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

*****Expedited Consideration Requested Under L.R. 7.1(e)*****

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

When students head to school in the morning, the First Amendment comes with them. Fifty-five years ago, the Supreme Court affirmed students' constitutional right to wear armbands protesting the Vietnam War to school despite objections from school administrators. The Court stressed "the Nation's future depends upon leaders trained through wide exposure" to different ideas and expression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (internal citation omitted). Educators "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). Here, Defendants exceeded those limits by prohibiting students from the nondisruptive political expression of wearing apparel with the "Let's Go Brandon" political slogan.

Defendants' briefs fail to answer one simple question: how is "Let's Go Brandon" "profane" or "vulgar?" It does not contain a swear word, sexual innuendo, or any other marker courts or agencies have relied upon to identify material inappropriate for minors. Defendants call the slogan "coded profanity." But Defendants invented that category. A Westlaw search for "coded profanity" returns zero results. And Defendants provide no examples of "coded profanity" (i.e. a non-vulgar phrase supposedly being used as a substitute for a profane phrase) being restricted by anyone, anytime, anywhere, much less being used as a categorial restriction on speech upheld by courts.

By Defendants' logic, the clean version of a music album, radio edits of songs, and even Kidz-Bop are "coded profanity," because the swear words are bleeped or

replaced with more PG language. In Defendants' view, bleeps, overdubbing, and even removing profanity altogether is not enough, because Defendants can tell you *really* mean something else, and the something else has a bad word.

But for the First Amendment, unlike a child making Mother's Day breakfast, it's not the thought that counts. *Stanley v. Georgia*, 394 U.S. 557, 565–66 (1969). Choosing words carefully depending on where you are is a staple of human communication. Students must express themselves differently at school than with friends at a park, just as adults often communicate differently at a bar than in the boardroom. D.A., X.A., and the other west Michigan students who wore "Let's Go Brandon" apparel did precisely what American tradition and the Supreme Court's precedent required them to do: They expressed their political views in a nondisruptive manner without using profanity, vulgarity, or sexual innuendo. It is Defendants who stand alone, without a single case in support, insisting no matter how careful students are to express their views in a school-appropriate way, schools may still censor their expression if it might cause someone to *think* about the uncensored original. America's students are not so fragile, and the First Amendment is not so brittle.

The First Amendment "means what it says," and permits reasonable regulation of student speech only in "carefully restricted circumstances." *Tinker*, 393 U.S. at 513. Those circumstances are absent here. Defendants acknowledge "Let's Go Brandon" is not substantially disruptive. Nor is it "vulgar" or "profane" under any metric the Supreme Court, lower courts, or anyone else has used to assess whether

material is appropriate for minors. The Court should grant D.A. and X.A. summary judgment and reaffirm Michigan's students may use their First Amendment rights, not just learn about them.

ARGUMENT

I. The First Amendment Protected D.A.'s and X.A.'s Nondisruptive Political Expression.

In 1969, the Supreme Court made clear America's public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. During school, the government may only restrict expression which causes, or may be reasonably forecast to cause, substantial disruption, or which invades the rights of others. *Id.* at 513–14. *Tinker*'s "general rule" governs schools' ability to regulate the content of student expression unless one of three narrow exceptions apply—profanity/sexual innuendo, speech bearing the school's imprimatur, and speech encouraging illegal drug use. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); *accord Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

D.A. and X.A. wore apparel with the "Let's Go Brandon" slogan to peacefully express their political views. Defendants agree it did not cause disruption and they did not forecast disruption. (Ex. 12, Williams Dep. Tr. 34:23–35:5, PageID.667; Ex. 7, Buikema Dep. Tr. 39:3–6, PageID.607.) Since, as explained below, none of the *Tinker* exceptions apply, the First Amendment protected D.A.'s and X.A.'s expression.

A. *Tinker* is the general rule for restrictions on students' speech, not a viewpoint discrimination case.

Defendants misinterpret *Tinker,* claiming it applies only when a school tries to silence a specific viewpoint. (Defs.' Resp. 13–14, PageID.836.) They are wrong. *Tinker*'s "general rule" applies whenever a school restricts or punishes student expression. *Saxe*, 240 F.3d at 214. The Sixth Circuit explained in *Barr* that, absent a *Tinker* exception, "the *Tinker* standard applies to all other" regulations of student speech. 538 F.3d at 563–64. Viewpoint discrimination is governed by decisions like *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995).

In *Barr*, the Sixth Circuit held "schools' regulation of student speech must be consistent with both the *Tinker* standard and *Rosenberger*'s prohibition on viewpoint discrimination." 538 F.3d at 572 (emphasis added). That holding could not exist if Defendants' misapprehension of *Tinker* were true.

Tinker's plain text demonstrates it swims in a different lane than *Rosenberger*. Though the *Tinker* Court noted the school appeared to be singling out students who opposed the Vietnam War since administrators permitted students to wear pro-war regalia, the Court held the school would still have to establish substantial disruption if it wished to "forbid[] discussion of the Vietnam conflict" entirely. 393 U.S. at 513.

Courts consistently apply *Tinker* as a general standard regarding restrictions on particular expression regardless of whether the student alleges viewpoint discrimination. The Supreme Court in *Mahanoy* assessed students' off-campus First Amendment rights through the lens of *Tinker*'s substantial disruption test and never

mentioned viewpoint discrimination as an element of the standard. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187–93 (2021); *see also Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) (applying *Tinker* analysis absent evidence of viewpoint discrimination); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 321 (3d Cir. 2013) (en banc) (same). Defendants are wrong about *Tinker*. The Sixth Circuit, and *Tinker*, show why.

B. Defendants' brief ignores the importance the Supreme Court places on nondisruptive political speech.

D.A. and X.A. wore "Let's Go Brandon" apparel to school to express their dissatisfaction with President Biden. Criticizing a government official "is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). Indeed, "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) (cleaned up).

Tinker, *Fraser*, and *Morse* stressed the importance of protecting students' ability to engage in nondisruptive political expression. *Tinker*, 393 U.S. at 506, 514; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007). *Fraser* and *Morse* emphasized the "marked distinction" between the non-political speech at issue in those cases (a sexually explicit student council speech in *Fraser* and a "BONG HiTS 4 JESUS" banner in *Morse*) and the political message of the anti-war armbands in *Tinker*. *Fraser*, 478 U.S. at 677–78; *Morse*, 551 U.S. at 404.

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." 551 U.S. at 422 (Alito, J., concurring). Justice Alito's "limitation is a binding part of *Morse*." *B.H.*, 725 F.3d at 310*; 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").

Defendants ignore the heightened protection the Court has provided political expression in schools. Instead, Defendants argue D.A.'s and X.A.'s "Let's Go Brandon" apparel is not political speech. (Defs.' Resp. 17, PageID.840.) Nonsense. Defendants' June 2022 letter justified restricting "Let's Go Brandon" apparel by calling it "code for using profanity against the President." (Ex. 28, Dist. Resp. Ltr. 1, PageID.715.) Defendants do not dispute D.A. and X.A. wore the apparel intending to express their disapproval of President Biden. Defendants (wrongly) believe the slogan constitutes profane or vulgar political speech, but it is still political speech.

C. *Fraser* shows why "Let's Go Brandon" apparel is not profane or vulgar.

Defendants' response is most notable for what it lacks: a single decision holding expression akin to "Let's Go Brandon" vulgar or profane. The absence makes sense, because the slogan is not "vulgar" or "profane" by any metric the Supreme Court, lower courts, or regulatory agencies have used to judge those categories. So far as we

can find, Defendants are the only ones suggesting an expression can be devoid of bad words and sexual content and still be "vulgar" or "profane."

Defendants repeatedly insist "Let's Go Brandon" is profane because it "means Fuck Joe Biden." (Defs.' Resp. 22, PageID.845.) But they never delve deeper than that. They do not explain why a non-profane slogan should be treated the same as an uncensored alternate. And they offer no established (or even articulable) standard for how they reached their result. Their argument boils down to "we think it is profane, and that's enough." It is not. *Morse*, 551 U.S. at 409.

"Vulgar" and "profane" mean something. They are not bottomless wells of censorship for schools to draw from when nondisruptive expression makes them uneasy. Yes, in *Fraser*, the Court held schools may censor profane, vulgar, and sexually explicit expression without *Tinker* substantial disruption. 478 U.S. at 685. But the Court justified its holding through the lens of existing restrictions on certain material reaching minors unabated.

To explain why a sexually explicit student council speech at a school assembly lacked First Amendment protection, the Court pointed to *Ginsberg v. New York*, 390 U.S. 629 (1968), which upheld a statute banning the sale of nudity-laden gentlemen's magazines to minors. *Fraser*, 478 U.S. at 684. The *Fraser* Court also relied on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the FCC's power to regulate an "indecent but not obscene" uncensored radio broadcast of George Carlin's "seven dirty words" monologue during the daytime, reasoning children would likely be listening. *Fraser*, 478 U.S. at 684–85. The Court then measured the student council

speech against the congressional decorum rules as a standard of socially acceptable behavior, noting it ran afoul of the prohibitions on "impertinent" and "indecent" "abusive," or "offensive" language. *Id.* at 682.

In short, the *Fraser* Court did not reach its holding in a vacuum. The Court looked to established yardsticks of material with distribution limited or restricted to minors: things like *Playboy* magazines, uncensored George Carlin stand-up on the radio, and, even then, tested whether the student's speech would have been acceptable in Congress. *See also B.H.*, 725 F.3d at 320 (holding "I 🖤 boobies!" bracelets were not lewd, vulgar, or profane under *Fraser* because they did not contain language prohibited on public airwaves).

Measured against the markers identified by the Court in *Fraser*, "Let's Go Brandon" apparel comes nowhere close to the line. It contains no swear words, sexual images, or sexual language. Defendants provide no examples of federal, state, or local governments restricting "coded profanity" for minors. And Defendants identify no congressional decorum rules "Let's Go Brandon" violates. That is no surprise: the slogan is omnipresent in congressional floor speeches.[1] "Let's Go Brandon" passes every test *Fraser* used to distinguish the permissible from the sanctionable.

D. Defendants cannot censor political expression merely by calling it inconsistent with their "educational mission."

Defendants also insist they can ban "Let's Go Brandon" apparel as "contrary to the District's educational mission." (Ex. 28, Dist. Resp. 2, PageID.715.) What

[1] *See* 167 Cong. Rec. H5774-01, H5776 (2021) (statement of Rep. William J. Posey); 167 Cong. Rec. H5880-01, H5880 (2021) (statement of Rep. Mary E. Miller); 168 Cong. Rec. H5240-05, H5240 (2022) (statement of Rep. Douglas L. LaMalfa).

Defendants have done is taken a sentence from *Fraser* out of context and tried to turn it into a fourth *Tinker* exception. It is not. As the Sixth Circuit explained in *Barr*, the Supreme Court's school speech cases yield "three principles: (1) under *Fraser*, a school may categorically prohibit vulgar, lewd, indecent, or plainly offensive student speech; (2) under *Hazelwood* a school has limited authority to censor school-sponsored student speech . . . ; and (3) the *Tinker* standard applies to all other student speech." 538 F.3d at 563–64. After *Morse*, the Sixth Circuit explained in *Barr*, schools may prohibit speech "reasonably view[ed] as promoting illegal drug use." *Id.* at 564.

That's it. Those are the three exceptions. There is not an untethered exception for expression a school deems "contrary to" its educational mission. If a school could satisfy *Tinker* merely by claiming a student's expression is "contrary to" its educational mission, the exception would swallow the rule. Schools always believe *their* censorship is justified. Were Defendants' approach the rule, *Tinker* would have come out the other way because the (reversed) district court deferred to the school district's insistence that prohibiting the armbands was necessary to "maintain[] a scholarly, disciplined atmosphere in the classroom." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966).

Defendants' response relies on the pre-*Morse* decision *Boroff*[2] to argue schools have unchecked authority for the "ultimate decision to define what is lewd or vulgar based on whether the speech is inconsistent with the school's basic educational

[2] D.A. and X.A. discuss *Boroff*, the fact it is no longer good law after *Morse*, and its inapplicability to this action, extensively in their response to Defendants' motion. (Pls.' Resp. 16–20, PageID.791–93.) In the interest of brevity, D.A. and X.A. incorporate that discussion here.

mission." (Defs.' Resp. 26, PageID.849) (citing *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000)). They do not. *Morse* made clear *Fraser*'s vulgar/profane/offensive bar is a high one, and not even the "BONG HiTS 4 JESUS" banner met it. *Morse*, 551 U.S. at 409. If Defendants' expansive approach were the law, schools could forbid "darn," "heck," or "drats," even on political apparel. Each student's First Amendment rights would turn on the eccentricities and skittishness of what their school principal believes is appropriate. That is not the law. Justice Black dissented in *Tinker* arguing it should be. 393 U.S. at 524. No one joined him. Thirty-eight years later, Justice Thomas tried to revive that view in *Morse*. 551 U.S. at 419 (Thomas, J., concurring). Again, no one joined him. Justice Thomas repeated his position three years ago in *Mahanoy*. 594 U.S. at 212 (Thomas, J., dissenting). Once again, Defendants' view schools should have total discretion to decide what is appropriate received just one vote.

In *Morse*, the Supreme Court warned school officials not to "stretch[] *Fraser* too far" and assume such broad discretionary powers. 551 U.S. at 409. Justice Alito explained, "The opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Id*. at 423 (Alito, J., concurring). The "educational mission" argument is ripe for abuse, Justice Alito reasoned, because "[i]t would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.*

Courts acknowledge *Morse*'s common-sense limitation. In *Guiles ex rel. Guiles v. Marineau*, for example, the Second Circuit explained: "*Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate public concern." 461 F.3d 320, 330 (2d Cir. 2006). If *Fraser* did grant schools such sweeping authority, the Second Circuit explained, "*Tinker* would no longer have any effect." *Id.*; *see also B.H.*, 725 F.3d at 316 ("[S]uch sweeping and total deference to school officials is incompatible with the Supreme Court's teachings.") Defendants insist *Guiles* and *B.H.* are not binding. But *Morse* is. And *Guiles* and *B.H.* simply enforced *Morse*.

D.A. and X.A. wore apparel featuring a socially accepted political slogan heard everywhere from the airwaves to the floor of Congress. Since *Fraser*'s narrow exception for vulgarity and profanity does not apply, *Tinker*'s general rule governs. Under *Tinker*, since there is no evidence of disruption, D.A. and X.A. prevail. The Court should grant them summary judgment and restore the First Amendment to west Michigan's public schools.

II. Buikema and Bradford Are Not Entitled to Qualified Immunity.

As D.A. and X.A. explained in their briefing (Pls.' Br. 28–31, PageID.561–564; Pls.' Resp. 21–30, PageID.794–803), *Tinker*, *Fraser*, *Morse*, and *Mahanoy*, plus *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. D.A. and X.A.'s response explained why *Fraser* and *Boroff* do not cloud the waters. (Pls.' Resp. 16–20,

PageID.789–93.) In the interest of brevity, D.A. and X.A. incorporate their prior briefing on qualified immunity here.

III. The School District Is Responsible for Buikema's and Bradford's Unconstitutional Actions.

A. Buikema and Bradford enforced the School District's policy banning "coded profanity."

The School District is liable for Buikema's and Bradford's constitutional violations because they enforced the School District's policy against so-called "coded profanity." That means the School District is liable for their actions enforcing the policy against D.A. and X.A.

The School District's dress code prohibits "[a]ttire with messages or illustrations that are lewd, indecent, vulgar, or profane." (Ex. 9, 2022-23 TCMS Handbook 24, PageID.644.) Departing from the customary definition of "profane" (e.g., something that has a profanity (*see supra* Section I,)) the School District interprets "profane" as including expression which is merely "code for using profanity." (Ex. 28, Dist. Resp. Ltr. 1, 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.*)

Consistent with the School District's policy of banning "coded profanity," Bradford testified D.A.'s sweatshirt violated the 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 rule against profane attire. (Ex. 7, Buikema Dep. Tr. 51:11–53:15, PageID.609.)

Defendants argue the School District cannot be held liable because "the dress code's prohibition of clothing with profane messages is constitutional under *Fraser*." (Defs.' Resp. 28, PageID.851.) That is irrelevant. "*Monell* (and municipal liability) are about responsibility, not merely written rules of conduct." *Paterek v. Village of Armada*, 801 F.3d 630, 651 (6th Cir. 2015) (cleaned up) (citing *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 691 (1978)). The School District has a policy against "coded profanity," which Buikema and Bradford enforced against D.A. and X.A. by instructing them to remove their "Let's Go Brandon" sweatshirts. That makes the School District responsible for their actions. *See Porter v. City of Philadelphia*, 975 F.3d 374, 383–84 (3d Cir. 2020) (holding, in light of "uncontroverted evidence from multiple witnesses" that Philadelphia had an unwritten policy of prohibiting certain speeches, the policy "was an official policy of the City for purposes of § 1983 liability under *Monell*").

B. The School District ratified Buikema's and Bradford's unconstitutional actions.

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," the ratification "is chargeable to the municipality because their decision is final." *Feliciano v. City of Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993). D.A. and X.A. sent the School District a letter demanding it allow "Let's Go Brandon" apparel. (Ex. 27, C&D Ltr. 1–3, PageID.711–13.) The School District refused, confirming Buikema and Bradford accurately enforced dress code policy. (Ex. 28, Dist. Resp. Ltr. 1, PageID.715.)

Defendants say the "municipal liability claim must fail since the subsequent ratification cannot logically be the moving force behind the constitutional violation." (Defs.' Resp. 33, PageID.856.) But that is how ratification works. In *Meyers v. City of Cincinnati*, for example, the Sixth Circuit held the city liable because it subsequently reviewed and approved city officials' unconstitutional termination of a fire chief. 14 F.3d 1115, 1118–19 (6th Cir. 1994); *see also Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 535 (4th Cir. 2022) (holding school board became "moving force" behind constitutional violation when it reviewed and upheld decision made by subordinate officials). The School District's June 2022 letter, which it sent through counsel, confirmed Buikema and Bradford acted in accordance with the School District's policy of prohibiting "coded profanity." (Ex 28, Dist. Resp. Ltr. 1, PageID.715.) That's ratification.

In response, the School District says, "Plaintiffs make no attempt to explain how the District's local counsel has final policymaking authority to ratify a particular decision by a District employee." (Defs.' Resp. 33, PageID.857.) Unless the School District's counsel went rogue in June 2022 and sent the letter without the School District's consent, the School District is bound to the statements of its counsel. *See, e.g.*, *Bible Believers v. Wayne County*, 805 F.3d 228, 260 (6th Cir. 2015); *United States v. Johnson*, 752 F.2d 206, 210–11 (6th Cir. 1985).

C. In the alternative, the School District delegated final dress code decisionmaking authority to school administrators.

In the alternative, the School District delegated final decisionmaking authority regarding the dress code to Buikema and is liable for his actions. School districts are

liable for the unconstitutional actions of their 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).

The School District says Buikema did not have final authority. (Defs.' Resp. 30, PageID.853.) But unlike student suspensions, for example (Ex. 34, Policy 5611), students have no ability to appeal a dress code determination to the School District. 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.)

When a government employee has final, unreviewable discretion, the government is liable for their actions. *See Paterek*, 801 F.3d at 652 (holding a city's inspector held final decisionmaking 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"). The buck has to stop with someone. If the School District, as it testified, has no role in dress code enforcement, it is bound by the actions of those to whom it delegated unreviewable authority: school administrators like Assistant Principal Buikema.

IV. Media Clips of "Let's Go Brandon" on the Public Airwaves and Dr. Moshman's Expert Report are Admissible and Probative.

The Court should reject Defendants' legally incorrect arguments regarding D.A. and X.A.'s media exhibits. D.A. and X.A. provided television and radio clips demonstrating the "Let's Go Brandon" slogan airs uncensored on broadcast television,

cable television, and terrestrial radio. (*See* Exs. 14–22, PageID.681–89.) Defendants argue the materials should be disregarded as hearsay.

Defendants are wrong. D.A. and X.A. are not offering the clips for the truth of the hosts' statements. *See* Fed. R. Evid. 801(c)(2) (evidence can be hearsay only if "offer[ed] in evidence to prove the truth of the matter asserted in the statement"). Rather, D.A. and X.A. offer the clips for the permissible purpose of establishing "Let's Go Brandon" airs uncensored on television and radio. The existence of the media, not its truth, is the proffered, and permissible, purpose. *See, e.g.*, *Rich v. Gobble*, No. 1:08cv35, 2009 WL 801774, at *23 (E.D. Tenn. Mar. 24, 2009) (considering newspaper article on summary judgment, concluding it is "not hearsay because it is not offered for the truth of the matter asserted.") *Cf.*, *Blick v. Ann Arbor Pub. Sch. Dist.*, 674 F. Supp. 3d 400, 429 (E.D. Mich. 2023) (taking judicial notice of various news articles).

The Court should also reject Defendants' request to disregard D.A.'s and X.A.'s expert report. D.A. and X.A. offered Dr. Moshman's report (Ex. 31, Moshman Expert Report, PageID.724–747) for the purpose of establishing, through his expertise in adolescent psychology, that nothing about the "Let's Go Brandon" slogan suggests it would disrupt the school day. Defendants now appear to concede they did not forecast substantial disruption (or, at least, they do not argue they made such a forecast). But Dr. Moshman's unrebutted findings are still probative and helpful regarding what, if any, impact "Let's Go Brandon" apparel would have on the school environment.

CONCLUSION

D.A. and X.A. respectfully request the Court grant their motion for summary judgment.[3]

Dated: May 17, 2024

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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 4,296 words, as calculated by Microsoft Word version 16.83, and therefore falls within the L.R. 7.2(b)(i) word limit of 4,300 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 34 to Plaintiffs' Motion for Summary Judgment

Book	Policy Manual
Section	5000 Students
Title	DUE PROCESS RIGHTS
Code	po5611
Status	Active
Adopted	March 9, 2020
Last Revised	November 9, 2020

5611 - **DUE PROCESS RIGHTS**

The Board of Education recognizes the importance of safeguarding a student's constitutional rights, particularly when subject to the District's disciplinary procedures.

To better ensure appropriate due-process is provided a student, the Board establishes the following guidelines which District Administrators shall use when dealing with students:

A. **Students subject to short-term suspension:**

Except when emergency removal is warranted, a student must be given oral or written notice of the charges against him/her and the opportunity to respond prior to the implementation of a suspension. When emergency removal has been implemented, notice and opportunity to respond shall occur as soon as reasonably possible. The principal or other designated administrator shall provide the opportunity to be heard and shall be responsible for making the suspension decision. An appeal may be addressed to the Superintendent whose decision will be final.

B. **Students subject to long-term suspension and expulsion:**

A student and his/her parent or guardian must be given written notice of the intention to suspend or expel and the reasons therefor, and an opportunity to appear with a representative before the Board to answer the charges. The student and/or his/her guardian must also be provided a brief description of the student's rights and of the hearing procedure, a list of the witnesses who will provide testimony to the Board, and a summary of the facts to which the witnesses will testify. At the student's request, the hearing may be private but the Board must act publicly. The Board shall act on any appeal, which must be submitted in writing, to expulsion, to a request for reinstatement, or to a request for admission after being permanently expelled from another district (Policy 5610).

In determining whether disciplinary action set forth in this policy is to be implemented, District Administrators shall use a preponderance of evidence standard. Further, any individual charged with making a disciplinary determination under this policy shall retain all documents, electronically stored information ("ESI"), and electronic media (as defined in Policy 8315 - Information Management (i.e. "Litigation Hold")) created and/or received as part of an investigation.

The documents, ESI, and electronic media (as defined in Policy 8315) retained may include public records and records exempt from disclosure under Federal (e.g., FERPA, ADA) and/or State law (e.g., R.C. 3319.321) – e.g., student records and confidential medical records.

The documents, ESI, and electronic media (as defined in Policy 8315) shall be retained in accordance with Policy 8310, Policy 8315, Policy 8320, and Policy 8330 for not less than three (3) years, but longer if required by the District's records retention schedule.