

NO. 24-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
(1:23-cv-00423)

**AMICUS BRIEF OF THE LIBERTY JUSTICE CENTER
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF AMICUS CURIAE¹

The Liberty Justice Center is a nonprofit, nonpartisan public-interest law firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018). LJC frequently litigates important cases affecting educational freedom and campus speech, with including matters currently pending or recently concluded in Arizona, Idaho, North Carolina, Oklahoma, South Carolina, and Tennessee

This case interests amicus because LJC believes in a robust right of free speech and is concerned that this right is being eroded on school campuses across the country. For example, LJC represents a child who was punished with three days out-of-school suspension for asking a

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

question that included the legal term “illegal alien.” *See C.M. v. Davidson County Board of Education*, 24-CV-380 (M.D.N.C.). LJC also represents an Oregon educator and mother who was censored and temporarily banned from local school board meetings for violating a policy that effectively proscribes criticizing administrators. *Scherer v. Gladstone School District*, Case No. 3:24-cv-00344-YY (D. Or.). Proper resolution of this case will further LJC’s ability to defend the free speech rights of its clients.

CORPORATE DISCLOSURE STATEMENT

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W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 4, 5

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Chacour Koop, *‘Make Liberals Cry Again.’ Pro-Trump student suspended over apparel, PA lawsuit says*, Center Daily Times (Oct. 23, 2020). <https://www.centredaily.com/news/nation-world/national/article246663238.html> 9

Eli Rosenberg, *A student was suspended for wearing a border wall shirt. It cost the district \$25,000 and an apology*, Wash. Post (July 25, 2018). <https://www.washingtonpost.com/news/local/wp/2018/07/25/a-student-was-suspended-for-wearing-a-border-wall-shirt-it-cost-the-district-25000-and-an-apology/>..... 8

Ellie Nakamoto-White, *Parents say students at Perry High School told to remove MAGA gear, student suspended*, AZCentral (Mar. 2, 2019)<https://www.azcentral.com/story/news/local/chandler-education/2019/03/02/parents-say-students-perry-high-school-told-remove-maga-gear-donald-trump/3035751002/>. 9

FIRE, “Student faces possible suspension, fine for Zoom background of President Trump,” (Aug. 7, 2020) <https://www.thefire.org/student-faces-possible-suspension-fine-for-zoom-background-of-president-trump/>..... 11

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INTRODUCTION

Euphemism is not vulgarity—by definition. American discourse is full of allusions and aversions and puritan oddities. We refer to poultry as “white” or “dark” meat because our ancestors were uncomfortable lusting after a chicken’s breast or thigh.² Our turkey subs are made by “sandwich artists”; our real estate agents no longer refer to the nicest sleeping area of a home as the “master bedroom,” because it sounds to some people like a reference to the history of American slavery.³ When the current President was still Vice President, his own exercise in profanity became a meme all its own—the “BFD”—a subject of lighthearted jokes from public officials and journalists alike.⁴ Everyone

² Hugh Rawson, “Fowl Talk for Thanksgiving,” Cambridge Dictionary, November 12, 2012

<https://dictionaryblog.cambridge.org/2012/11/19/fowl-talk-for-thanksgiving/>

³ Sydney Franklin, “The Biggest Bedroom Is No Longer a ‘Master,’” The New York Times, August 5, 2020.

<https://www.nytimes.com/2020/08/05/realestate/master-bedroom-change.html>

⁴ Mychael Schnell, “Biden pokes fun at 2010 ‘BFD’ hot mic moment during Obama visit,” The Hill, April 5, 2022.

<https://thehill.com/homenews/administration/3259815-biden-pokes-fun-at-2010-bfd-hot-mic-moment-during-obama-visit/>

knew what the “F” refers to, and all understand the initials are not the same as what they stand for.

So too here: the “Let’s Go Brandon” meme these students chose to indulge is not itself vulgar in anyway—any more than the church lady going “oh SHOOT” when she stubs her toe is a vulgarian. Indeed, the slogan has become such a ubiquitous quip that Amicus itself once invoked it in another context, when it successfully represented a business owner challenging the Occupational Safety and Health Administration’s requirement that employees take vaccines as a condition of their employment. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609 (5th Cir. 2021), *rev’d Mass. Bldg. Trades Council v. United States DOL (In re MCP No. 165)*, 21 F.4th 357, 365 (6th Cir. 2021), *aff’d Nat’l Fed’n of Indep. Bus. v. DOL, OSHA*, 595 U.S. 109, 112 (2022). That business owner’s name was “Brandon,” and the very slogan at issue in this case became the call to arms of that litigation—or as our Louisiana-based co-counsel adapted it, #GeauxBrandon:⁵

⁵ Pelican Institute (@PelicanInst), Twitter (Sep. 26, 2022), <https://x.com/PelicanInst/status/1574534278339100672>



The students’ black armbands at issue in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* were a euphemism too—a subtle representation of the darkness of the war those children opposed. 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”). The school officials there were not entitled to object to the children politely reminding them of serious matters. The school officials here are engaged in their own euphemism: falling back on some implied offensiveness to cover for their objection to the *political* content of the student’s speech.

“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). But such principles of neutrality are slipping: throughout the country, the institutions that we depend on to educate future generations increasingly seek to proscribe new orthodoxies, and to take sides where they should make space for debate. Amicus submits

this brief to emphasize that Justice Jackson’s ideal came with a warning: that if public education “is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system.” *Id.* And ideological discipline is tragically the modus operandi of many educational institutions today.

Amicus submits this brief to highlight the fact that censorship of entirely mainstream political discourse has become all too common around the country. If every euphemism can now be treated as the equivalent of its reference, the problem will only get worse. This court should reverse the decision below, and find that schools are not entitled to punish students for vulgarities they’ve never uttered.

ARGUMENT

Campus Authorities Increasingly Seek To Impose Ideological Conformity And Restrict Free Expression

It feels like the stories arrive daily: a student suspended, a teacher put on leave, a mandatory school program taking ideological and political sides. Yet each story invokes a common theme: school officials seeking to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

or act their faith therein.” *Barnette*, 319 U.S. at 642. From T-shirts, to Facebook posts, to parties, no aspect of student life now escapes attempts to impose some dominant view on dissenters.

For instance, Amicus represents Barton Thorne, a career educator in Tennessee who saw that career threatened simply for explaining the value of the marketplace of ideas to his students. *See Thorne v. Shelby County Board of Education*, Western District of Tennessee No. 2:21-cv-02110. As part of his job as principal, Thorne delivered a weekly “principal’s minute” message to his students as part of the daily announcements video. These messages inspired, educated, informed, and challenged his high school students with broad themes and life advice from their principal.

After the disturbing events of January 6, 2021, our country faced an important debate around free speech, as social media moderators reacted by censoring or deplatforming various accounts. Thorne used this teachable moment: if you support restricting speech, he explained, “[y]ou may be in agreement with the people who are doing the filtering, but it’s just one moment away from somebody else being able to filter you. And so, if they can do that to a minority—or if they can do that to a

powerful voice, it doesn't have to be a minority—what will stop them one day from doing that to you?” This straightforward articulation of fundamental American values earned Principal Thorne a suspension and investigation—even advocating the First Amendment is too much for some school administrations.

This same censorship, when applied to minors, is not a minor issue: the Supreme Court has recognized that schools' punishments of students can “seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.” *Goss v. Lopez*, 419 U.S. 565, 575 (1975). Consider Amicus' representation of C.M., a minor plaintiff who was suspended for asking whether the word “alien” during a class referred to “space aliens” or “illegal aliens who need green cards.” *C.M. v. Davidson County Board of Education*, Middle District of North Carolina, No. 24-CV-380. For this innocuous question, the school insisted on a “harsh” (its description) punishment of a three-day out-of-school suspension. As a result, C.M. was prohibited from competing in the most important track meet of the year, potentially hampering his ability to earn a track scholarship to attend college. And his college

dreams themselves were jeopardized by the school's write-up of the incident as racially biased; according to the then-principal, C.M had to be punished as if the student had said "the N-word." *Id.*, Dkt. No. 8 (P's Mot.) at p. 7.

Other cases around the country tell a similar story. A few years ago, one school in Nevada disciplined a minor student for wearing a T-shirt that celebrated constitutional rights. *See Guardanapo v. Washoe County School District*, District of Nevada No. 3:18-cv-00172. The shirt in question referenced the Constitution in general and the Second Amendment in particular, but included no depictions of firearms, or any other weapon. The student was disciplined anyway, while the school district simultaneously supported students with the opposite view participating in the National School Walkout, a formal, organized protest calling for expansive new gun control measures.

Indeed, one could fill a brief with student T-shirts alone. A student in Oregon was suspended for a shirt that advocated building physical

barriers on the southern border.⁶ A sophomore in Pennsylvania was suspended for wearing a shirt that said “Keep America Great” and a mask that said “Women for Trump.”⁷ Students in Arizona were disciplined for wearing “Make America Great Again” apparel to the school’s official “Party in the USA” theme day.⁸ In California, students may be disciplined simply for wearing the stars and stripes on their shirt at school. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014).

Or consider *Starbuck v. Williamsburg James City Cty. Sch. Bd.*, 28 F.4th 529 (4th Cir. 2022). There, a student received both an in-school

⁶ Eli Rosenberg, *A student was suspended for wearing a border wall shirt. It cost the district \$25,000 and an apology*, Wash. Post (July 25, 2018). <https://www.washingtonpost.com/news/local/wp/2018/07/25/a-student-was-suspended-for-wearing-a-border-wall-shirt-it-cost-the-district-25000-and-an-apology/>.

⁷ Chacour Koop, *‘Make Liberals Cry Again.’ Pro-Trump student suspended over apparel, PA lawsuit says*, Center Daily Times (Oct. 23, 2020). <https://www.centredaily.com/news/nation-world/national/article246663238.html>.

⁸ Ellie Nakamoto-White, *Parents say students at Perry High School told to remove MAGA gear, student suspended*, AZCentral (Mar. 2, 2019) <https://www.azcentral.com/story/news/local/chandler-education/2019/03/02/parents-say-students-perry-high-school-told-remove-maga-gear-donald-trump/3035751002/>.

and out-of-school suspension for factually discussing the February 2018 school shooting that occurred in Parkland, Florida. The student “question[ed] the intent of the shooter” and noted that “the shooter was left alone within the building unchallenged by local law enforcement” for a considerable length of time. 28 F.4th at 531-32. The Fourth Circuit held that “[t]he First Amendment does not permit schools to prohibit students from engaging in . . . factual, nonthreatening speech.” *Id.* at 536. Nor could schools “silence such student speech on the basis that it communicates controversial or upsetting ideas.” *Id.* And although the school board argued that the student’s language was “reasonably perceived as threatening school violence,” the Fourth Circuit disagreed. *Id.* The Court stated that deferring to the administrators, as the district court urges here, “would be incompatible with the very purpose of public education.” *Id.*

Even when schools approve of student activism, it often must be on the administrators’ terms. At Utica Academy for International Studies in Michigan, students were encouraged to participate in the National School Walkout, mentioned *supra*. However,

The rules required the students to stick to “pre-identified chants” as they marched outside the school, and any posters they wished to

carry during their walkout would need to be submitted to administrators for advance approval. Incredibly, the rules also provided that no “political messages” would be permitted. Several students who refused to be silenced by school administrators were suspended for peacefully participating in the walkout and holding up signs with political messages.⁹

Even those students who choose to support the administrators’ proposed messages must jump through their hoops.

And these forms of censorship are no longer limited to school grounds. The COVID-19 pandemic provided its own new avenues for the stifling of student speech. One school threatened to suspend a student for including the sitting President of the United States in his background for virtual learning.¹⁰ A high school student in Washington likewise faced similar sanction for a flag in the frame of his webcam.¹¹

⁹ ACLU of Michigan, *Students Suspended For ‘Unapproved’ Political Speech*. <https://www.aclumich.org/en/cases/students-suspended-unapproved-political-speech>

¹⁰ FIRE, “Student faces possible suspension, fine for Zoom background of President Trump,” (Aug. 7, 2020) <https://www.thefire.org/student-faces-possible-suspension-fine-for-zoom-background-of-president-trump/>.

¹¹ Bradford Betz, “Washington high school student kicked out of Zoom class over pro-Trump flag, parents say,” Fox News (Sep. 23, 2020). <https://www.foxnews.com/us/washington-high-school-student-kicked-out-of-zoom-class-over-pro-trump-flag-parents-say>.

The same happened to a student in Maine as well.¹² And although the pandemic might have receded, the proliferation of smart phones has given school administrators new avenues to police student speech even off campus—which is why the Supreme Court was recently forced to clarify that school officials’ discretion to punish students for off campus speech is even more limited than the leeway *Tinker* provides them during school hours. *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 189 (2021).

This blurring of the line between the campus and the home should give this Court even greater pause in expanding the speech-regulating conduct of school administrators: can schools punish students for the posters on the walls of their private bedrooms? For the T-shirts they happen to have hanging in the closet behind them? Is a student to be punished because their parent keeps an antique rifle on the mantel behind the couch which is their one quiet place to try to learn? Amicus

¹² Jackie Mundry, “Student says she was removed from Zoom class for having Trump flag,” News Center Maine (Oct. 4, 2020). <https://www.newscentermaine.com/article/news/politics/student-says-she-was-removed-from-zoom-class-for-having-trump-flag/97-fd7f79f5-81aa-41be-a1fe-b65793b16104>.

submits the answer is no, and that this Court should call a spade a spade, and hold that students who do not express profanity cannot be punished for expressing profanity.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's orders denying Plaintiffs' motion for summary judgment and granting Defendants' motion for summary judgment.

December 11, 2024

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Dated: December 11, 2024

/s M.E. Buck Dougherty III
M.E. Buck Dougherty III

CERTIFICATE OF SERVICE

The undersigned certifies that on December 11, 2024, an electronic copy of the Brief of the Liberty Justice Center as Amicus Curiae was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

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