No. 24-1769

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.

Appeal from the United States District Court for the Western District of Michigan, Civil Action No. 1:23-CV-00423

BRIEF OF *AMICUS CURIAE*
NATIONAL COALITION AGAINST CENSORSHIP
IN SUPPORT OF PLAINTIFFS-APPELLANTS B.A., D.A., & X.A.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-1769 Case Name: B.A. v. Tri County Area Schools

Name of counsel: Matthew Kudzin, Covington & Burling LLP

Pursuant to 6th Cir. R. 26.1, National Coalition Against Censorship
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on December 11, 2024 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Matthew Kudzin

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF INTEREST

This brief is filed on behalf of *amicus curiae* National Coalition Against Censorship ("NCAC"). NCAC is an alliance of more than 60 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups. Founded in 1974, NCAC's purpose is to promote freedom of thought, inquiry, and expression and to oppose all forms of censorship. NCAC engages in direct advocacy and education to support free expression rights of students, authors, readers, publishers, booksellers, teachers, librarians, artists, and others.

NCAC is committed to supporting the First Amendment rights of students. Through its Student Advocates for Speech Leadership Program, NCAC trains and connects a nationwide network of student leaders to address free speech and censorship issues in their communities and their schools. NCAC also organizes the Right to Read Network, a national grassroots network of local community organizers who advocate in front of school boards and local public library boards to fight book bans, expand access to information, and raise awareness about the harms of censorship.

Through its advocacy efforts, NCAC has observed the continuing and widespread censorship of student speech, due in part to misapprehension or misapplication of the Supreme Court's precedents and, in particular, due to an unduly broad reading of *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). School administrators, like the district court in this case, have read isolated phrases in *Fraser* as authorizing their censorship of any message they deem contrary to their undefined, unreviewable notion of the "educational mission of the school."

Given the importance of political speech in public schools to the inculcation of democratic values, the teaching of political pluralism and dissent, and the cultivation of active participants in our public discourse, any exception to the First Amendment's protection of student speech should be narrowly construed. The district court's decision put those rights at risk. *Amicus* has an interest in a clear, circuit-level articulation of the robust political speech rights enjoyed by public school students.

Pursuant to Fed. R. App. P. 29(a)(4), *amicus* certifies that counsel for *amicus* authored this brief in whole; that no counsel for a party authored this brief in any respect; and that no person or entity, other

than *amicus* and their counsel, contributed monetarily to this brief's preparation or submission.

INTRODUCTION

"[W]hile public schools are not run as democracies, neither are they run as Stalinist regimes. Students do have First Amendment rights, and school officials do not have unfettered authority to regulate student speech." *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007). Even if not coextensive with the rights of adults, the First Amendment rights of students are robust and subject only to carefully prescribed exceptions. Wearing a sweatshirt with the phrase "Let's Go Brandon" does not fall within any such exception.

The district court's analysis would create a new, ill-defined category of "euphemistic" profanity—speech that does not contain any actual profanity, but which might convey a "profane message." Opinion and Order, RE 58, Page ID # 943, 968. The district court's approach would give school officials wide latitude to silence viewpoints they find objectionable, a result at odds with existing First Amendment doctrine. Any restrictions on student speech must be strictly limited to well-defined, circumscribed categories that can be objectively identified.

In addition to generally expanding the ability of schools to censor student speech, the district court's opinion fails to credit the students'

speech for the political speech that it is. Political speech—which is often raucous, sharp, and controversial—is a central concern of the First Amendment. The response to students wearing "Let's Go Brandon" sweatshirts cannot be to grant school officials wide latitude to censor core political speech they disfavor, based not the actual words used, but on an administrator's subjective interpretations of message those words convey. But that is the result that the district court's analysis dictates.

The district court's opinion represents a serious departure from our nation's historical commitment to protecting political speech. The Court should decline to adopt this broad new exception allowing schools to suppress the euphemistic, non-disruptive, political speech at issue in this case.

ARGUMENT

I. The First Amendment Protects the Rights of Public School Students, Subject Only to Narrow Exceptions.

Over one hundred years ago, in *Meyer v. Nebraska*, the Supreme Court recognized that public school students are protected by the Constitution's guarantee of "certain fundamental rights which must be respected." 262 U.S. 390, 401 (1923). That basic principle has been reiterated and reinforced time and again over the past century so that by

1969, "[i]t [could] hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). While every rule has its exceptions, in the case of student speech, any exception must be carefully drawn and narrowly construed.

The district court turns this Constitutional order on its head. Instead of prioritizing students' First Amendment rights, the court would grant school administrators broad discretion to restrict student speech based on their own subjective views as to what "can reasonably be interpreted as inappropriate." Opinion and Order, RE 58, Page ID # 965. In the district court's telling, *Tinker* ceases to be the "guiding standard" underlying student speech cases. *Barr v. Lafon*, 538 F.3d 554, 576 (6th Cir. 2008). Instead, it is reduced to an "exception" to a "general rule" that courts should defer to school administrators' judgment as to what speech to allow. Opinion and Order, RE 58, Page ID # 957 (quoting *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 342 (6th Cir. 2010) (Rogers, J., concurring)). The district court's approach is not only wrong, it is a dangerous imposition on speech critical to our democratic system of government.

A. The special circumstances of the school environment require that any limitations on student speech be narrowly defined.

In student speech cases, the First Amendment must be "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. But it is those "special characteristics" that demand that any restrictions on student speech be narrowly drawn. As the Supreme Court has recognized, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). "The classroom is peculiarly the marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (cleaned up). Students must be permitted to speak freely, to express unpopular, or even offensive, ideas if education is to be more than mere indoctrination. The First Amendment rights of students are therefore "of transcendent value" to all of society. *Id.*; *see also Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021) ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'").

Because the freedom of speech—*especially* student speech—is a public good and not merely a personal right, courts have been careful to

limit student speech only when, and to the extent, necessary. Contrary to the deferential approach adopted by the district court, "school officials do not have unfettered authority to regulate student speech." *Lowery*, 497 F.3d at 588. Delegating broad authority to school administrators could be "manipulated in dangerous ways," limiting student speech to "whatever political and social views are held" by those administrators. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). Therefore, any limitation on student speech must be based on "a specific showing of constitutionally valid reasons to regulate their speech." *Davis v. Yovella*, 1997 WL 159363, at *5 (6th Cir. Apr. 2, 1997). Such a showing requires "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. This framework permits almost all student speech under the First Amendment's protective umbrella, while carefully circumscribing certain exceptions targeted to preserve order at public schools.[1] *See Barr*, 538

[1] Another line of student speech cases, not implicated by the facts here, allows for school regulation of student speech that could, if not so regulated, be "erroneously attributed to the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988) (concerning certain articles withheld from publication in a school newspaper).

F.3d at 564 (clarifying that the Supreme Court's student speech cases "do[] not hold that the special characteristics of the public schools necessarily justify any other speech restrictions beyond those [specifically] articulated") (cleaned up).

B. The Supreme Court has repeatedly emphasized that any limitations on student speech must be narrow.

In *Tinker*, the Supreme Court recognized that schools need to be able to regulate speech that causes "substantial disruption of or material interference with school activities." 393 U.S. at 514. At the same time, the Court was careful to explain the limited nature of this exception. Student speech that "neither interrupt[s] school activities nor s[eeks] to intrude in the school affairs or the lives of others" must be permitted. *Id.* *Tinker* is a "demanding standard." *Mahanoy*, 594 U.S. at 193. "[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Tinker*, 393 U.S. at 509 (cleaned up). Thus a balance was struck, which honored the value of free expression to the development of students' critical thinking skills *and* protected schools' ability to maintain order in the classroom.

The Supreme Court's post-*Tinker* cases are similarly narrow and are largely based in *Tinker's* disruption-focused logic. In *Bethel School District No. 403 v. Fraser*, the Court held that a school could discipline a student who had given a speech featuring "an elaborate, graphic, and explicit sexual metaphor." 478 U.S. 675, 678 (1986). The Court emphasized the extreme nature of the student's conduct, focusing on the impact that the speech had on other students and on the school as a whole. The concern was not merely that the speech was "plainly offensive," but "[b]y glorifying male sexuality," "the speech was acutely insulting to teenage girl students" in the audience, casting them as objects acted upon in its extended sexual metaphor. *Id.* at 684.

In *Fraser*, the school urged the Court to adopt a broader rule that "permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Morse*, 551 U.S. at 423 (Alito, J. concurring). But as Justice Alito explained in *Morse*, the Court did not adopt such a view. *See id.* The *Morse* majority similarly acknowledged that it "stretches *Fraser* too far" to suggest that schools may proscribe "any speech that could fit under some definition of 'offensive.'" *Morse*, 551 U.S. at 409; *see also Barr*, 538 F.3d at 564 n.5

(clarifying that "[p]lainly offensive" speech proscribable under *Fraser* is limited as discussed in Justice Alito's concurrence in *Morse*).

In *Morse*, the Court held that schools could proscribe speech promoting illegal drug use, also without a formal showing of disruption. 551 U.S. at 425 (Alito, J. concurring). However, the Court's decision was not based on any notion of deference to the school's editorial preferences or policies. Rather, the Court found that such speech could be regulated because it was a dangerous threat to student safety. The Court found that the dangers of drug use are both "serious and palpable." *Morse*, 551 U.S. at 408. Thus, "deterring drug use by schoolchildren is an important—indeed, perhaps compelling interest." *Id.* at 407 (cleaned up). And threats to student safety have, by their nature, a tendency to disrupt a school's learning environment, unlike "speech which is political or merely offensive." *R.L. v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 636–37 (M.D. Pa. 2016). Thus, the Supreme Court has only departed from *Tinker* with respect to certain limited and defined areas of student speech, where the propensity of the speech in question to cause a disruption was apparent or all but inevitable.

II. "Let's Go Brandon" is Constitutionally Protected Speech.

The school's prohibition on students wearing "Let's Go Brandon" apparel fails under any existing legal test. No party claims that the "Let's Go Brandon" sweatshirts caused or threatened any disruption, *see* Defs.' Resp. to Pls.' Mot. Summ. J., RE 46, Page ID ## 836–37, so the school's restriction doesn't survive *Tinker*. "Let's Go Brandon" does not advocate drug use, so *Morse* is inapplicable. 551 U.S. at 407–08. To justify their actions, the school's only argument is that "Let's Go Brandon" is profane, and may be properly prohibited under *Fraser*.

A. "Let's Go Brandon" is not profane.

The district court held that the school could ban the phrase "Let's Go Brandon," even though "none of the three words, considered separately, are profane." Opinion and Order, RE 58, Page ID # 965. It only reached this conclusion by redefining "profanity" in ways that are inconsistent with the limited holding of *Fraser* and directly contrary to Supreme Court precedent. According to the district court, schools may prohibit not only *actual* profanity, but also "seemingly innocuous phrases [which] may convey profane messages." Opinion and Order, RE 58, Page ID # 962. But *Fraser* cannot be read to allow schools to censor a student's

peaceful, lawful, non-disruptive "message." *See Morse*, 551 U.S at 409. This is a line the Supreme Court has rightly refused to cross.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (holding that "[g]overnment action that stifles speech on account of its message" strikes "[a]t the heart of the First Amendment"). The Supreme Court has drawn a clear distinction between "words" and "messages" and has warned against conflating the two, cautioning that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Cohen v. California*, 403 U.S. 15, 26 (1971); *see also id.* (finding that "little social benefit [] might result from running the risk of opening the door to such grave results"). But that is exactly what the district court has done.

The district court's expansion of "profanity" to include euphemisms or "profane messages" also ignores the logic of *Fraser*. While the Court recognized "an interest in protecting minors from exposure to vulgar and offensive spoken language," *Fraser*, 478 U.S. at 684, nothing in the

opinion suggests that students can or should be prohibited from expressing an unpopular message. The Court analogized the school's restrictions to FCC regulations on "the words you couldn't say on the public . . . airwaves." *Id.* at 684 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978)).

The Supreme Court has looked to the FCC context to analyze how profanity should be regulated in schools because the government has similar interests in regulating profanity in public schools and on public airwaves. First, children will be listening in both contexts, and cannot reasonably be prevented from doing so.[2] See *Pacifica Found.*, 438 U.S. at 750 (citing "[t]he ease with which children may obtain access to broadcast material" as a key concern "justify[ing]" the censorship of "indecent broadcasting"); *Fraser*, 478 U.S. at 684 (recognizing the "obvious concern . . . to protect children—especially in a captive audience" at a school assembly). Second, for most families, there is no readily available

[2] The FCC enforces the statutory prohibition on profane language on the radio "between the hours of 6 a.m. and 10 p.m." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) ("*Fox I*").

alternative to either public schooling or public broadcasts.[3] *Compare Morse*, 551 U.S. at 424 (Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school.") *with Pacifica Found.*, 438 U.S. at 748 (noting the "uniquely pervasive presence" of broadcast media in the United States).

Pacifica Foundation does not condone or permit the censorship of "profane messages." To the contrary, both the FCC and the Court were clear that the restrictions applied only to a limited set of words, namely "certain words [that] depicted sexual and excretory activities in a patently offensive manner." *Pacifica Found.*, 438 U.S. at 732; *see also id.* at 737 (discussing the FCC's authority to regulate "obscene, indecent, or profane *language*") (emphasis added). The Court further explained that its holding was limited to "patently offensive references to excretory and sexual organs and activities." *Id.* at 728. It was not suggesting that the

[3] Truancy laws may also compel students to attend school. Under the burden of that obligation, students should be afforded the flexibility to freely exercise their other rights, like free speech.

FCC could censor "programs dealing with important social and political controversies." *Id.* at 743.

Other courts addressing FCC restrictions on profanity have adopted similarly narrow definitions which encompass only certain specific words. In *Tallman v. United States*, for example, the Seventh Circuit defined "profanity" as "denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is . . . grossly offensive." 465 F.2d 282, 286 (7th Cir. 1972).

The FCC has adopted the *Tallman* court's definition of profanity to include "the 'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word.'" *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4981 (2004). The FCC also recognizes additional limitations on its ability to regulate "profanity." As used colloquially, "profanity" could include language that some might consider blasphemous or irreverent. But words such as "damn," while offensive to some, are not "legally profane." *In re Warren B. Appleton*, 28 F.C.C.2d 36, 37 (1971); *see also Gagliardo v. United States*, 366 F.2d 720, 725 (9th Cir.

1966) (holding that "God damn it" was not "profane" within the meaning of 18 U.S.C. § 1464).

The district court held "Let's Go Brandon" to be synonymous with "Fuck Joe Biden." But the opinion itself demonstrates the difference between profanity and euphemism. The opinion never uses the uncensored phrase "Fuck Joe Biden," instead replacing it throughout with "F*** Joe Biden." *See, e.g.*, Opinion and Order, RE 58, Page ID # 945. Yet the opinion uses the phrase "Let's Go Brandon" thirty times, without alteration. *See, e.g.*, Opinion and Order, RE 58, Page ID # 943, 945, 948. In doing so, the district court implicitly recognizes the difference between the two phrases—one contains profanity and the other does not—even where both phrases convey the same message to the reader.

This distinction is consistent with other federal court opinions involving the FCC and profanity. Nor is the district court alone in its treatment of actual profanity. *See generally, e.g.*, *Fox I*, 556 U.S. 502 (using "f***" and "s***" to remove profanities from discussion of allegedly indecent television broadcasts); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("*Fox II*") (same); *see also United States v. Green*, 202 F.3d

869, 871 (6th Cir. 2000) (removing profanities from a quotation of trial transcript using "[expletive deleted]").

"Let's Go Brandon" is simply not profanity. Permitting schools to censor non-profane "messages" based not on the language used but on the implicit political message conveyed is an unwarranted expansion of *Fraser*'s narrow exception and an unjustifiable intrusion on constitutionally protected speech.

B. "Let's Go Brandon" is political speech entitled to broad First Amendment protection.

The district court held that "Let's Go Brandon" is merely a "personal insult" that is unworthy of First Amendment protection. Opinion and Order, RE 58, Page ID # 965. The court dismisses the students' speech as "the combination [of] a politician's name and a swear word—nothing else," certainly not "the sort of robust political discourse protected by the First Amendment." Opinion and Order, RE 58, Page ID # 967. To the contrary, "Let's Go Brandon" is political speech in a style deeply rooted in our nation's history and tradition.

The First Amendment is grounded in "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The offensive or provocative nature of some political speech does not lessen its Constitutional protection. The purpose of the First Amendment is to protect offensive speech. *See, e.g.*, *Mahanoy*, 594 U.S. at 190 (holding that the First Amendment "must include the protection of unpopular ideas, for popular ideas have less need for protection"); *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 243 (6th Cir. 2015) ("[First Amendment] protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted."). This is never more true than in the case of political speech which "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *see also Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (quoting *Pacifica Found.*, 438 U.S. at 745–46).

The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987). Debate on issues of public concern may not be limited to what "is grammatically palatable to the most squeamish among us." *Cohen*, 403 U.S. at 25. Indeed, as Justice Harlan memorably wrote of the word "fuck," displayed explicitly and without euphemism, it is "often true that one man's vulgarity is another's lyric." *Id.*

Political speech can be and often is pithy. Political slogans, including such iconic examples as "I Like Ike," "Hope," or "Make America Great Again" are political messages deserving maximum First Amendment protection. Indeed, significantly racier—and no less succinct—political phraseology, like New York governor Al Smith's 1928 anti-prohibition presidential campaign slogan, "Make your wet dreams come true," falls solidly in the same First Amendment territory. Even the "Fuck the Draft" message emblazoned on Cohen's jacket—concededly vulgar, but pithy nonetheless—was political speech meriting stringent First Amendment protection. *See Fraser*, 478 U.S. at 682 (acknowledging that "Tinker's armband" and "Cohen's jacket" were both political speech).

Moreover, protecting campaign slogans—a type of speech directed at influencing the results of elections—is an especially important First Amendment value. The Supreme Court has repeatedly struck down restrictions on commentary about political candidates for public office and, in so doing, has emphasized the democratic importance of these protections. "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (cleaned up); *see id.* at 233 (striking down a California statutory ban on party governing bodies endorsing or opposing candidates in primary elections as unduly burdening the First Amendment rights of both the parties and their members); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971) (holding that publications concerning candidates for public office receive the same First Amendment protection as those concerning elected officials).

As these examples show, the district court's claim that "Let's Go Brandon" is not core political speech is without merit. It has served as the kind of pointed critique of an elected official protected under *Sullivan*, 376 U.S. at 270, and *Terminiello*, 337 U.S. at 4. As was the case in *Cohen*,

the fact that one could, perhaps, find the sentiment expressed by "Let's Go Brandon" disrespectful or even offensive has no bearing on the political nature of the speech itself. And, like so many similar slogans before it, as a grassroots political slogan ultimately adopted by a major political campaign, it would be folly to treat "Let's Go Brandon" as less entitled to protection because it is concise. In fact, it is entitled to the same level of deference as the campaign speech at issue in *Eu*, 489 U.S. at 223, and *Monitor Patriot*, 401 U.S. at 271–72.

It was also far too simplistic for the district court to set aside "Let's Go Brandon" as an insult otherwise empty of meaning. Beyond the mere "insult" on which the district court focused, "Let's Go Brandon" also has at least two other politically important meanings.

First, speech communicates more than just rational thought. Equally important is language's ability to convey "otherwise inexpressible emotions." *Cohen*, 403 U.S. at 26. The First Amendment protects both functions of language—the rational and the emotional. *Id.* ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more

important element of the overall message sought to be communicated."). "Let's Go Brandon" expresses the visceral frustration and dissatisfaction of many Americans with the policies of the Biden administration.[4] Whether or not one agrees with that sentiment, saying, displaying, or otherwise affiliating oneself with the phrase "Let's Go Brandon" expresses a clear political viewpoint.

Second, "Let's Go Brandon" is mockingly used to express disapproval with the media. By September 2021, chants of "Fuck Joe Biden" had broken out at college football and other sporting events.[5] The

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[4] *See, e.g.*, *Assessments of Biden and his administration*, PEW RSCH. CTR. (Apr. 7, 2023), https://www.pewresearch.org/politics/2023/04/07/assessments-of-biden-and-his-administration/ (noting that six-in-ten U.S. adults polled said they disapproved of Biden's performance as president, with little change over a nine-month period); Seung Min Kim & Amelia Thomson-Deveaux, *Many say Biden and Trump did more harm than good, but for different reasons, AP-NORC poll shows*, ASSOC. PRESS (Apr. 12, 2024), https://apnews.com/article/biden-trump-immigration-economy-inflation-abortion-21b95914866c2af3a1e7af8e302dbe27# (showing that a majority of U.S. adults polled said that Biden's presidency hurt the country with respect to cost of living and immigration and border security).

[5] Ewan Palmer, *'F*** Joe Biden' Chants Erupt Across College Football Games for Second Weekend*, NEWSWEEK (Sept. 13, 2021), https://www.newsweek.com/joe-biden-chants-football-games-1628323; Samantha Lock, *'F*** Joe Biden' Chant Breaks Out at Ryder Cup as U.S.*

chants were a relatively insignificant form of protest until an NBC reporter, denying the obvious, claimed that fans at a NASCAR race were chanting "Let's Go Brandon."[6] The event quickly came to symbolize a perceived media bias and a belief that some news outlets were downplaying, or refusing to report on, the deep dissatisfaction with the President and his policies.[7] The media's role in election-related discourse is a matter of great public concern and a key issue in the recent elections, with Democrats accusing Republicans of pushing "cheap fakes"[8] and

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Beat Europe, NEWSWEEK (Sept. 27, 2021), https://www.newsweek.com/joe-biden-chant-ryder-cup-us-beat-europe-1632890.

[6] Chris Cillizza, *'Let's Go Brandon,' explained*, CNN (Nov. 1, 2021), https://www.cnn.com/2021/11/01/politics/lets-go-brandon-joe-biden/index.html.

[7] *See* Annie Linskey, *How 'Let's Go Brandon' Became an Unofficial GOP Slogan*, WASH. POST (Nov. 15, 2021), https://www.washingtonpost.com/politics/lets-go-brandon-republicans/2021/11/14/52131dda-4312-11ec-9ea7-3eb2406a2e24_story.html [https://perma.cc/9BU9-LAC3]; Anthony Zurcher, *How 'Let's Go Brandon' Became an Anti-Biden Conservative Heckle*, BBC (Oct. 11, 2021), https://www.bbc.com/news/world-us-canada-58878473.

[8] Nikki McCann Ramirez, *'Cheap Fakes': Republicans Target Biden Over His Age with Deceptive Videos*, ROLLING STONE (June 19, 2024), https://www.rollingstone.com/politics/politics-news/biden-cheap-fakes-republicans-trump-deceptive-videos-1235042544/ [https://perma.cc/5J8B-UBXK].

Republicans accusing Democrats of "gaslighting" the public about the President's health.[9]

The restriction sanctioned by the district court in this case stifles not just the phrase's alleged "personal insult" but also its more nuanced, political messages. The district court's failure to recognize the sweatshirts as political speech ignores the role that the phrase "Let's Go Brandon" has come to play in the current political debates and is contrary to established First Amendment doctrine.

III. The Court Should Not Expand *Fraser* to Cover Non-Profane, Non-Disruptive, Political Speech.

"Let's Go Brandon" is nothing if not an expression of the critical opinions many Americans hold concerning President Biden and his administration's policies. Criticism of public figures—even harsh or insulting criticism—must be afforded the "breathing space" essential to freedom of expression's truth-seeking function. *Hustler Mag.*, 485 U.S. at 52; *see also Sullivan*, 376 U.S. at 270–72. Providing students the

[9] Tom Slater, *Democrats can't pretend to be shocked by Joe Biden's decline*, SPECTATOR (June 28, 2024), https://www.spectator.co.uk/article/democrats-cant-pretend-to-be-shocked-by-joe-bidens-decline/.

breathing space to process and engage with American political discourse should be a feature, not a bug, of public education.

A proper education—one that prepares students for the obligations of citizenship in a free nation—requires students to participate in "that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian*, 385 U.S. at 603 (cleaned up). Students cannot be faulted, much less disciplined, for using euphemistic language. In a political climate in which politicians regularly resort to vulgar attacks and commentators use profanity as part of routine political debate, euphemism serves an important function. It can transform that which might be profane into something appropriate for a broader audience. Using euphemistic language gives students the tools to engage in political speech without causing disruption or using profanity. In many cases, there would be no way for students to engage with that political dialogue *without* the use of euphemism.

Nor can courts leave it to the schools to define the proper terms of political debate. Deferring to an administrator's claims regarding "the educational mission of the schools," as the district court would do,

Opinion and Order, RE 58, Page ID # 954, is an abdication of the Court's responsibility to protect vital Constitutional guarantees. It also misunderstands the function of public education. Students should be encouraged to engage in non-profane, non-disruptive political speech as a core civic skill. *Fraser*, 478 U.S. at 681 (recognizing the need to inculcate "tolerance of divergent political and religious views"). Courts therefore do not meekly accept an administrator's definition of the school's "mission." *See Morse*, 551 U.S. at 423 (Alito, J., concurring). Allowing school officials to shut down non-profane political speech would not only fail students by interfering with the inculcation of democratic values, it "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.* A school could, for example, "define[] its educational mission to include solidarity with our soldiers and their families" and, on that basis, prohibit Tinker's armband. *Id.*

This is not an abstract or hypothetical concern. Too many public schools already attempt to define their "educational mission" to include the "the inculcation of whatever political and social views" are held by the elected officials that oversee the schools. *Id. Amicus*, the National

Coalition Against Censorship, deals with this problem on a regular basis. Defendants are not the only ones that have prohibited students from wearing "Let's Go Brandon" apparel. The Port Allegany School District in Pennsylvania[10] and the New London-Spicer School District in Minnesota[11] have adopted similar policies. The Lookout Valley Middle/High School in Tennessee has gone ever farther, banning all shirts with "designs, pictures, symbols, or writing" that are "political."[12]

Schools regularly abuse their authority by censoring speech related to current affairs and matters of national debate that directly affect students' lives. A student in the Middleborough Public Schools in Massachusetts was prohibited from wearing a shirt reading "there are

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[10] *See NCAC Criticizes Pennsylvania School for Stifling Student's Political Speech by Prohibiting "Let's Go Brandon" T-Shirt*, NCAC (Mar. 16, 2022), https://ncac.org/news/port-allegany-pennsylvania-tshirt.

[11] *See New London, Minnesota, Student Forbidden from Wearing "Let's Go Brandon" T-Shirt*, NCAC (Apr. 21, 2023), https://ncac.org/news/new-london-minnesota-student-forbidden-from-wearing-lets-go-brandon-t-shirt.

[12] *See Chattanooga, Tennessee School Officials Free Expression with Dress Code*, NCAC (Nov. 17, 2023), https://ncac.org/news/blog/chattanooga-tennessee-school-officials-free-expression-with-dress-code.

only two genders."[13] A student at Framingham High School, also in Massachusetts, was forced to remove a "pro-Palestine" shirt.[14] A school in Brooklyn, New York removed a student mural featuring the words "Black Trans Live Matter" because the mural was allegedly "too divisive."[15]

In this case, the district court acknowledged that the phrase "Let's Go Brandon" does not contain any actual profanity. Opinion and Order, RE 58, Page ID # 965. The court nonetheless was willing to allow school administrators to censor the students' speech, not based on the words they used, but out of a fear of what other students might *think* when they see those words. The role of public education is to encourage students to think, including about things that might make them uncomfortable.

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[13] *See Middleborough, MA, Student Forbidden to Wear Shirt Expressing Political Views*, NCAC (May 5, 2023), https://ncac.org/news/middleborough-ma-student-forbidden-to-wear-shirt-expressing-political-views.

[14] *See A Massachusetts High School Student Was Forced to Remove Clothing That Expressed Support for Palestine*, NCAC (Nov. 1, 2023), https://ncac.org/news/a-massachusetts-high-school-student-was-forced-to-remove-clothing-that-expressed-support-for-palestine.

[15] *See NCAC Criticizes Brooklyn School's Censorship of Student Mural*, NCAC (Nov. 15, 2021), https://ncac.org/news/brooklyn-student-mural.

School authority should never be used to discourage students from thinking. Nothing in *Fraser* authorizes schools to define the "educational mission" of the school such that they can stamp out political thought with which they disagree.

CONCLUSION

The district court erred by expanding *Fraser* to permit schools to censor not just profanity, but anything the school deems to be a "profane message." "Let's Go Brandon" is not profanity. It is core political speech that is protected by the First Amendment. The decision of the district court should be reversed.

Respectfully submitted,

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Dated: December 11, 2024

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CERTIFICATE OF SERVICE

I certify that on December 11, 2024, the foregoing document was served on all counsel of record through the Court's CM/ECF system.

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