UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

D.A., a minor, by and through his mother B.A.; and X.A., a minor, by and through his mother B.A.,

Plaintiffs,

v.

TRI COUNTY AREA SCHOOLS; ANDREW BUIKEMA, in his individual capacity; and WENDY BRADFORD, in her individual capacity,

Defendants.

Case Number: 23-cv-423

Judge Paul L. Maloney
Magistrate Judge Sally J. Berens

ORAL ARGUMENT REQUESTED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants ask this Court to be the first in the post-*Tinker* era to hold public schools may censor nondisruptive political expression based not on the speech's content, but the thoughts it might provoke. To reach that extreme result, Defendants jettison 55 years of Supreme Court precedent (1) placing political speech in a preferred position in public schools and (2) confining exceptions to students' First Amendment rights to situations likely to substantially disrupt the school environment, like organized walkouts, explicit profanity, and encouraging drug use.

Defendants' motion is built upon a legally incorrect foundation. They present regulation of student speech as the norm, and any limitations on that authority as aberrations. This transposition of exception as rule infects the whole of Defendants' argument, violating *Tinker*'s plain command that "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." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969). The First Amendment "means what it says," and permits reasonable regulation of student speech only in "carefully restricted circumstances." *Id.* at 513.

To ban Plaintiffs D.A.'s and X.A.'s sweatshirts containing "Let's Go Brandon"—an anti-Biden political slogan voiced everywhere from political rallies to the floors of Congress—Defendants depart from the Supreme Court's "carefully restricted circumstances" and try to create their own. Defendants attempt to stretch a narrow exception permitting schools to punish swearing and sexually explicit messages to cover non-profane and non-sexual expression if it might cause someone to *think* about those topics. Defendants say because "Let's Go Brandon" began as a cultural

reference to a "fuck Joe Biden" chant, schools can censor the slogan as if it *were* "fuck Joe Biden," because that is what the students are really thinking.

Defendants' argument is reminiscent of a political cartoon satirizing 19th century censor Anthony Comstock, showing him arresting an artist for depicting an almost totally submerged woman bathing, Comstock insisting, "Don't you suppose I can imagine what is under the water?"[1]

THAT FERTILE IMAGINATION.

A-n-y C-m-st-k: HOLD! I ARREST YOU FOR PAINTING INDECENT PICTURES!

Artist: INDECENT! WHY THE HEAD IS THE ONLY PORTION VISIBLE.

A. C.: THAT MAKES NO DIFFERENCE. DON'T YOU SUPPOSE I CAN IMAGINE WHAT IS UNDER THE WATER?

Now, nearly 150 years after Comstock, Defendants ban the "Let's Go Brandon" political slogan, insisting to students, "don't you suppose I can imagine what you're really thinking?" These controlling and invasive intrusions into the private mind are

[1] P.M. Howarth, *The Fertile Imagination* (Illustration), LIFE, Jan. 12, 1888, at 18, available at https://babel.hathitrust.org/cgi/pt?id=hvd.32044092670538&seq=26.

"wholly inconsistent with the philosophy of the First Amendment." *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

With the constitutional poles corrected—student political expression the expected norm and censorship a rare exception—qualified immunity answers itself. *Tinker* clearly established students' First Amendment right to engage in the nondisruptive expression of wearing political apparel. And "Let's Go Brandon" is well outside the narrow exception for swear words and sexual innuendo. That Defendants may have "subjectively believed" the "Let's Go Brandon" slogan constituted profanity "does not make it so." *Glowacki ex rel. D.K.G. v. Howell Pub. Sch. Dist.*, 2:11-cv-15481, 2013 WL 3148272, at *12 (E.D. Mich. June 19, 2013) (relying on *Tinker* to deny qualified immunity in student speech dispute).

The Court should also reject Defendant Tri County Area Schools' attempt to evade *Monell* liability. The district's written correspondence, as well as testimony from its administrators and teachers, confirm it interprets the dress code policy banning "profanity" as including so-called "coded" profanity, which the School District (plus Defendants Buikema and Bradford) say encompasses "Let's Go Brandon." Moreover, the School District ratified Buikema's and Bradford's actions in writing.

Like all important First Amendment cases, this dispute is about power. There is no dispute D.A. and X.A. remained nondisruptive, "polite," and "kind" while wearing their sweatshirts. But Defendants ask this Court to grant schools the unprecedented power to censor nondisruptive student speech based not on what students are saying, but what they reckon students are *thinking* when they say it.

We can locate no decision in the last 55 years granting such limitless authority to school administrators. This Court should decline to be the first.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs D.A. and X.A.'s brief in support of their motion for summary judgment sets forth the full factual background of this dispute. (Pls.' Br. Supp. Mot. Summ. J. 3–14, PageID.536–547.) In the interest of brevity, Plaintiffs will not repeat it here and incorporate that section by reference. Critically, however, Defendants' brief and discovery responses confirm the parties do not dispute the material facts. The following facts are undisputed:

D.A. and X.A. are students in Sand Lake, Michigan's Tri County Area School District (the "School District"). D.A. is an eighth-grade student at Tri County Middle School ("TCMS") and X.A. is a sophomore at Tri County High School ("TCHS"). They live with their mother B.A. in Newaygo County, Michigan. During the 2021–2022 school year, D.A. (then in sixth grade) and X.A. (then in eighth grade) attended TCMS.

The political slogan "Let's Go Brandon" originated at an October 2021 NASCAR race in Talladega, Alabama. After the race, won by Brandon Brown, members of the crowd chanted "fuck Joe Biden" during Brown's post-race interview. A commentator remarked that the fans were shouting "Let's Go Brandon!" (Defs.' Mot. Summ. J. 1, PageID.366.) "Let's Go Brandon" quickly became a popular political slogan used to express opposition to President Biden.

Within weeks, members of Congress began using the "Let's Go Brandon" slogan to convey strong disapproval of President Biden's administration and

legislative initiatives during floor speeches. On October 21, 2021, Representative William Posey of Florida used the "Let's Go Brandon" slogan to punctuate a floor speech opposing President Biden's "Build Back Better Plan." 167 Cong. Rec. H5774-01, H5776 (2021). Roughly a week later, Representative Mary Miller of Illinois similarly ended a speech in the House of Representatives with, "Our response to a weaponized Federal Government is loud and clear. In the spirit of freedom, we say: Let's go, Brandon." 167 Cong. Rec. H5880-01, H5880 (2021). And on June 7, 2022, Representative Douglas LaMalfa of California finished his remarks on food security with, "I guess that is why everybody is leading the charge these days in cheering for: Let's go, Brandon." 168 Cong. Rec. H5240-05, H5240 (2022). Representatives Posey, Miller, and LaMalfa were not censured, ruled out of order, or disciplined for using the slogan on the House floor, nor did any member request a sanction.

In the spring of 2022, D.A. and X.A. wore "Let's Go Brandon" apparel to school to express their disapproval of President Joe Biden. Other students did, too. (Ex. 7, Buikema Dep. Tr. 70:10–21, PageID.612; Defs.' Mot. Summ. J. 5, PageID.370.) D.A. and X.A. wore plain blue sweatshirts with the text "Let's Go Brandon," with no accompanying imagery:

(Ex. 23, Buikema Resp. to Pls.' RFAs No. 8, PageID.693; Ex. 24, Bradford Resp. to Pls.' RFAs. No. 6, PageID.696) (admitting this sweatshirt is what they observed D.A. and X.A. wearing).

Before D.A. and X.A. began wearing "Let's Go Brandon" apparel, the School District had not experienced disruption due to students wearing political apparel to school or engaging in political discussions. (Ex. 12, Williams Dep. Tr. 34:23–35:1, 37:8–11, PageID.667; Ex. 26, Bradford Dep. Tr. 27:10–17, PageID.707; Ex. 13, Goheen Dep. Tr. 20:25–21:7, 22:18–21, PageID.677–678; Ex. 7, Buikema Dep. Tr. 41:5–15, PageID.607.) Similarly, it had not experienced disruption due to students using the "Let's Go Brandon" slogan or wearing apparel with the slogan. (Ex. 12, Williams Dep. Tr. 34:23–35:2–5, PageID.667; Ex. 7, Buikema Dep. Tr. 39:3–6, PageID.607; Ex. 13, Goheen Dep. Tr. 21:9–13, PageID.677.)

D.A. and X.A. were not disruptive while wearing "Let's Go Brandon" sweatshirts. (Ex. 7, Buikema Dep. Tr. 39:14–41:4, PageID.607; Ex. 12, Williams Dep. Tr. 35:6–37:7, PageID.667.) Their apparel did not disrupt classes or cause teachers to alter lesson plans. (Ex. 12, Williams Dep. Tr. 44:18–46:6, PageID.668–669; Ex. 11, Sch. Dist. Resp. to Pls.' RFAs No. 3, PageID.660.) Still, Assistant Principal Buikema instructed D.A. and X.A. to remove their sweatshirts because he considers the slogan "vulgar, profane, and pornographic" in violation of the school dress code. (Ex. 25, Buikema Resp. to Pls.' Interrog. Nos. 1, 3, PageID.700.) D.A. and X.A. remained "polite" and "kind" during their interactions with Buikema, and were not breaking any other school rules. (Ex. 7, Buikema Dep. Tr. 66:18–19, 67:14–15, PageID.611; Ex.

23, Buikema Resp. to Pls.' RFAs Nos. 4, 5, PageID.692.) D.A. and X.A. complied with Buikema's orders and removed their "Let's Go Brandon" apparel. (Ex. 7, Buikema Dep. Tr. 51:11–18, PageID.609.)

A few weeks later, teacher Wendy Bradford stopped D.A. in the hallway and told him "you might want to take that ["Let's Go Brandon" sweatshirt] off," "otherwise [Assistant Principal] Buikema is right down the hallway, you can talk to him." (Ex. 26, Bradford Dep. Tr. 34:1–7, PageID.709.) Like Buikema, Bradford testified D.A. was not breaking any other school rules and remained "polite" through the interaction. (*Id.* 34:13–16, PageID.709; Ex. 24, Bradford Resp. to Pls.' RFAs No. 4 PageID.696.) D.A. removed his "Let's Go Brandon" sweatshirt.

On May 27, 2022, D.A. and X.A., through counsel, sent the School District a letter demanding it lift the prohibition on "Let's Go Brandon" apparel. (Ex. 27, C&D Ltr., PageID.711–713.) The School District refused, and confirmed it considers "Let's Go Brandon" violative of its dress code prohibition on "vulgar or profane" clothing. (Ex. 28, Dist. Resp. Ltr., PageID.715.) During discovery, TCMS' Principal and (now former) Assistant Principal confirmed they still believe "Let's Go Brandon" apparel violates the School District's dress code. (Ex. 7, Buikema Dep. Tr. 51:11–53:15, 70:10–21, PageID.609, 612; Ex. 12, Williams Dep. Tr. 54:7–20, PageID.671.)

LEGAL ARGUMENT

The Court should deny Defendants' motion because the facts viewed in D.A.'s and X.A.'s favor demonstrate they engaged in nondisruptive political expression protected by the First Amendment. *See Maben v. Thelen*, 887 F.3d 252, 266 (6th Cir.

2018) (on a Rule 56 motion the Court "must consider the evidence in the light most favorable to" D.A. and X.A. "and draw all reasonable inferences" in their favor). (internal quotation omitted).

I. The First Amendment Protects D.A.'s and X.A.'s Silent, Passive Expression of Wearing "Let's Go Brandon" Political Apparel to School.

"It is a prized American privilege to speak one's mind" about our national leaders. *Bridges v. California*, 314 U.S. 252, 270 (1941). And "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (internal quotation omitted). To that end, "speech on public issues occupies the highest rung on the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (internal quotation omitted).

A. *Tinker* protects nondisruptive political expression.

The First Amendment's "special protection," *id.*, for speech on public issues does not disappear inside our nation's public schools. "Students in school as well as out of school are 'persons' under our Constitution," possessing the "fundamental rights" of freedom of speech and expression. *Tinker*, 393 U.S. at 511. True, student expression may not substantially disrupt the school day. But students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate," nor may students be "confined to the expression of those sentiments that are officially approved." *Id.* That is because "America's public schools are the nurseries of democracy," as much a part of the "marketplace of ideas" as a

newspaper's editorial page. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021).

To protect students' First Amendment rights, *Tinker* established a "general rule." *Saxe v. State Coll. Area. Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) Schools may not censor student speech absent "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" or actual substantial disruption or material interference. *Tinker*, 393 U.S. at 514.

Defendants fundamentally err in categorizing *Tinker* as a viewpoint discrimination case and dismissing it as irrelevant. (*See* Defs.' Mot. Summ. J. 13, PageID.378) ("There is no evidence that Buikema or Bradford intended to regulate a particular political viewpoint. So, *Tinker* does not apply.") *Tinker* made clear its general rule for student expression applies regardless of whether a school singles out a particular view. 393 U.S. at 513 (holding a school would have to establish substantial disruption even if it wished to "forbid[] discussion of the Vietnam conflict" entirely). Contrary to Defendants' misreading of *Tinker*, the "substantial disruption" test is the governing standard when schools try to censor student expression and has been for 55 years. *See Mahanoy*, 594 U.S. at 187–88.[2]

The Court has carved out three narrow exceptions to *Tinker*'s "general rule." First, schools may regulate student speech "bear[ing] the imprimatur of the school."

[2] Of course, viewpoint-based restrictions are even more constitutionally infirm, but *Tinker* makes clear the government cannot turn schools into "First Amendment Free Zone[s]." *Cf. Bd. of Airport Commr's of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–75 (1987); *Minn. Voters Alliance v. Mansky*, 585 U.S. 1, 15 (2018) (citing *Tinker*).

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–73 (1988). Second, schools may curb speech "that can reasonably be regarded as encouraging illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 397 (2007). And third, schools may prohibit vulgar, lewd, and indecent speech. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–85 (1986). Absent those exceptions, the Sixth Circuit explained, "the *Tinker* standard applies to all other student speech and allows regulation only when the school reasonably believes that the speech will substantially and materially interfere with schoolwork or discipline." *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

The three carveouts from students' otherwise ironclad First Amendment rights are "*narrow* exceptions." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d Cir. 2011) (en banc) (emphasis in original). The burden remains on the school to show an exception applies. *Id.* at 926. *See also Tinker*, 393 U.S. at 511 (schools must make a "specific showing of constitutionally valid reasons to regulate" student expression).

With the constitutional framework corrected—student First Amendment rights the norm, and *Tinker* the "general rule" subject to three "narrow exceptions"—evaluating D.A.'s and X.A.'s "Let's Go Brandon" sweatshirts is straightforward. The students wore "Let's Go Brandon" sweatshirts to school as a "silent, passive" way to express their disapproval of President Biden. *Id.* at 508. There is no genuine issue of fact as to whether the School District experienced substantial disruption due to the sweatshirts during (or after) the four-month period D.A., X.A., and other students wore them. (*See supra* p. 6.) No disruption occurred. It is similarly undisputed that

prior to the boys wearing "Let's Go Brandon" sweatshirts, the School District had not experienced disruption due to political apparel, the "Let's Go Brandon" slogan, or political arguments generally. (*Id.*)

The three "narrow exceptions" to *Tinker* are inapplicable. Defendants do not argue students confused D.A.'s or X.A.'s attire for the school's own speech. Nor do Defendants assert "Let's Go Brandon" encourages illegal drug use. And as explained in the next section, "Let's Go Brandon" is a common, non-profane conservative political slogan, used everywhere from floor speeches in the House of Representatives to the National Republican Congressional Committee's gift shop.

That means the First Amendment squarely protects D.A.'s and X.A.'s nondisruptive political expression criticizing President Biden. *See also Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 322, 330–31 (2d Cir. 2006) (holding, given the lack of substantial disruption, the First Amendment protected a student's right to wear a shirt calling President George W. Bush a "Crook," "Cocaine Addict," "AWOL, Draft Dodger," and "Lying Drunk Driver"); *Barber ex rel. Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 849, 858 (E.D. Mich. 2003) (awarding preliminary injunction against school's ban on student's shirt calling President George W. Bush an "International Terrorist").

Public schools "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). Defendants exceeded those bounds. The Court should deny their motion for summary judgment.

B. Defendants' arguments ignore the political nature of the popular "Let's Go Brandon" slogan.

"Let's Go Brandon" is a popular conservative political slogan used by elected officials, candidates, and everyday Americans to express disapproval of President Joe Biden. But Defendants' motion reduces the familiar political slogan to its cultural origin as a misheard "fuck Joe Biden" chant at a NASCAR race. Defendants say because "Let's Go Brandon" has profanity in its backstory, schools may regulate the expression as though students actually said "fuck Joe Biden."

Defendants are mistaken. First, Defendants' argument ignores the political and cultural significance the "Let's Go Brandon" slogan has taken on since its origin. Multiple members of Congress have used the slogan in House of Representatives policy speeches to express disapproval of President Biden or his legislative initiatives. Representative William Posey said "Let's Go Brandon" to punctuate a floor speech opposing President Biden's "Build Back Better Plan." 167 Cong. Rec. H5774-01, H5776 (2021). Representative Mary Miller similarly ended a policy speech with, "In the spirit of freedom, we say: Let's go, Brandon." 167 Cong. Rec. H5880-01, H5880 (2021). And Representative Douglas LaMalfa ended his remarks with, "I guess that is why everybody is leading the charge these days in cheering for: Let's go, Brandon." 168 Cong. Rec. H5240-05, H5240 (2022).

Reporters raised the "Let's Go Brandon" slogan at official (televised) White House press briefings. *See* Press Briefing By Press Secretary Jen Psaki, Nov. 12, 2021, 2021 WL 5276102, at *10. The National Republican Congressional Committee

sold "Let's Go Brandon" wrapping paper for the holidays,[3] and the Republican nominee for President sold "Let's Go Brandon" shirts.[4] Even Democrats boast of "Biden aides and allies repackag[ing] the 'Let's Go Brandon' insult and morph[ing] it into 'Dark Brandon,' a celebratory meme casting Mr. Biden as some sort of omnipotent mastermind."[5]

Regardless of "Let's Go Brandon's" origin, it quickly became part of popular political culture—a way to express strong disapproval of President Biden. That is what D.A. and X.A. did here. D.A. testified he sees "Let's Go Brandon" as a "respectful" way to convey his views about President Biden without using profanity. (Ex. 3, D.A. Dep. Tr. 11:19–24, PageID.589.)

But Defendants insist the political slogan's "implied meaning" remains "fuck Joe Biden" and therefore Defendants can regulate the phrase as if the student actually *said* "fuck Joe Biden." (Defs.' Mot. Summ. J. 14, PageID.379.) But people use different words for different purposes. That is how words work. D.A. and X.A. know they are not allowed to use profanity in school. So they didn't. They, like members of Congress, expressed their views without using profanity. *See also Fraser*, 478 U.S. at 682, 685–86 (holding the student's school assembly speech fell outside First

[3] *See, e.g.*, Annie Linskey, *How 'Let's go Brandon' became an unofficial GOP slogan*, Wash. Post (Nov. 15, 2021, 6:00 AM), https://www.washingtonpost.com/politics/lets-go-brandon-republicans/2021/11/14/52131dda-4312-11ec-9ea7-3eb2406a2e24_story.html [https://perma.cc/2HDP-MRAA].

[4] *See, e.g.*, Maureen Breslin, *Trump campaign sells 'Let's Go Brandon' T-shirts*, The Hill (Oct. 28, 2021, 7:32 PM), https://thehill.com/media/579039-trump-campaign-sells-lets-go-brandon-t-shirts [https://perma.cc/T375-UWYP].

[5] Reid J. Epstein, *Biden Struggles to Make 'Bidenomics' a Plus, Not a Minus,* N.Y Times (Sept. 2, 2023), https://www.nytimes.com/2023/09/02/us/politics/biden-economy-inflation-voters.html [https://perma.cc/8S4V-S4GB].

Amendment protection in part because it would have violated Congressional decorum rules).

Removing swear words has been the accepted cultural (and legal) method to turn a profane message non-profane. Take Kidz Bop, which re-records popular songs, uses children as singers, removes swear words and overt sexuality, but otherwise leaves the song intact. Tyler Bickford, *Kidz Bop, "Tweens," and Childhood Music Consumption*, Consumers, Commodities & Consumption, Dec. 2008, at 2. Kidz Bop "fill[s] a niche for children who are exposed to hit songs at school, on the radio, on television or through the internet, but whose parents are uncomfortable purchasing music for their children that includes heightened language or sexuality." Tyler Bickford, *The New "Tween" Music Industry: The New Disney Channel, Kidz Bop and an Emerging Childhood Counterpublic*, 31 Popular Music 417, 420 (2012). And those minor changes make the songs appropriate for children. *See, e.g.*, The Daily Mom ("Kidz Bop is kid-friendly music sung by real kids. The best part? They sing today's top hits without the not-so-PG language.")[6]

But under Defendants' view, because the underlying song and message remain the same, Kidz Bop retains the "vulgar" and "profane" character of the uncensored original. Using Defendants' logic, there is no difference between the explicit and clean version of a music album, no distinction between a movie showing nudity and implying it, and no difference between saying "shoot" versus "shit." Defendants claim

[6] *Top 3 Reasons Kidz Bop Should be Your Kid's First Concert*, Daily Mom, https://dailymom.com/travel/top-3-reasons-kidz-bop-should-be-your-kids-first-concert/ [https://perma.cc/J77W-SMET] (last visited Apr. 15, 2024).

to know what speakers are *really* thinking, regardless of how they express themselves. Defendants' position "amounts to [no]thing more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 555–56.

Defendants' position is wildly out of step with American indecency law and common sense. Time and again the Federal Communications Commission has made clear that "bleeps" (or other methods of removing profanity) is how to turn a "profane" or "vulgar" message into something kid-friendly. *See, e.g.*, *In re Fox Television Stations*, 20 FCC Rcd. 4800 (2005) (holding an episode of Arrested Development was not indecent because "[v]irtually all of the language to which [the Parents Television Council] objects was edited from the program prior to broadcast"); *In re Citadel Broad. Co.*, 17 FCC Rcd. 483, 486 (2002) (explaining why the radio edits to Eminem's Grammy-winning song "The Real Slim Shady" meant the edited song "was not patently offensive, and thus not actionably indecent").

Regular Americans, and reasonable officials, know the unedited "parental advisory" version of a music album might contain profanity or vulgarity, but the "clean" version will not. *See generally* Carrie A. Beyer, *Fighting for Control: Movie Studios and the Battle over Third-Party Revisions*, 2004 U. Ill. L. Rev. 967, 985–86 (2004). And they know if an R-rated movie airs on regular television, the nudity and swear words will be absent. *Id.* at 986. That is how American society has decided to separate the profane from non-profane. Defendants stand alone in asserting

expression can be cleansed of swear words and sexual imagery yet still be profane or vulgar.

If students say "fuck Joe Biden" at school, the First Amendment provides no refuge from punishment. "Fuck" is a profanity and you can't swear at school. But Defendants ignore the slogan's omnipresence in popular political culture and claim no matter how much a message is sanitized, the government can regulate it as though it were the uncensored original. Defendants cite no support (and we can find none) for such an unbounded theory of government censorship. This Court should reject it.

C. Defendants cite two cases for their position; both are inapposite and neither involve political speech.

Defendants marshal just two (2) cases to justify their censorship of D.A.'s and X.A.'s "Let's Go Brandon" sweatshirts, *Fraser* and *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000). Both are inapposite.

First, neither involved political speech. *Fraser* involved a high school punishing a student for delivering a sexual-innuendo laden speech at a school assembly. 478 U.S. at 677–78. The student used "an elaborate, graphic, and explicit sexual metaphor" to endorse a student council candidate. *Id.* at 678. During the speech, "some students hooted and yelled," while others "by gestures graphically simulated the sexual activities pointedly alluded to in [the student's] speech." *Id*. The Supreme Court held the speech unprotected, stressing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of" the student's assembly speech. *Id.* at 680.

The Court continued viewing student speech through the political/non-political lens in *Morse*, 551 U.S. at 404 (quoting *Fraser*'s "marked distinction" language). There, the Court held the First Amendment did not prohibit a school from suspending a student who unfurled a "BONG HiTS 4 JESUS" banner during a field trip to watch the Olympic torch relay. The Court held the message could reasonably be regarded as an encouragement of illegal drug use, and, critically, noted the student did not assert "the banner conveys any sort of political or religious message," for example, advocacy of drug legalization. *Id.* at 403.

Justice Alito, whose concurrence with Justice Kennedy provided the deciding votes for *Morse*, "join[ed] the opinion of the Court on the understanding . . . it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Id.* at 422 (Alito, J., concurring). Justice Alito's "limitation is a binding part of *Morse*." *B.H. ex rel Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 310 (3d Cir. 2013) (en banc)*; see also Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (calling Justice Alito's concurrence "controlling" and an opinion which "ensure[s] that political speech will remain protected within the school setting").

There is a "marked difference" between non-disruptively wearing a sweatshirt with a political slogan used on the floor of the House of Representatives, and a non-political student council speech laden with explicit sexual innuendo. Not only is *Fraser* unhelpful for Defendants, it shows why D.A.'s and X.A.'s expression is protected.

The problem with Defendants' reliance on *Fraser* (and other cases involving profanity, vulgarity, or double entendre) is, in those decisions, the school (and court) can find the objectionable language within the four corners of the student's expression. And even then, if the speech is only "ambiguously" lewd, student speech remains protected if it comments on a matter of political or social concern. Take the "I 🖤 boobies!" breast cancer bracelets the en banc Third Circuit considered in *B.H.* 725 F.3d at 297. The court held the First Amendment protected the bracelets because, though edgy, they commented on a matter of social concern: breast cancer. *Id.* at 298.[7]

But nothing in the four corners of D.A.'s and X.A.'s apparel is profane or vulgar, even ambiguously so. True, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's ["Fuck the Draft"] jacket." *Fraser*, 478 U.S. at 682–83 (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J. concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)). But under Defendants' view, a school could prohibit a student from wearing an anti-draft jacket with the slogan "Cohen's Jacket" not because of what it says, but because it might cause others to *think* about the words on Cohen's jacket. None of Defendants' authority provides a green light for such censorship.

Defendants' second case, *Boroff*, 220 F.3d 465, is even further afield (and no longer good law, to boot). *Boroff*, like *Fraser*, did not involve political speech. So it is

[7] As Plaintiffs explained in their opening brief (Pls.' Br. Supp. Mot. Summ. J. 26–27, PageID.559–560), D.A. and X.A. rely on *B.H.*'s "ambiguously lewd" language only in the alternative since "Let's Go Brandon" is not ambiguously lewd or vulgar. It is simply a common conservative political slogan which began as a cultural reference to a profane chant.

inapposite out of the gate due to that "marked distinction." *Fraser*, 478 U.S. at 680. *Boroff* instead involved a student wearing Marilyn Manson[8] band shirts to school, many of which criticized Christianity. 220 F.3d at 466. Manson's lyrics also encouraged illegal drug use and used racial slurs (including the n-word). *Id.* at 469–70. The school principal testified he banned the shirts because of the racial slurs, and he considered the student's shirts "offensive" because Manson's lyrics encouraged drug use and "mocking any religious figure is contrary to our educational mission." *Id.* at 469. The Sixth Circuit sided with the school, relying on *Fraser*'s language that a school may prohibit "offensive" expression. *Id.* at 469.

But *Morse*, seven years later, sharply limited that portion of *Fraser*, rejecting the school's argument it could punish the "BONG HiTS 4 JESUS" banner under *Fraser*'s "offensiveness" language. *Morse*, 551 U.S. at 409. The *Morse* Court explained, "We think th[at argument] stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some." *Id.* The Court added, "The concern here is not that [the student's banner] was offensive, but that it was reasonably viewed as promoting illegal drug use." *Id.*

If school administrators in *Morse* could not rely on *Fraser*'s "offensiveness" language to prohibit a *student* from advocating illegal drug use, logically *Boroff*'s reliance on that same aspect of *Fraser* to justify punishing a student for wearing a shirt of a *band* that promotes illegal drug use is no longer supportable. It is therefore

[8] "Marilyn Manson is the stage name of 'goth' rock performer Brian Warner . . . [who] is widely regarded as a user of illegal drugs." *Boroff*, 220 F.3d at 466.

no surprise that multiple courts interpret *Morse* as rendering *Boroff* dead letter. *See, e.g.*, *B.H.*, 725 F.3d at 316 (listing *Boroff* as an example of a case that "before *Morse* . . . adopted th[e] broad interpretation" of *Fraser*, but is now "incompatible with the Supreme Court's teachings"); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 644 (D.N.J. 2007) ("Further, the *Boroff* Court's analysis must now be called into question based on the Supreme Court's recent rejection of a rule allowing prohibition of 'any speech that could fit under some definition of offensive.'") (quoting *Morse*, 551 U.S. at 409).

Boroff is no longer good law, and pre-*Morse*, would have been distinguishable based on the student's lack of political expression and the speech's adjacency to racial slurs. Defendants' two cases are far afield from the "silent, passive" expression of wearing a sweatshirt with a common political slogan. *Tinker*, 393 U.S. at 508. The Court should deny Defendants' motion for summary judgment.

D. Defendants fail to meet their burden to justify censoring nondisruptive political speech.

Tinker places the burden on Defendants to justify punishment or censorship of student speech. *See Tinker*, 393 U.S. at 509*; see also Norris ex rel A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) ("Generally, the circuits have concluded that *Tinker* places the burden on the school to justify student speech restrictions.") (collecting cases).

Defendants fail to justify instructing D.A. and X.A. to remove, and refrain from wearing, "Let's Go Brandon" apparel. They point to no substantial disruption, or facts causing them to reasonably forecast substantial disruption, from the apparel. And as

explained above, they cannot meet their burden to show the common political slogan falls within the "*narrow* exceptions" for speech bearing the school's imprimatur, encouraging illegal drug use, or using profanity/sexually explicit speech. *J.S.*, 650 F.3d at 927.

In 2008, Judge Posner explained, "From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech." *Id.* *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2008). Here, Defendants have nothing—no disruption, no reasonable fear of disruption, no complaints from parents or teachers of interrupted lessons, no "symptoms of a sick school"—just a raw claim of censorship authority. That is not enough to meet their high burden under *Tinker* to censor students' nondisruptive political expression. The Court should deny Defendants' motion.

II. Buikema and Bradford Are Not Entitled to Qualified Immunity Because D.A. and X.A. Had a Clearly Established Right to Wear Political Apparel to School.

The Court should deny qualified immunity to Buikema and Bradford because they "(1) violated a constitutional right that (2) was clearly established." *Anders v. Cuevas*, 984 F.3d 1166, 1175 (6th Cir. 2021). *Tinker*, *Fraser*, *Morse*, and *Mahanoy*, buttressed by *B.H.* and *Guiles*, clearly established D.A.'s and X.A.'s right to engage in the "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" of wearing non-profane political apparel to school. *Tinker*, 393 U.S. at 508.

A. Viewing the facts in the light most favorable to D.A. and X.A. demonstrates Buikema and Bradford violated their constitutional rights.

Viewed in the light most favorable to D.A. and X.A., the facts show Buikema and Bradford violated D.A.'s and X.A.'s constitutional rights. The first step in assessing a defendant's request for qualified immunity on summary judgment is to assess whether the facts, "taken in the light most favorable" to D.A. and X.A., show Defendants violated a constitutional right. *Tolan v. Cotton*, 572 U.S. 650, 655–57 (2014) (reversing summary judgment qualified immunity dismissal because the lower court "failed to view the evidence . . . in the light most favorable" to the plaintiff).

As shown in Section I, Buikema and Bradford violated D.A.'s and X.A.'s First Amendment rights when they instructed D.A. and X.A. to remove "Let's Go Brandon" apparel despite the lack of substantial disruption caused by the sweatshirts and in the absence of facts which would have allowed them to reasonably forecast substantial disruption. In the light most favorable to D.A. and X.A., these facts show Buikema and Bradford violated their First Amendment rights.

B. *Tinker*, *Fraser*, *Morse*, *Mahanoy*, *Guiles*, and *B.H.* clearly established D.A.'s and X.A.'s First Amendment rights in spring 2022.

D.A. and X.A. had a clearly established right to engage in the "silent, passive" expression of wearing political apparel to school criticizing the president. *Tinker*, 393 U.S. at 508. A constitutional right is clearly established when the contours of constitutional protection are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010) (cleaned up). In the Sixth Circuit, those contours

are established by precedent from the Supreme Court, the Sixth Circuit, the district court, and other circuits. *Id.* Overcoming qualified immunity "do[es] not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). So "a public official can still be on notice that his conduct violates established law even in novel factual circumstances." *Holzemer*, 621 F.3d at 527 (cleaned up) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). The "focus" of qualified immunity is whether a government official had "fair notice" their actions violated the First Amendment. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Core First Amendment principles and Supreme Court precedent provided Buikema and Bradford fair notice their actions violated the Constitution. "[T]he right to criticize public officials is clearly protected by the First Amendment." *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008). And *Tinker* (1969), *Fraser* (1986), *Morse* (2007), and *Mahanoy* (2021), along with *B.H* (2013) and *Guiles* (2006), clearly established in the spring of 2022 that Buikema and Bradford could not order D.A. and X.A. to refrain from engaging in the nondisruptive political expression of wearing "Let's Go Brandon" apparel to school.

First, *Tinker* clearly established the general rule schools may not censor student speech absent "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" or actual substantial disruption or material interference. 393 U.S. at 514. Then, in 1986, *Fraser* clearly established schools may prohibit plainly lewd and sexually explicit speech, particularly when it does not touch upon a matter of political or social

concern. 478 U.S. at 685. Then, *Morse* clarified in 2007 schools cannot use *Fraser* to censor "offensive" speech, because "much political and religious speech might be perceived as offensive to some." 551 U.S. at 409. Finally, in 2021, *Mahanoy* reaffirmed *Tinker*'s promise that America's public schools are "nurseries of democracy" and reminded public school officials "the school itself has an interest in protecting a student's unpopular expression." 594 U.S. at 190.

Critically, *Fraser* and *Morse* stressed the importance of Ms. Tinker's political message to First Amendment protection. *Fraser*, 478 U.S. at 680; *Morse*, 551 U.S. at 403; *Mahanoy*, 594 U.S. at 186; *see also Mahanoy*, 594 U.S. at 205 (Alito, J., concurring). So each clearly established wearing political clothing in a nondisruptive manner, like D.A. and X.A. did, is protected by the First Amendment and that political expression in schools is entitled to heightened protection generally. *Id.*

To that end, the Third Circuit's en banc *B.H.* and the Second Circuit's decision in *Guiles* further clearly established D.A.'s and X.A.'s rights. *B.H.* and *Guiles* directly addressed the scope of First Amendment rights in public schools post-*Fraser*, holding "I 🖤 boobies!" charity bracelets and a shirt calling the sitting president a "Cocaine Addict" retained full First Amendment protection because the students' speech related to a political or social issue and the students remained nondisruptive. *B.H.*, 725 F.3d at 320 (calling it an "open-and-shut case"); *Guiles*, 461 F.3d at 330–31 (holding *Tinker* protected the student's "Cocaine Addict" shirt because the apparel "did not cause any disruption or confrontation in the school").

By spring 2022, Defendants had 53 years of Supreme Court precedent, and on-point decisions interpreting that precedent, clearly establishing D.A.'s and X.A.'s right to engage in nondisruptive expression by wearing political apparel.

Defendants say "there are no cases in the Supreme Court or in the Sixth Circuit that analyze a student's First Amendment rights to wear clothing to school with a well-known profane meaning." (Defs.' Mot. Summ. J. 16, PageID.381.) Here again, Defendants are inverting the constitutional analysis. Defendants' framing assumes regulation of student speech is the norm and they are protected by qualified immunity unless a court has held a particular type of expression protected. Not so. As explained above, *Tinker* places the burden on the school to demonstrate the student's speech falls within one of the "narrow exceptions" to students' First Amendment rights. *J.S.*, 650 F.3d at 926–27*; see also Tinker*, 393 U.S. at 511 (schools must make a "specific showing").

For qualified immunity, the "Supreme Court expressly rejected a requirement that previous cases be 'fundamentally similar.'" *Hope*, 536 U.S. at 741. And "[t]he same is true of cases with 'materially similar' facts." *Id.* Defendants need only have fair notice of "the general form or structure" of the constitutional right. *Baynes v. Cleland*, 799 F.3d 600, 616 & n.5 (6th Cir. 2015). *Tinker*, *Fraser*, *Morse*, *Mahanoy*, *B.H.*, and *Guiles* provided Buikema and Bradford more than sufficient fair notice of "the general form or structure" of students' right to engage in nondisruptive political expression.

The Eleventh Circuit's decision in *Holloman* provides a useful example of these principles in play in a school speech case and demonstrates Defendants' misapplication of the qualified immunity test. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). *Holloman* involved a student's First Amendment claim against school officials for punishing him when he raised a fist in protest during the pledge of allegiance. *Id.* at 1259. The court held between *Tinker*'s requirement of substantial disruption and *Barnette*'s holding that students may refuse to stand for the pledge of allegiance, case law provided the school "clear notice" their conduct violated the student's constitutional rights. *Id*. at 1269, 1278–79. This was so despite the lack of on-point authority regarding silent protests during the pledge of allegiance. *Id.* at 1279. The court concluded, "[the officials] are essentially asking us to distinguish, on constitutional grounds, between a student with his hands in his pockets . . . and a student with his hand in the air. This is a hair we will not split; First Amendment protections are not lost that easily." *Id.*

Likewise here, *Tinker* clearly established D.A.'s and X.A.'s right to engage in the nondisruptive political expression of wearing "Let's Go Brandon" apparel to school. Even though, like in *Holloman*, courts have not examined this *exact* type of speech, the underlying constitutional principles (and presumptions of protection) surrounding school speech are well trodden. The lack of cases about expression like "Let's Go Brandon" is best explained by the fact that, so far as we can find, no school has actually tried to ban nondisruptive political speech which lacks a swear word or sexual innuendo. No school has tried to stretch *Fraser* so far beyond its plain terms.

Defendants argue *Fraser* and *Boroff* "suggest that a reasonable school official in either Buikema and [sic] Bradford's position would believe that they had the authority to prohibit clothing with a profane message." (Defs.' Mot. Summ. J. 16, PageID.381.) But the question is not whether a reasonable official would believe the Constitution permits a school to ban profanity. Rather, the question is whether a "reasonable official" could believe "Let's Go Brandon" somehow falls within *Fraser*'s definition of "profanity." There, Defendants come to the Court empty-handed.

Fraser discussed "profane" language and "vulgarity" in their commonly understood meaning: swear words and sexual material inappropriate for children. 478 U.S. at 684–85 (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC's power to regulate uncensored broadcast of George Carlin's "seven dirty words" monologue on the radio during times children were likely listening) and *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding statute banning the sale of adult magazines to minors)). As the Sixth Circuit explained, *Fraser* merely "observed that prior Court decisions had allowed limitations on speech in the interest of protecting children, especially those in captive audiences, from sexually explicit, vulgar, and offensive spoken language." *Barr*, 538 F.3d at 563.

School officials do not receive qualified immunity just because no court has addressed whether a particular phrase is "profane." Reasonable officials know the meaning of "profane," (*see supra* Section I(B)), and would know "Let's Go Brandon" is light-years away from that meaning. Reasonable officials know the clean version of a music album is not equally profane to the unedited original, and reasonable officials

know "Let's Go Brandon" is not equally profane to "fuck Joe Biden." That Buikema and Bradford apparently believe "Let's Go Brandon" constitutes profanity "does not make it so." *Glowacki*, 2013 WL 3148272, at *12 (applying *Tinker* to deny qualified immunity, explaining an administrator's "subjective belief" substantial disruption occurred "does not make it so").

The Sixth Circuit's decision in *Sandul v. Larion*, 119 F.3d 1250 (1997) is also helpful. There, police officers arrested John Sandul after he leaned out of a vehicle and shouted "fuck you" at abortion protesters. *Id.* at 1252. Sandul sued under Section 1983 alleging, among other things, that the officers unlawfully arrested him for protected First Amendment speech. *Id.* at 1253. The officers asserted qualified immunity. Like Buikema and Bradford here, the officers attempted to rely on a narrow First Amendment exception—there, the fighting words doctrine—to defeat qualified immunity. *Id.* at 1255 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

The Sixth Circuit reversed the district court's grant of immunity, explaining, "the fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence." *Id.* Critical here, the court focused on whether existing precedent clearly established the underlying First Amendment right, and then assessed whether the "fighting words" doctrine *actually did* apply, not whether a reasonable official could have believed it did. *Id.* at 1255–57 (cleaned up). The court added, "state employees may

not rely on their ignorance of even the most esoteric aspects of the law to deny individuals their constitutional rights." *Id.* (internal quotation omitted).

So too here. Defendants are relying on a limited and "narrow exception" to students' First Amendment rights. *J.S.*, 650 F.3d at 927. As in *Sandul*, Defendants are trying to stretch the exception to the rule far beyond its scope. But this Court's inquiry need not be complex. *Tinker*'s general rule applies, and *Fraser*'s narrow exception does not. Because the contours of D.A.'s and X.A.'s underlying rights are clearly established, nothing more is needed. *Cf. Baynes*, 799 F.3d at 616 ("Because, in the Sixth Circuit, the right to be free from excessively forceful or unduly tight handcuffing under the Fourth Amendment is clearly established law, no more specificity in defining this right is required.")

Defendants' final argument for qualified immunity is circular. They say because Buikema, Bradford, and Principal Williams believe "Let's Go Brandon" is profane, "it cannot be said that the contours of [D.A.'s and X.A.'s First Amendment] right[s] are 'beyond debate.'" (Defs.' Mot. Summ. J. 16, PageID.381.) That is not how qualified immunity works. Courts assess qualified immunity with "a test that focuses on the *objective* legal reasonableness of an official's acts." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). If an individual's subjective belief their conduct followed the Constitution were sufficient to mean a right is not "beyond debate," qualified immunity would be nearly automatic. Government defendants would be immune for even the most blatant constitutional violations so long as they demonstrated they were sufficiently ignorant of the Constitution's requirements.

That is no way to protect the First Amendment. Luckily, it is also not the law. *Id.*; *Sandul*, 119 F.3d at 1256.

Tinker alone clearly established D.A.'s and X.A.'s First Amendment right to wear apparel with the "Let's Go Brandon" political slogan to school in a nondisruptive manner. Nothing in *Fraser*, *Morse*, or *Mahanoy* clouded the waters. The Supreme Court's K–12 student speech quartet, along with *B.H.* and *Guiles*, clearly established D.A.'s and X.A.'s First Amendment rights in spring 2022. The Court should deny Buikema's and Bradford's request for qualified immunity.

III. The School District is Liable Under *Monell* For Buikema's and Bradford's Constitutional Violations.

A. D.A. and X.A. established a constitutional violation.

As shown in Section I, Buikema and Bradford violated D.A.'s and X.A.'s First Amendment rights when they instructed D.A. and X.A. to remove "Let's Go Brandon" apparel. The School District is liable under *Monell* for Buikema's and Bradford's constitutional violations because they acted pursuant to the School District's policy and because the School District ratified their actions. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Alternatively, the School District is liable for Buikema's actions because it delegated final policymaking authority regarding the dress code to school administrators. *See Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (explaining *Monell* liability can be established by showing an official policy, an action

taken by an official with final decision-making authority, or a custom which violates the Constitution).[9]

1. The School District's dress code policy prohibited "Let's Go Brandon" apparel.

There is no genuine issue of material fact the School District is liable under *Monell* for Buikema's and Bradford's actions. Their "execution" of the School District's "policy or custom . . . inflict[ed] the [Plaintiffs'] injury." *Monell*, 436 U.S. at 694. When a government's policy results in constitutional violations, "liability falls on the city, not on the offic[ials] personally," even if the policy is facially constitutional. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1279 (10th Cir. 2009); *see also Monell*, 436 U.S. at 691 (holding municipal liability exists "where action pursuant to official municipal policy of some nature caused a constitutional tort").

To establish municipal liability, plaintiffs need only "identify the policy, connect the policy to the [municipality] itself and show that the particular injury was incurred because of the execution on that policy." *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993). The undisputed facts establish the School District's policy and demonstrate it deprived D.A. and X.A. of their First Amendment rights.

The School District maintained a dress code policy prohibiting "[a]ttire with messages or illustrations that are lewd, indecent, vulgar, or profane." (Ex. 9, 2022-2023 TCMS Handbook, PageID.644). Departing from the customary definition of

[9] Critically, the "clearly established" prong of qualified immunity is irrelevant to the School District's liability because only individuals may claim qualified immunity. *Moldowan v. City of Warren*, 578 F.3d 351, 392–93 (6th Cir. 2009).

"profane" (e.g., something that has a profanity, (*see supra* Section I(B),) the School District interprets "profane" as including expression which is merely "code for using profanity." (Ex. 28, Dist. Resp. Ltr., PageID.715.) In the School District's view, because of its origin in a "fuck Joe Biden" chant, "Let's Go Brandon" is "profane" under the dress code because it is "code for using profanity against the President." (*Id.*) Principal Williams testified in February 2024 that interpretation remains in place. (Ex. 12, Williams Dep. Tr. 54:7–20, PageID.671.)

That means causation is straightforward. Bradford testified D.A.'s sweatshirt violated the dress code's ban on "lewd, indecent, vulgar, and profane" messages because it "infers a curse word." (Ex. 26, Bradford Dep. Tr. 36:15–37:23, PageID.709.) And Buikema instructed D.A. and X.A. to remove their "Let's Go Brandon" apparel because he, too, believed it violated the dress code's rule against profane attire. (Ex. 7, Buikema Dep. Tr. 51:11–53:15, 70:10–21, PageID.609, 612.)

Buikema and Bradford are not wayward actors misapplying the dress code. They enforced the dress code as the School District interprets it: as covering "implied" profanity. That means the School District is liable for their actions enforcing the policy.

2. The School District ratified Buikema's and Bradford's constitutional violations.

D.A. and X.A. also establish municipal liability because the School District ratified Buikema's and Bradford's actions. When "authorized policymakers approve a subordinate's decision and the basis for it," that ratification is "chargeable to the municipality because their decision is final." *Feliciano v. City of Cleveland*, 988 F.2d

649, 656 (6th Cir. 1993); *see also Paterek v. Village of Armada*, 801 F.3d 630, 651 (6th 2015) ("[L]iability can be established by showing that 'an official with final decision making authority ratified the illegal actions.'" (cleaned up) (quoting *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1117–18 (6th Cir. 1994))).[10]

The School Board—which has final policymaking authority for the School District—ratified Buikema and Bradford's decisions. In May 2022, D.A. and X.A., through counsel, sent the School District a letter demanding it allow "Let's Go Brandon" apparel. (Ex. 27, C&D Ltr., PageID.711–713.) The School District responded, through counsel:[11]

> [T]he District, pursuant to its Student Code of Conduct and Dress Code, prohibits language or clothing containing language that is offensive, vulgar or profane. "Let's Go Brandon" is a transparent code for using profanity against the President. The District would similarly prohibit other clothing that has the intent to use profane language against another individual as this would be contrary to the District's educational mission.

(Ex. 28, Dist. Resp. Ltr., PageID.715.)

D.A. and X.A. raised Buikema's and Bradford's actions to the School District. And the School District confirmed Buikema and Bradford acted in accordance with

[10] Defendants falsely claim "[p]laintiffs do not allege that any individual with final decision-making authority ratified any of the alleged illegal actions." (Defs.' Mot. Summ. J. 21, PageID.386.) But D.A. and X.A.'s Complaint points to the School District's May 2022 response letter and alleges "the School District confirmed that Buikema's and Bradford's actions—prohibiting D.A. and X.A from wearing "Let's Go Brandon" sweatshirts—followed and correctly enforced the School District's policy." (Compl. ¶ 132, PageID.22.)

[11] The School District's counsel's statements are binding on the School District. *See, e.g.*, *United States v. Johnson*, 752 F.2d 206, 210–11 (6th Cir. 1985) (holding attorney served as client's agent and statements made within the scope of the attorney's authority were binding on the client); *Bible Believers v. Wayne County, Mich.*, 805 F.3d 228, 260 (6th Cir. 2015) (holding a municipal attorney's involvement in sending a letter to an opposing party pre-litigation can "easily resolve[] the matter of municipal liability" in favor of the plaintiff).

School District's dress code policy. That's ratification, and it makes the School District liable for their employees' actions.

In *Starbuck v. Williamsburg James City County School Board*, for example, the Fourth Circuit held a school board liable when the board affirmed a student's suspension for engaging in protected speech. 28 F.4th 529, 535 (4th Cir. 2022). Because the school board had "the final say-so" over student suspension, it became the "moving force" behind the constitutional violation when it reviewed and upheld the decision. *Id.* at 532–33, 535; *see also Meyers*, 14 F.3d at 1118–19 (holding Cincinnati ratified its director of safety and city manager's decision to terminate the assistant fire chief because the city's civil service commission reviewed the firing and determined it complied with city policy).

In short, "[w]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). Here, the School District did not respond to D.A. and X.A.'s letter by insisting it had no role in the dress code or its enforcement. Instead, like the school board in *Starbuck* and the commission in *Meyers*, it confirmed, in writing, that Buikema and Bradford interpreted and enforced the dress code against D.A. and X.A. in a manner consistent with School District policy. That means the School District ratified Buikema's and Bradford's unconstitutional actions.

3. Alternatively, the School District delegated final decision-making authority to school administrators and is liable for Buikema's actions.

In the alternative, if the School District does not have a policy banning "Let's Go Brandon" apparel, and if it did not ratify Buikema's and Bradford's actions as the final policymaker, it delegated final policymaking authority to Buikema and therefore is liable under *Monell* for his constitutional violations.

A municipality is liable for the unconstitutional actions of its authorized decisionmakers. *Feliciano*, 988 F.2d at 655. "An official has final authority if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions." *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983). "Officials can derive their authority to make final policy from customs or legislative enactments, or such authority can be delegated to them by other officials who have policymaking authority." *Feliciano*, 988 F.2d at 655.

The School District delegated dress code decisions to school administrators. School District Policy 5511 "designate[s] the principal as arbiter of student dress and grooming in his/her building." (Defs.' Mot. Summ. J., Ex. 10, Policy 5511, PageID.520.) TCMS Principal Williams testified Assistant Principal Buikema handled most day-to-day discipline, including dress code violations, and did not need Williams' approval to discipline students. (*Id.* Ex. 5, Williams Dep. Tr. 17:5–18:12, PageID.455–456.) Williams was not involved in Buikema's decision to instruct D.A. or X.A. to remove their "Let's Go Brandon" apparel. (*Id.* 68:4–9, PageID.468.) The School District does not second-guess administrators' dress code determinations, and

administrators do not need the School Board's approval to discipline students for violations. (Ex. 10, 30(b)(6) Dep. Tr. 59:10–16, 70:4–71:5, PageID.654, 657.)

That means Assistant Principal Buikema held final decision-making authority (alongside Williams) related to the dress code. Bradford testified when she had questions about how to enforce the dress code, she consulted Williams or Buikema. (Defs.' Mot. Summ. J., Ex. 4, Bradford Dep. Tr. 13:17–15:2, PageID.440–441.) Teachers instructed students to speak with Williams and Buikema when they had questions about the dress code. (*Id.* Ex. 3, Buikema Dep. Tr. 68:18–69:9, PageID.433.) And when Bradford asked D.A. to remove his "Let's Go Brandon" sweatshirt, she told him "you might want to take that off," "otherwise Buikema is right down the hallway, you can talk to him." (Ex. 26, Bradford Dep. Tr. 34:1–7, PageID.709.)

Assistant Principal Buikema, acting through Policy 5511's delegation of total authority to school administrators to interpret and enforce the dress code, was therefore the final policymaker behind D.A.'s and X.A.'s constitutional violations when he instructed them to remove "Let's Go Brandon" apparel. His decisions were final and not subject to (or in a practice of) being reviewed by a superior. That's a final decisionmaker, and the School District is liable for his actions. *See Paterek*, 801 F.3d at 651 (holding a city's building inspector held final decision-making authority related to zoning ordinances because he was "imbued with the primary responsibility for enforcing [the ordinances] and determining whether an ordinance had in fact been violated").

IV. D.A. and X.A. Have Standing to Challenge the School District's Prohibition on "Let's Go Brandon" Apparel.

D.A. and X.A. have standing to challenge the School District's prohibition on "Let's Go Brandon" apparel because they have (1) suffered a concrete injury which is actual and imminent, (2) the injury is fairly traceable to the School District's challenged action, and (3) it is likely a favorable decision will remedy the injury. *See McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012).

D.A. and X.A. have suffered an injury in fact because the School District is prohibiting them from wearing "Let's Go Brandon" apparel to school. The School District was crystal clear in its letter to D.A. and X.A. that "Let's Go Brandon" apparel violates the dress code and is not permitted. (Ex. 28, Dist. Resp. Ltr., PageID.715.) The School District has not renounced, rescinded, or withdrawn that position. Because of that, D.A. and X.A. are refraining from wearing "Let's Go Brandon" apparel to school, fearing punishment. "It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact." *Id.* at 729 (quotation omitted). And a plaintiff's "intention to engage in expression regulated by [the government's] policy is sufficient to support his assertion that the policy objectively chills his desired speech." *Id.* at 730. D.A. and X.A. want to wear "Let's Go Brandon" apparel to school. The School District, enforcing its dress code, says they can't. That is textbook injury in fact.

The injury is also fairly traceable to the School District. The School District, through its employees, are preventing D.A. and X.A. from wearing the apparel. D.A.

and X.A. must seek injunctive relief from the School District. *See v. Graham*, 473 U.S. 159, 165 (1985).

Finally, D.A.'s and X.A.'s injury would be redressed by a favorable decision. An injunction (and declaratory relief) is how students vindicate their First Amendment rights against an unconstitutional application of a school dress code. *See, e.g.*, *Nuxoll*, 523 F.3d at 668, 676 (reversing district court and awarding a preliminary injunction against a school district's ban on "Be Happy, Not Gay" shirts); *Nixon v. N. Loc. Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967, 975 (S.D. Ohio. 2005) (granting preliminary injunction against school's ban on t-shirts reading in part "Homosexuality is a sin! Islam is a lie! Abortion is murder!")

Defendants' standing argument fundamentally misunderstands how constitutional challenges work. Defendants insist they do not now (nor have they ever) had a "Let's Go Brandon" ban. (Defs.' Mot. Summ J. 28, PageID.393.) What Defendants mean is that they do not have a written policy banning "Let's Go Brandon" apparel specifically. But that does not matter. The school in *Nuxoll* did not have a specific policy regarding "Be Happy, Not Gay" shirts. 523 F.3d at 670. And the school in *Nixon* did not have a specific policy against shirts reading "Homosexuality is a sin! Islam is a lie! Abortion is murder!" 383 F. Supp. 2d at 967–68. Rather, each school, like the School District here, purported to enforce general rules to ban the clothing, and the students challenged the application of the rule to what they argued was protected expression. *Nuxoll*, 523 F.3d at 670 (noting the plaintiff challenged the

underlying rule "as well as its application in this case"); *Nixon*, 383 F. Supp. 2d at 968 (challenging the application of the dress code to t-shirt).

The School District and its employees argue "Let's Go Brandon" apparel is prohibited by the dress code. D.A. and X.A. assert their "Let's Go Brandon" apparel is protected by the First Amendment. That means they have standing to seek an injunction to prevent Defendants from using the dress code to block their protected expression a declaration that wearing "Let's Go Brandon" apparel in a nondisruptive manner is protected First Amendment speech.

V. Defendants' Jurisdiction Argument Ignores the Federal Rules of Civil Procedure, Sixth Circuit Law, and Common Sense.

Defendants' one-paragraph jurisdictional argument, (Defs.' Mot. Summ. J. 6, PageID.371) is legally wrong, ignores the Federal Rules of Civil Procedure, and contravenes Sixth Circuit precedent. Rather than barring minor plaintiffs from proceeding pseudonymously, the rules *require* minor plaintiffs to use their initials in court filings. Fed. R. Civ. P. 5.2(a)(3). So the Sixth Circuit has held minor plaintiffs do not need to seek court permission to proceed pseudonymously. *Doe v. Boland*, No. 21-3517, 2022 WL 2053256, at *2 (6th Cir. Mar. 2, 2022) ("There are several exceptions for plaintiffs seeking to proceed pseudonymously, including when the plaintiffs are children." (cleaned up)). Indeed, Defendants' counsel will notice each time they log in to ECF filing, they are required to check a box indicating they understand Rule 5.2 prohibits them from filing a document containing a minor's name on the docket. (*See* Ex. A, ECF screenshot.)

Defendants rely on *Citizens for a Strong Ohio v. Marsh,* claiming D.A. and X.A. need the court's permission to proceed pseudonymously. 123 F. App'x 630, 636–37 (6th Cir. Jan. 3, 2005). But, as the Sixth Circuit explained, *Marsh* "can be readily distinguished" from cases involving minors because it "did not involve a plaintiff who was a minor or otherwise had a compelling interest in preserving their anonymity." *Boland*, 2022 WL 2053256, at *2.

The rule requiring leave to proceed under a pseudonym is fundamentally about ensuring public access to the judiciary and ensuring defendants know who is suing them. *See Marsh*, 123 F. App'x at *636 (the rule is designed to ensure defendants are not litigating against unknown "straw men").

But minors' identity is already a codified exception to the general right of access to court proceedings. *See* Fed. R. Civ. P. 5.2(a)(3). And Defendants have known D.A.'s, X.A.'s, and B.A.'s identities since the outset of this case. Immediately after filing, Plaintiffs' counsel sent Defendants' counsel an email containing their complete names and explained the Complaint used initials to protect the identity of the minor students. (*See* Exhibit B, email.) Defendants did not object. Defendants litigated this case for nearly a year, attended a settlement conference with Plaintiffs present, and deposed D.A., X.A., and B.A. in person. Yet Defendants never whispered a word of concern to the Court until summary judgment briefing. And Defendants do not explain how Plaintiffs proceeding using initials impacted their defense of the case.

The Court should reject Defendants' tardy (and wrong) jurisdictional argument. *See, e.g.*, *Boland*, 2022 WL 2053256, at *3 (rejecting argument like

Defendants' because the defendant had "adequate notice of the identity of the minor plaintiffs . . . and their claims against [them]").

CONCLUSION

D.A. and X.A. respectfully request the Court deny Defendants' motion.[12]

Dated: April 26, 2024

Respectfully submitted,

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Counsel for Plaintiffs

[12] Because it appears the School District formally repealed the dress code provision banning apparel which calls "undue attention to oneself," Plaintiffs agree the challenges to that policy are now moot.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I transmitted a true and correct copy of the foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Conor T. Fitzpatrick
Conor T. Fitzpatrick

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.2(b)(ii), I hereby certify this brief contains 10,550 words, as calculated by Microsoft Word version 16.83, and therefore falls within the L.R. 7.2(b)(i) word limit of 10,800 words for a brief filed in support of a dispositive motion.

/s/ Conor T. Fitzpatrick
Conor T. Fitzpatrick

D.A., a minor, et al. v. Tri County Area Schools, et al.

Exhibit A to Plaintiffs' Response to Defendants' Motion for Summary Judgment

D.A., a minor, et al. v. Tri County Area Schools, et al.

Exhibit B to Plaintiffs' Response to Defendants' Motion for Summary Judgment

Maia Walker <maia.walker@thefire.org>

D.A., et al. v. Tri County Area Schools, et al. - Complaint

Conor Fitzpatrick <conor.fitzpatrick@thefire.org> Tue, Apr 25, 2023 at 7:32 AM
To: KRozin@clarkhill.com
Cc: Harrison Rosenthal <harrison.rosenthal@thefire.org>, Maia Walker <maia.walker@thefire.org>, Natalie Ekberg <natalie.ekberg@thefire.org>

Good morning Ms. Rozin,

The Foundation for Individual Rights and Expression (FIRE) represents D.A. & X.A. (by and through their mother, B.A.) in a lawsuit filed this morning against Tri County Area Schools, Andrew Buikema, and Wendy Bradford. I have attached a copy of the filed Complaint here. Consistent with other student speech cases involving minors, we refer to the students and parent by initials in order to protect the anonymity of the minors (with search engines, the full name of the parent makes it frightfully easy to discover the name of the kids). We trust this won't be an issue.

I understand from your June 9, 2022, letter to Philip Glovick that you represent the defendants regarding this dispute. If that is still the case, please let me know whether you are able to accept service on behalf of the defendants. If so, there's no reason for us to dispatch a process server.

All the best,
Conor

--
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*Admitted in Michigan

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