No. 24-1769

In the United States Court of Appeals for the Sixth Circuit

B.A., mother of minors D.A. and X.A., et al.
Plaintiffs-Appellants,

v.

TRI COUNTY AREA SCHOOLS, et al.,
Defendants-Appellees.

*On Appeal from the United States District Court for the Western District of Michigan, No. (*1:23-cv-00423)

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan-institute.org

December 10, 2024

CORPORATE DISCLOSURE STATEMENT

The Manhattan Institute states that it has no parent companies, subsidiaries, or affiliates, and does not issue shares to the public.

December 10, 2024

/s/ *Ilya Shapiro*
Ilya Shapiro

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster individual responsibility and agency across multiple dimensions. It has sponsored scholarship and filed briefs opposing regulations that interfere with constitutionally protected liberties. MI has a particular interest in defending speech protections because its scholars have been targets of speech-suppression efforts.

This case interests MI because it involves the viewpoint-based regulation of student speech.

SUMMARY OF ARGUMENT

The Constitution does not limit its school-related free-speech guarantee to students in high school. Such an arbitrary distinction makes little sense and would serve little purpose. Yet there are those who would whittle the speech rights of public-school students out of existence. This lack of respect for the speech rights of America's children is alarming, and the decision of the lower court, failing to uphold D.A.'s and X.A.'s constitutional rights, amplifies this alarm.

[1] Pursuant to Fed. R. App. P. 29, *amicus* states it sought consent to file this brief from the parties and received consent from Plaintiffs-Appellants. Defendants-Appellees did not reply to counsel's request for consent despite repeated entreaties. Accordingly, *amicus* is filing an accompanying motion for leave to file this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

Although the Supreme Court has infrequently addressed the speech rights of public-school students as such, courts across the country have articulated the contours of these rights directly. The right to freedom of speech for these students is consistently recognized by circuit and district courts alike. *See, e.g.*, *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013); Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc); *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough County*, 905 F. Supp. 2d 1262 (M.D. Fla. 2012); *DePinto v. Bayonne Bd. of Educ*., 514 F. Supp. 2d 633 (D.N.J. 2007); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006). Those courts, which impose some limits on the students' speech so as not to disrupt schools' educational missions, nonetheless acknowledge the students' rights to speak. *See, e.g., Cuff ex rel. B.C. v. Valley Cent. Sch. Dist*., 677 F.3d 109, (2d Cir. 2012). The few outlying courts suggesting that students do not partake in substantial First Amendment protections have been rebuked by others. *See, e.g., Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003).

Indeed, there is no jurisprudential reason for this Court to abandon the lead of courts respecting the speech rights of primary school students, and every reason to respect those rights. And from a policy perspective, enforcing student speech rights provides significant pedagogical benefits. When public-school students enjoy

speech protections, they learn critical thinking, benefit from enhanced teacher engagement, and become engaged and thoughtful members of society.

ARGUMENT

I. Courts Nationwide Regularly Protect the Speech of Public-School Students

Whether public school students enjoy the constitutional guarantee of free speech is not, and should not be, a difficult question to answer. The Supreme Court has long recognized that students in public schools maintain such rights, recently reaffirming the idea that students do not "'shed their constitutional rights to freedom of speech or expression,' even 'at the schoolhouse gate.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 187 (2021) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). Although much of the jurisprudence on student speech rights involves high schoolers and college students, ample case law confirms that primary-school students also enjoy significant protections. Unfortunately, the district court below did not accurately reflect this understanding.

A. Courts frequently hold that school restrictions of young students' speech violate the First Amendment.

When public schools restrict the speech of primary school students, courts consistently find that the school violated that student's constitutional protection of free speech, reinforcing the tenet that primary school students are not devoid of speech protections. *Tinker* governs most primary school speech disputes, unless they fall into one of the several exceptions to the broad speech protections that *Tinker*

outlines. *See Tinker*, 393 U.S. at 506. It is often in the context of *Tinker's* general rule—that a school may not restrict a student's speech unless that speech causes a substantial disruption of school activity or is reasonably foreseen to cause such a disruption—that courts analyze these disputes. *Id*. at 514. And it is in the application of this rule that courts have largely determined the speech rights of primary school students. Time and again, and in situations dealing with different forms of student speech, courts have applied the protections outlined in *Tinker* to primary school students, protecting them from constitutional violations perpetuated by their schools.

Although the Supreme Court has not directly addressed the question of what level of speech rights primary school students possess, numerous circuit and district courts have. Those courts show that young students enjoy robust free speech rights. In one such case, the Third Circuit explicitly upheld the speech rights of an elementary-school student whose speech was restricted by her school. *See K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107 (3d Cir. 2013). There, an elementary school prohibited a fifth-grade student from distributing invitations for a Christmas party at her church to her fellow students. *Id*. at 102. The court directly addressed the question "of the extent to which *Tinker* applies in the elementary school context." *Id*. at 107. Finding that the school likely violated the student's free speech rights, as it could not show substantial disruption of school activities, the court held "that the *Tinker* analysis has sufficient flexibility to

accommodate the educational, developmental, and disciplinary interests at play in the elementary school environment." *Id*. at 111.

The *Ayers* court recognized that an primary school student's exercise of speech that causes no disruption and is perfectly age-appropriate should be protected, something the lower court here failed to do for D.A. and X.A. Instantly, the school district never experienced disruption due to the students using the "Let's Go Brandon" slogan or wearing apparel with the "Let's Go Brandon" slogan.

The Third Circuit is not alone in this view; two years earlier, the Fifth Circuit also upheld the speech rights of an elementary school student. *See Morgan v. Swanson*, 659 F.3d 359, 385-86 (5th Cir. 2011) (en banc). *Morgan* dealt with several speech challenges in different elementary schools and chose to review the constitutionality of only one incident: a second-grade student was prohibited from distributing religious pencils to her friends after school. *Id*. at 388. Finding that the student's action did not interfere with the work of the school nor with the rights of other students, and that the school restricted her speech solely because of the message, the court held that the student's free speech rights were violated. *Id*.

While *Morgan's* outcome serves as another relevant example of a young student's speech being protected, it is the *Morgan* court's analysis of that right that is most salient. The en banc court made a point to explain "that the student-speech rights announced in *Tinker* inhere in the elementary-school context," further

elaborating that "it is difficult to identify a constitutional justification for cabining the First Amendment protections announced in *Tinker* to older students." *Id*. at 386. And if *Morgan* is correct that *Tinker*'s speech-protective holding extends to elementary-school students, then it assuredly extends to middle-school students. While a bit older than elementary-school students, middle schoolers nonetheless remain on the younger end of students involved in free-speech disputes, so the jurisprudential logic transfers easily to them. Accordingly, *Morgan* provides a definitive recognition of speech rights for all K-12 students, relying on the First Amendment as explicated in *Tinker* to provide guidance for speech disputes. Suffice it to say, the district court here declined to follow the Fifth Circuit's lead.

District courts across the country also recognize primary-school students' robust First Amendment rights, protecting them from school restrictions. *See*, *e.g.*, *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty.*, 905 F. Supp. 2d 1262, 1264 (M.D. Fla. 2012) (finding a student's First Amendment rights violated when a school prohibited her from passing out invitations to an Easter egg hunt during non-instructional school time); *DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 649 (D.N.J. 2007). *DePinto* dealt with two fifth-grade students who faced suspension if they continued to wear buttons protesting the district's uniform policy; the buttons seemed to depict Hitler Youth with a text overlay saying, "No School Uniforms." *DePinto*, 514 F. Supp. 2d at 636 (noting that the depiction of Hitler

Youth did not display any Nazi symbols or specific references to the organization). The court ruled for the students, enjoining the schools from prohibiting them from wearing their buttons, because there was no disruption of school activities and the buttons did not fall under any of *Tinker* exception. *Id*. at 650. That some may have found the buttons problematic or offensive was no reason to curtail these students' rights. The court faithfully applied *Tinker* and affirmed their speech rights.

In addition to cases dealing exclusively with elementary-school students, courts have also reaffirmed the speech rights of middle-school students. They have held that middle-school students are afforded speech rights and that traditional First Amendment tests, like *Tinker's*, serve as adequate and flexible standards through which a school's restriction of student speech can be analyzed. *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013) (finding that a school district violated the speech rights of middle-school students when it banned them from wearing bracelets reading "I ♥ boobies! (KEEP A BREAST)," supporting breast-cancer awareness); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 330-31 (2d Cir. 2006) (finding that a school violated a student's speech rights when it prevented him from wearing a shirt depicting George W. Bush in an unsavory manner).[2] The *B.H.* court noted that "[a] school's leeway to categorically restrict

[2] The shirt depicted images of drugs, so the case would now face potential scrutiny under *Morse v. Frederick*, in which the Supreme Court allowed schools to

ambiguously lewd speech . . . ends when that speech could also plausibly be interpreted as expressing a view on a political or social issue." 725 F.3d at 309. Although the phrase "Let's Go Brandon" carries potentially vulgar connotations, such a connotation is considerably more ambiguous than the phrase "I ♥ boobies! (KEEP A BREAST)" at issue in *B.H.*—and is unambiguously political expression.

All of this jurisprudence shows that primary-school students retain speech rights—and that courts can and do step in to ensure that these rights are protected.

B. The First Amendment permits only limited intrusion on students' speech rights, even during school.

Under *Tinker*, students retain their First Amendment rights at school, and the government may only restrict expression which causes, or may be reasonably forecast to cause, substantial disruption, or which invades the rights of others. 393 U.S. at 513–14. *Tinker* built on earlier holdings that the free speech rights of minors are subject to "scrupulous protection," and that school authorities are constrained by "the limits of the Bill of Rights." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). A key factor in this line of cases is recognition that school officials may not exceed their limited sphere of authority: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*

---

restrict student speech that can be reasonably viewed as promoting illegal drug usage. 551 U.S. 393, 403 (2007).

v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law banning the teaching of modern foreign languages in before high school). Defendant-Appellees here failed to establish that D.A. and X.A.'s "Let's Go Brandon" apparel caused or may be reasonably foreseen to cause disruption, the restriction violates the First Amendment.

C. Courts recognize young students' speech rights even when they impose those limits.

When courts ultimately conclude that a specific instance of student speech is not protected, they do so in ways that in no way lessens the rights of primary school students. In one such case, the Second Circuit okayed a school's suspension of a fifth-grade student for a drawing in which he desired to "blow up the school with the teachers in it." *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 110-12 (2d Cir. 2012). The court applied a *Tinker* analysis, noting the significance that the drawing threatened violence and finding it reasonable to suspect a potentially substantial disruption of school activities. *Id*. at 113-14. While the court ultimately came down on the school's side, its opinion fully recognized that primary school students enjoy speech protections.[3] That a school may discipline a student for a drawing threatening violence is relatively unremarkable and does little to diminish

[3] Indeed, one member of the court dissented, asserting that "the First Amendment should make us hesitate before silencing students who experiment with hyperbole for comic effect, however unknowing and unskillful that experimentation may be." *Cuff*, 677 F.3d at 124 (Pooler, J., dissenting).

the fundamental speech rights of other young students. Moreover, the apparel at issue here portrays no hint of violence.

When courts venture so far as to suggest that primary school students may lack substantial First Amendment rights, those suggestions are rebuked by other members of their court and read narrowly by other judges. In a case where a fourth-grade student was prohibited from distributing invitations to a religious meeting at his church, the Seventh Circuit performed a worrisome free-speech analysis, but ultimately backed off from its more problematic suggestions. *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996). The court properly noted that "age is a critical factor in student speech cases," but extended that consideration too far when it suggested, "especially considering the important role age plays in student speech cases . . . it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students." *Id*. at 1538-39. Holding that *Tinker* protections should not apply to elementary-school students would effectively strip those children of their First Amendment rights and leave them with extremely limited protection.

Thankfully, the Seventh Circuit did not take that step, instead holding that "because the Supreme Court has not directly decided this question, the following analysis will assume that grade schoolers partake in certain of the speech rights set out in the *Tinker* line of cases." *Id*. at 1539. Not only did the court decline to adopt its hinted-at more-drastic view, one judge explicitly noted that she "disagree[d] with

the suggestion that the standard articulated in *Tinker* is unlikely to apply to grammar school students." *Id*. at 1546 (Rovner, J., concurring in part and in the judgment). The view that primary school students have few speech rights, especially under a *Tinker* analysis, is not and should not be accepted in America's jurisprudence.

In a later case, the Third Circuit considered the First Amendment speech rights of a third-grade student who was asked to put away a petition protesting her class's planned trip to the circus. *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 414 (3d Cir. 2003). The court held the school's actions to be permissible because the school never punished the student, and the student was unable to show any speech suppression. *Id*. at 419. Although the court noted in passing that, "if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited," and that "much—perhaps most—of the speech that is protected in higher grades" may be regulated by elementary schools, *id*. at 417-18, some members of the court did not support that dictum. One judge asserted that it was "unacceptable" to suggest that the elementary school students lacked "sufficient maturity to express or form valid opinions concerning the proposed class trip." *Id*. at 421 (Fullam, J., concurring).

Tellingly, the Third Circuit has since read that treatment narrowly. *See, e.g.*, *K.A. ex rel. Ayers*, 710 F.3d at 110. The *K.A.* court read "*Walker–Serrano* to suggest that Tinker analysis can apply even in the elementary school context" and noted that the *Walker-Serrano* court's suggestion that the speech rights of elementary school

students under *Tinker* are severely limited was "however, dicta." *Id*. Thus, *Walker-Serrano's* suggestion was not received well and has not been adopted, as most courts continue to recognize and respect the speech rights of young public-school students.

II. Free Speech Provides Significant Pedagogical Benefits to Young Students

A. Free speech cultivates critical thought and enhances teacher engagement.

The protection of speech rights for primary-school students plays a crucial role in ensuring they develop critical thinking skills. The ability to analyze information and claims, and discern truth from mistruth, is an invaluable skill that students must learn to become successful in life. Indeed, "developing critical thinking in students has been proposed as the most important skill set the education system can develop in students." Catherine O'Reilly et al., *Critical Thinking in the Preschool Classroom—A Systematic Literature Review*, Thinking Skills and Creativity, Dec. 2022, at 1 (literature review of 25 empirical studies analyzing critical thought teaching methods in early education). Young children, as early as three and four years old, have already begun to develop these critical thinking skills. *See* Gail D. Heyman, *Children's Critical Thinking When Learning from Others*, 17(5) Current Directions in Psych. Sci. 344, 344 (2008). When children are in primary school, receiving some of their first formal education, they continue to develop these critical thinking skills every day. Protection of their speech rights provides a significant pedagogical benefit in cultivating those skills.

Free speech protections also allow students to hear varied perspectives and to think critically about those perspectives. If speech in elementary or middle schools lacked meaningful protection and students were unable to express their opinions on certain matters, a chilling effect would arise to dampen that skill development. While these youngsters may be unlikely to engage in complex or nuanced political conversations, they nonetheless have the ability to discuss controversies that lead to disagreement, necessitating speech protections.

The story of *Walker-Serrano* serves as a prime example of such a scenario. There, the third-grade student encouraged more than 30 of her peers to sign a petition protesting her school's field trip to the circus due to animal cruelty concerns. *Walker-Serrano*, 325 F.3d at 414. Although the school eventually prevented her from circulating the petition, it provided her with alternative avenues to express her views, such as passing out coloring books discussing animal cruelty. *Id*. Additionally, Judge Fullam's concurrence lamenting the proposition that elementary school students lacked "sufficient maturity to express or form valid opinions concerning the proposed class trip," supports the idea that young students are equipped to critically consider such issues. *Id*. at 421 (Fullam, J., concurring). While the majority's dicta was concerning, the background facts of the case are illustrative. Without free speech protections, these students would miss out on valuable opportunities to think critically about challenging topics and the growth potential from those discussions.

Student free-speech protections also enhance teacher engagement. The important role of teachers in the growth of school children cannot be overstated; empirical studies show that "teachers can and do help develop attitudes and behaviors among their students that are important for success in life." David Blazar & Matthew A. Kraft, *Teacher and Teaching Effects on Students' Attitudes and Behaviors*, 39(1) Educ. Evaluation and Pol'y Analysis 146, 161 (2017). Because of their significant role, it is imperative that teachers engage effectively with students to aid their growth. When teachers arbitrarily silence student speech and resort to punishment, they do not engage students in their speech and thus do not help them learn. To be sure, primary-school teachers require a sufficient scope of authority over students to ensure what they learn and discuss is age appropriate, but just because some speech is uncomfortable does not mean it should be stifled.

In that context, the school's actions towards D.A. and X.A. here illustrate precisely what schools should *not* do and serve as an example of how respect for free speech benefit the student. Instead of using their interest in politics as a learning opportunity, the school silenced D.A. and X.A. These actions served no pedagogical use. Had their teachers respected these students' constitutional rights, the situation could have instead yielded significant pedagogical benefits. The teachers might have engaged more with D.A. and X.A., giving them the opportunity to learn more. When

teachers respect the speech rights of those in their tutelage, they do not simply resort to punitive measures and thus do not neglect their pedagogical responsibility.

B. Protecting young students' speech rights aids their civic growth.

Robust and intellectually free education at the primary-school level, for which speech protections are indispensable, is essential in preparation for life. Not only does it provide the crucial pedagogical benefits outlined above, but it helps prepare students to be good citizens later in life. The Supreme Court has time and again recognized this dynamic, noting the important role schools play in raising America's youth. *See Mahanoy*, 594 U.S. at 190 (noting that "America's public schools are the nurseries of democracy"); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)) (noting the importance of public education is its "'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system'"); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954) (asserting that education "is the very foundation of good citizenship"). Further, if higher education is the "marketplace of ideas," *Tinker*, 393 U.S. at 512, students must learn to express their unique ideas prior to joining the marketplace to add value. Students who learn only to regurgitate their teachers' points of view are deprived of the opportunity to develop new ideas. *Cf.* Lauren A. Wright, *How Liberal Colleges Benefit Conservative Students*, The Atlantic, July 8, 2024, https://tinyurl.com/22njrvf7.

The role of schools in raising the next generation of citizens is evidently crucial and cannot be accomplished without respect for the speech rights of young students. From an early age, it is important that primary school students understand and benefit from their right to free speech, otherwise the country runs the risk of "strangl[ing] the free mind at its source and teach[ing] youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. If students like D.A. and X.A. are not afforded the speech protections they are due at a time when they have already begun to think critically and form their own opinions, what kind of respect will they have for such "important principles" later in life? *Id*.

In addition to cultivating respect and understanding of basic constitutional protections, ensuring that primary school students partake in free speech fosters the kind of discussion and engagement that is crucial to their future. The ability to speak freely and critically engage with one another in discussion are fundamental skills necessary for a successful life. It is imperative that schools foster this engagement and discussion, not just for the benefit of each individual student, but for the benefit of society at large in the future. As one study notes, "preparing students to participate in a strong democracy requires the apprenticeship of students to democratic talk." Terence A. Beck, *Tools of Deliberation: Exploring the Complexity of Learning to Lead Elementary Civics Discussions*, 33 Theory and Rsch. in Soc. Educ. 103, 103 (2005) (discussing the complexities of leading civics discussions in elementary

school for teachers). In other words, primary-school students must be taught, and have the opportunity, to practice the critical thinking and discussion skills on which they will rely later in life. They cannot do this without adequate free speech protections. If the school in *Walker-Serrano* had prevented the young student from discussing her concerns about animal cruelty, the student and her peers would be worse off for it. If the students in *DePinto* had been barred from wearing their protest buttons, they too would have been worse off. And if D.A. and X.A.'s speech rights had been respected, they might have learned more and benefited from superior teacher engagement. In each scenario, the protection of these speech rights leads to the optimal outcome for these young students' education and future growth.

CONCLUSION

For the foregoing reasons, and those stated by the plaintiffs-appellants, the judgment below should be reversed.

Respectfully submitted,

/s/ Ilya Shapiro

Ilya Shapiro
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
ishapiro@manhattan.institute

December 10, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,136 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as determined by the word counting feature of the software (Microsoft Office 365) used to prepare this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman.

Dated: December 10, 2024

/s/ *Ilya Shapiro*
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2024, I electronically filed the above with the Clerk of Court using the CM/ECF system which will send notification of this filing to counsel for all parties.

/s/ *Ilya Shapiro*
Counsel for *Amicus Curiae*