

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

**REPLY IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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**REPLY IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

Respondents' brief colorfully illustrates why clarifying *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), is necessary. Lower courts and schools lack guidance for how to call balls and strikes on the hundreds of hypotheticals Respondents offer. That is because *Fraser's* "mode of analysis" is "not entirely clear." *Morse v. Frederick*, 551 U.S. 393, 404 (2007). It provides no standard to distinguish "Vote Heck Yes on Prop 2!" from "Fü©k Trump!"

This case is an ideal vehicle to provide clarity. Petitioners' "Let's Go Brandon" sweatshirts did not disrupt a single class or school activity. They silently expressed opposition to President Joe Biden using a popular political slogan containing no hint of sexual double entendre and no trace of a swearword.

Tinker requires a showing of "substantial" disruption to prevent schools from too readily embracing censorship in response to disfavored political speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). *Fraser* lacks, but needs, that same starch. Because if, as Respondents urge, the First Amendment's protection for nondisruptive political speech evaporates the moment a single teacher calls it "vulgar," little is left of *Tinker's* guarantee that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

Before the Court are two paths. The first, followed by the Third and Ninth Circuits, places guardrails on

Fraser to ensure students’ nondisruptive but pointed political speech retains First Amendment protection while keeping sexually lewd and profane expression out of schools. The second, followed by the Sixth Circuit, allows each teacher and administrator to decide for themselves what *Fraser* means. That path, Judge Bush warned in dissent, “open[s] the door for viewpoint discrimination.” Pet.App.53a–54a.

Without a standard “to distinguish the vigorous from the vulgar,” *Fraser*, 478 U.S. at 690 (Brennan, J., concurring) (citation omitted), millions of public school students are vulnerable to censorship based on subjective tastes and politically motivated reasoning. America’s students deserve to know what political speech the First Amendment protects in school, and not to have the answer depend on which teacher they’re assigned.

The Court should grant the petition.

ARGUMENT

I. The Sixth Circuit’s Blessing of Subjective Enforcement is Unprecedented in First Amendment Law.

Respondents’ brief in opposition contains a fatal concession: The Sixth Circuit’s approach to *Fraser* “will produce disparate outcomes across different schools” for identical nondisruptive political speech based on the subjective preferences of individual teachers and administrators. BIO.17. Yet, Respondents celebrate this as a “feature, not a bug” of the decision below. BIO.17. That is remarkable.

This Court has never, in any context, allowed government officials to subjectively enforce speech regulations. Allowing an official's tastes to dictate legal boundaries "smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). It is untenable in a country predicated on a marketplace of ideas, because "[w]hat seems to one to be trash may have for others fleeting or even enduring values." *Id.* Even in the special environment of public schools, officials cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To stop administrators from using subjective discomfort as pretext for censoring disfavored speech, *Tinker* established the objective "substantial" disruption test that places the burden on "school officials to justify prohibition of a particular expression of opinion." 393 U.S. at 509. As *Tinker* held: "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511. There is broad recognition that *Tinker's* "substantial" disruption test is "objective."¹

Because *Tinker's* "substantial" disruption test is objective, courts do not defer to a school's view on

1. See, e.g., *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022) (holding *Tinker* is an "objective" test); *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) (same); *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 398 (5th Cir. 2015) (same); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir. 2012) (same).

whether substantial disruption occurred. *See, e.g., Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 192 (2021) (rejecting high school’s substantial disruption assertion, reasoning, “the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class ‘for just a couple of days’ and that some members of the cheerleading team were ‘upset’ about the content” of the speech); *C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270, 1278 (10th Cir. 2022) (rejecting school’s claim of substantial disruption).

The decision below flips both *Tinker* and the core First Amendment principle of objectivity on their heads. *Tinker’s* command that schools must make a “specific showing of a constitutionally valid reason” to censor nondisruptive political speech, 393 U.S. at 509, means little if each school gets to decide the boundaries of “valid reasons.” As Judge Bush explained in dissent, the Sixth Circuit “grants schools unrestrained authority to suppress speech based on subjective interpretations, opening the door for viewpoint discrimination without any need for schools to justify their regulations.” Pet.App.53a–54a.

To defend this overturning of the apple cart, Respondents invoke *obscenity* law, arguing it permits consideration of “community standards.” BIO.17–18. Even if obscenity—an unprotected category of speech—were relevant (and it is not), Respondents butcher its test. Obscenity law permits consideration of “community standards” only if “proscribed material ... [is] specifically defined by the applicable state law” and the material “taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Reno v.*

ACLU, 521 U.S. 844, 873 (1997) (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)). And those definitional and serious value requirements are judged on a national, not community, standard. *Id.* The decision below contains no similar (or any) safeguards against subjective enforcement, and Respondents tellingly do not argue otherwise. *Cf. id.* (“Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.”).

Even if local “community standards” had a role to play, Petitioners explained, and Respondents do not dispute, that the decision below permits inconsistent enforcement not only between schools in the same district but between teachers in the same school. Pet.3–4. That is untenable. If an administrator’s or teacher’s personal view of “vulgarity” carries the day so long as it is “reasonable,” a student’s *First Amendment right* to nondisruptively wear a particular political shirt will turn on which school they’re zoned to attend and which teachers appear on their class schedule.

That is unworkable and unconstitutional. “Merely local attitudes can neither shrink nor inflate the meaning of fundamental Bill of Rights guarantees that apply to the States through the Fourteenth Amendment.” *Wolford v. Lopez*, No. 24-1046, slip op. at 18 (U.S. June 25, 2026). As Justice Brennan put it, “The Court ... has rejected the notion that the Fourteenth Amendment applies to the States only a watered down, subjective version of the individual guarantees of the Bill of Rights.” *Malloy v. Hogan*, 378

U.S. 1, 10–11 (1964) (quotation marks and citation omitted).

What constitutes “substantial” disruption under *Tinker*, therefore, does not change from school to school based on a principal’s conception of “disruption.” See, e.g., *Mahanoy*, 594 U.S. at 192; *Cl.G.*, 38 F.4th at 1278. It is a constant, with lower courts looking to this Court’s holdings on whether specific sets of facts constitute “substantial” disruption to ensure consistency in enforcing *Tinker*’s objective test. See, e.g., *Cl.G.*, 38 F.4th at 1276–79 (comparing factual circumstances of student’s post to the insufficient asserted “disruption” in *Mahanoy*); *Barr v. Lafon*, 538 F.3d 554, 566–67 (6th Cir. 2008) (“In contrast to the dearth of evidence on the record in *Tinker*, the record in the instant case contains evidence of racial violence, threats, and tensions”).

Respondents are flat wrong in claiming that a footnote in *Tinker* blessed inconsistent enforcement. BIO.18. Their discussion of that footnote erased its three critical words. *Tinker* described two Fifth Circuit cases decided by “the same panel on the same day” reaching opposite conclusions on school regulations “forbidding students to wear ‘freedom buttons.’” 393 U.S. at 505 n.1 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966), and *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)). But *Tinker* made clear, yet Respondents omitted, that the panel reached the opposite results “on different facts,” specifically, that the students in *Blackwell* “created much disturbance” while the students in *Burnside* did not. *Id.* (emphasis added). The footnote Respondents cite thus cements

Tinker's command of an objective standard. The Fifth Circuit panel had engaged in precisely the type of objective disruption analysis *Tinker* adopted.

Clarifying *Fraser* as covering “plainly” profane and lewd speech, Pet.i, 13–15, does for *Fraser* what “substantial” disruption does for *Tinker*: provide a workable, objective standard that is sufficiently flexible to account for the myriad potential fact patterns while sturdy enough to ensure schools have a strong justification for censoring nondisruptive political speech.

II. Respondents’ Brief is a Showcase for Why Review is Warranted and Why Resolving the Circuit Split is Imperative.

Respondents’ brief in opposition and appendix contain (by our count) 205 sexual double entendres and 45 permutations of the word “f***.” Unless this Court grants review, administrators and teachers must make difficult judgment calls on each based solely on *Fraser*, a decision this Court acknowledges is “not entirely clear.” *Morse*, 551 U.S. at 404.

It is also not clear why Respondents spend so much time on obvious sexual double entendres in the first place, considering it is the category of expression *Fraser* squarely addressed and held schools may prohibit. 478 U.S. at 685. Petitioners are not asking the Court to overturn *Fraser*, but merely to clarify its scope, particularly with respect to assessing asserted “vulgarity” in nondisruptive political speech. A ruling for Petitioners would not disturb *Fraser*’s express allowance of prohibiting sexual double entendres.

But *Fraser* provides scant guidance regarding, for example, how (if at all) to weigh the fact the student's expression is political; how (if at all) to separate “gosh darn” and “fudge” from “G** d***” and “f***”; and how to deal with borderline cases.

Contrary to Respondents' protestations, there is a clear-cut, doctrinal circuit split on how to handle *Fraser's* lack of guidance. The Third and Ninth Circuits supply an objective standard for lower courts to enforce akin to *Tinker's* “substantial” disruption test, confining *Fraser* to “plainly” and “per se” lewd and profane speech. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 306–15 (3d Cir. 2013) (en banc); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992).

The Sixth Circuit, in stark contrast, holds *Fraser* allows a school to subjectively censor any expression it deems inappropriate, with courts able to step in only if the decision is “unreasonable.” Pet.App.14a–15a. This not only shields decisionmakers from liability through qualified immunity for “reasonable” decisions, but those judgment calls determine the student's constitutional rights. That is a startling expansion of *Fraser*. Take *Boroff*, in which the Sixth Circuit relied on *Fraser* to uphold a school's decision to ban T-shirts for the band Marilyn Manson not because the shirts used profanity or sexual language or imagery, but because the artist's lyrics—*none of which were on the shirt*—were “contrary to the school's educational mission.” *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000).

This Court warned against overreading *Fraser*. In *Morse*, the Court rejected a school’s argument that it could rely on *Fraser* to punish a student for unfurling a “BONG HiTS 4 JESUS” banner at a school event, explaining, “We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of ‘offensive.’” 551 U.S. at 409. After *Morse*, the Third Circuit listed *Boroff* as an example of a decision that “before *Morse* ... adopted th[e] broad interpretation” of *Fraser* but which is now “incompatible with the Supreme Court’s teachings.” *Hawk*, 725 F.3d at 316. Yet the decision below expressly spurned *Hawk*’s admonition and reaffirmed the Sixth Circuit’s broad interpretation of *Fraser*. Pet.App.15a–16a.

At bottom, the circuits fundamentally disagree over who decides when student speech crosses the *Fraser* line and what that line is. The Third and Ninth Circuits say the *Fraser* line for political speech is “plainly” or “per se” profane and lewd expression, with courts ensuring schools meet their constitutional burden. The Sixth Circuit claims *Fraser* allows censorship of nondisruptive political speech a single teacher or administrator “reasonably” considers vulgar, lewd, or profane, with courts treating even that determination with “deference.” Pet.App.16a.

Resolving the circuit split, as Respondents’ brief (literally) illustrates, is imperative.

III. The Sixth Circuit's Approval of Censoring Nondisruptive, Nonprofane Political Speech is Egregiously Wrong.

Petitioners expressed their views precisely the way *Tinker* and *Fraser* said they should. The students wore political apparel in a “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Tinker*, 393 U.S. at 508. Their expression contained no profanity (obscured or explicit), no sexual terms, nor any lewd double entendres. Instead, the students used a political slogan the decision below acknowledged was “firmly established in the national lexicon.” Pet.App.5a. But the decision below nevertheless held the slogan “mean[s]” the uncensored chant from which it derived and is thus indistinguishable from it. Pet.App.3a.

That stretches *Fraser* past the breaking point. This Court intended *Fraser* as a narrow exception to *Tinker*'s broad protections, allowing schools to “categorically prohibit lewd, vulgar or profane language.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). But if expression completely sanitized of profanity and sexual content or innuendo can still qualify as “lewd” or “profane,” then “lewd” and “profane” lose meaning. The “clean” version of music albums would qualify as lewd and profane, as would R-rated movies edited for broadcast television.

Petitioners explained, and Respondents do not challenge, that the decision below would permit schools to ban anti-war jackets reading “Cohen's Jacket” on the basis the jackets “mean” Mr. Cohen's

“F*** the Draft” jacket from *Cohen v. California*, 403 U.S. 15 (1971). Pet.22. Nothing in *Fraser* or any of the Court’s subsequent student speech cases suggests that this Court intended to gut *Tinker*’s protection for nondisruptive political speech so thoroughly.²

Respondents insist Petitioners may still wear other pro-Trump or anti-Biden apparel, offering examples of clothing and slogans the district deems acceptable. BIO.16–19. But *Tinker* made clear students “may not be confined to the expression of those sentiments that are officially approved.” 393 U.S. at 511. The question under the First Amendment, and *Tinker*, is whether the government can meet its burden of making “a specific showing of constitutionally valid reasons to regulate” *this* speech. *Id.* In *Spence v. Washington*, for example, this Court “rejected summarily” the Washington Supreme Court’s rationale that a speech restriction was lawful “because there are thousands of other means available to [the speaker] for the dissemination of his personal views.” 418 U.S. 405, 411 n.4 (1974).

“Let’s Go Brandon” is not profane. It is not lewd. It is not a sexual double entendre. It is a staple of

2. Respondents even try to dodge *Tinker* entirely, arguing that on-campus speech could cause “substantial disruption *off* campus” if students raise difficult topics with their parents. BIO.14–15. *Tinker*, they claim, is therefore inapplicable because it “asks whether speech causes a substantial disruption *on* campus.” BIO.14–15. This is meritless. Public schools gain limited authority over student speech only because they “stand *in loco parentis*” during the school day “where the children’s actual parents cannot protect, guide, and discipline them.” *Mahanoy*, 594 U.S. at 189. The content of discussions at home is parents’ business, not the government’s. *Id.*

political discourse and debate over the last four years used everywhere from the floor of Congress to television roundtables and the campaign trail. Petitioners, no different to Mary Beth and John Tinker, silently wore apparel with their preferred political message and continued about their day. It is precisely the nondisruptive political speech *Tinker* protects. That the decision below follows a test permitting its censorship demonstrates just how far afield from *Tinker* that *Fraser's* uncertainty has allowed the lower courts to stray. As Judge Bush's dissent urged, "the Supreme Court itself must ultimately clarify, and ideally limit, *Fraser's* reach." Pet.App.62a (quoting Recent Case, B.H. ex rel. Hawk v. Easton Area School District, 725 F.3d 293 (3d Cir. 2013) (*en banc*), 127 Harv. L. Rev. 1049, 1050 (2014)).

IV. Respondents' Vehicle Argument Ignores Petitioners' Request for Injunctive Relief.

Even though Petitioners seek injunctive relief against Respondents' ban on "Let's Go Brandon" apparel, *see* BIO.6, Respondents claim this petition is a "poor vehicle" for the question presented, because its resolution would not be "outcome determinative" given the need to address qualified immunity below. BIO.23. Respondents are wrong. Requests for injunctive relief are not subject to qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009). Resolving the question presented conclusively resolves the core requested relief in this case with qualified immunity to be addressed on remand.

This Court recently proceeded similarly. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 186 n.3

(2024) (rejecting argument for improvident grant of certiorari where the Court “limit[ed] its review to the First Amendment question and declin[ed] to review the Second Circuit’s alternative holding that Vullo is entitled to qualified immunity” because the “qualified immunity question” could be addressed on remand); *remanded to* 144 F.4th 376 (2d Cir. 2025) (addressing qualified immunity). This case can follow the same path.

CONCLUSION

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

Respectfully submitted,

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