePublic*, teepublic.com/t-shirt/19704835. The Sixth Circuit's decision places no restrictions on students' ability to engage in vigorous debate about any political or social issue.

II. This Case Implicates No Circuit Split

1. Petitioners (at 8-15) erroneously claim that lower courts have split over "whether *Fraser* permits schools to censor nondisruptive political speech that is not plainly profane or lewd." That split is illusory.

a. Start with the Third Circuit. That court holds that although schools categorically may restrict "plainly" lewd or vulgar speech, they are more limited in their ability to restrict students' "ambiguous speech that a reasonable observer could interpret as having a lewd, vulgar, or profane meaning and could plausibly interpret as commenting on a social or political issue." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 320 (3d Cir. 2013) (en banc). True, the decision below did not adopt the Third Circuit's rule that courts must first determine whether a student's speech is "plainly" or "ambiguously" vulgar or lewd before applying *Fraser*. But neither has

any other court of appeals embraced this dubious methodological approach. *See infra* pp. 21-23. And the question presented does not ask the Court to adopt that approach either. Instead, it asks "whether *Fraser* permits schools to censor nondisruptive political speech that is not plainly profane or lewd." Pet. i.

Here, the Sixth Circuit held that "Let's Go Brandon" has "a plainly vulgar meaning." Pet.App.20a. Since there was no other reason to wear the sweatshirts than to profess the F word, *supra* p. 9, school administrators properly categorized "Let's Go Brandon" "as being vulgar speech" that could be restricted under *Fraser* "despite its political message." Pet.App.29a. The petition's attempt to classify "Let's Go Brandon" as speech that is not "plainly" vulgar wars with the holding of the decision below. As a result, before this Court could even address *Fraser*'s application, the petition would require the Court to weigh in on an antecedent fact-bound dispute over whether "Let's Go Brandon" is "plainly" vulgar. And there is not even an arguable circuit split on that good-for-one-case-only issue.

Moreover, even if the Sixth Circuit (or this Court) adopted the Third Circuit's outlier methodology, it is far from clear that it would have prevented Tri County Schools from asking X.A. and D.A. to remove their "Let's Go Brandon" apparel. The Third Circuit has never held that "Let's Go Brandon" or other coded speech that conveys a vulgar meaning is not "plainly" vulgar. In *B.H.*, the bracelets that the Third Circuit held were "ambiguously lewd" used language that was at worst sophomoric ("boobies") to convey an entirely non-vulgar message regarding breast-cancer awareness. 725 F.3d at 320. Here, by contrast, the Sixth Circuit concluded that because "Let's Go Brandon" conveys a "plainly vulgar

meaning," it was "reasonable for [school officials] to classify the phrase as vulgar." Pet.App.20a. And petitioners conceded that they understood that "Let's Go Brandon" meant "F[***] Joe Biden," D. Ct. Dkt. 38-2 at 6, 8; indeed, they wore the sweatshirts precisely because they believed it was "funny" to convey that vulgar message, *see id.*; D. Ct. Dkt. 38-3 at 5-6. Accordingly, petitioners' rule—that courts need not defer to schools' reasonable interpretation—is not even implicated by this case, because there was no other meaning for the speech.

The Third Circuit's reasoning in *B.H.* is thus consistent with finding "Let's Go Brandon" to be "plainly" vulgar and subject to categorical restriction. In fact, the court recognized that Matthew Fraser's speech was "plainly lewd," even though the student used only "pervasive sexual innuendo," rather than explicit words. *B.H.*, 725 F.3d at 320 (quoting *Fraser*, 478 U.S. at 683). And the Third Circuit explained that the contours of "plainly lewd" speech "necessarily admit of some flexibility" and are context-dependent. *Id.* at 319. The Third Circuit's open-ended, admittedly "elusive," *id.* (citation omitted), approach to defining vulgarity does not give rise to a circuit split.

b. The purported split with the Ninth Circuit fares no better. The Ninth Circuit has never distinguished between "plainly" and "ambiguously" vulgar or lewd speech. Petitioners (at 14) cherry-pick two words from *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992). There, the Ninth Circuit noted that students' pins calling substitute teachers "scab[s]" during a teacher strike "cannot be considered *per se* vulgar, lewd, obscene, or plainly offensive within the meaning of *Fraser*." *Id.* at 530 (emphasis added). But that "per se" qualifier was a product of the procedural posture. The case was at the motion-to-dismiss stage, so the court was required to

"construe the complaint in a light most favorable to" the students; school officials had not yet shown that "scab" fell within *Fraser*'s scope. *Id.*

Chandler never suggested that only "plainly" lewd or vulgar student speech can be disciplined. The opinion emphasized that schools, "not … federal courts," have the discretion to determine appropriate classroom speech. *Id.* at 527. And *Chandler*'s other discussions of *Fraser* omit any "per se" qualification, *id.* at 529, as have subsequent Ninth Circuit decisions citing *Chandler*, *see, e.g.*, *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013).

c. Petitioners (at 14) half-heartedly claim that the Second Circuit adopted a "largely similar framework" to the Ninth and Third Circuits by "limit[ing] *Fraser*'s holding" to the facts of the case. But they are forced to admit that the Second Circuit has not "cabined *Fraser* to 'plainly' and 'per se' profane and sexual expression." *Id.* Moreover, petitioners misread *Doninger ex rel. Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). There, the court merely explained that *Fraser*'s particular "reference to 'plainly offensive speech'" did not give school officials a blank check, because that term "must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in that case." *Id.* at 49.

2. The First Amendment Scholars amici (at 20-21) purport to identify an additional circuit split between the Sixth Circuit and "at least five other circuits" over whether *Tinker* applies to students' political speech. Petitioners notably do not endorse that split. And the claim is wrong. Amici's cases (other than *B.H.*) applied *Tinker* to non-vulgar political speech. *See, e.g.*, *L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024) ("There Are Only Two Genders" shirt); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006) (shirt portraying

President Bush as a chicken alongside depictions of drugs and alcohol); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (shirt depicting firearms); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008) ("Be Happy, Not Gay" shirt).

The Sixth Circuit agrees that *Tinker* governs non-vulgar political speech. Pet.App.11a. Last year, for instance, the en banc court held that *Tinker* applies when students refuse to call peers by their preferred pronouns. *See Defending Educ. v. Olentangy Local Sch. Dist. Bd. of Ed.*, 158 F.4th 732, 738 (6th Cir. 2025) (en banc).

3. Petitioners (at 10-13) profess a need for this Court to "clarify *Fraser*." Pet. 4, 12. Petitioners' inability to identify a real circuit split forty years after *Fraser* indicates otherwise. That a handful of decisions have described school-speech law as complex sheds no light on whether the specific question presented here has sowed real confusion in the lower courts. *Cf.* Pet. 12-13.

In any case, *Fraser*'s bottom line is straightforward: As petitioners themselves explain, the case created "a narrow exception [to *Tinker*] by allowing schools to prohibit profane and sexually lewd speech." Pet. i. Difficult cases along the margins are a product of the entrepreneurial creativity of America's schoolchildren to invent new ways of conveying profane and lewd messages; they are not a sign of uncertainty in the rules governing such speech in school.

III. This Case Is an Unsuitable Vehicle

This case is also an exceptionally poor vehicle for addressing the question presented, because resolving the question presented would not be outcome determinative here. As Judge Bush signaled in his dissent, respondents have a pending qualified-immunity argument that would

need to be addressed on remand. Pet.App.30a. Petitioners would have to show specifically that the unconstitutionality of respondents' request that they remove their profane political sweatshirts was "beyond debate." *See Reichle v. Howards*, 566 U.S. 658, 664-65 (2012) (citation omitted).

Petitioners would not be able to make that showing. No precedent from this Court (or the Sixth Circuit) established that middle-school students have a First Amendment right to wear political apparel with a vulgar or profane message to school. To the contrary, *Fraser* would have signaled to school administrators that politically tinged profane student speech could be restricted. 478 U.S. at 685. And even were petitioners' rule somehow clearly established, petitioners identify no case supporting their view that "Let's Go Brandon" is not "plainly" profane or lewd. Given the lack of caselaw supporting petitioners' free-speech claim, respondents would be entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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