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 CURIAE* BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Amicus states that it has no parent corporation and issues no stock, thus no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain overreach at all levels of government. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). In fulfillment of its purpose, The Buckeye Institute files lawsuits and submits amicus briefs. In the context of this case, The Buckeye Institute supports free speech rights protected by the First Amendment.

SUMMARY OF THE ARGUMENT

The English language has a very rich vocabulary, which continues to expand. Mark J. Perry, *English Has the Richest Vocabulary*, AEI (Oct. 18, 2006).[2] The words speakers choose convey emotion, tone, setting, and other details that characterize the

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[1] The Buckeye Institute states that no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

[2] https://www.aei.org/carpe-diem/english-has-the-richest-vocabulary/.

communication and the message conveyed. Speakers can express similar concepts with different words taking into consideration the particular audience.

Some people express concepts with impolite—or even profane—words or phrases**,** while others express those same ideas through (more) polite words or phrases to avoid giving offense. In this case, the district court judged the words on a shirt as though the speakers said something besides what was actually "said."

Like many phrases or political slogans, "Let's go Brandon" has taken on a life of its own and has come to be universally understood as representing dissatisfaction with President Biden and his administration's policies. Originating when a sports broadcaster at a NASCAR race incorrectly reported on live television that the crowd chanting "F*** Joe Biden" was instead chanting "Let's go Brandon," perhaps the only interpretation worse than that reporter's is the district court's understanding of the First Amendment. *Let's go Brandon: NASCAR driver Brandon Brown caught in unwinnable culture war,* ESPN (Feb 19, 2022).[3]

The Supreme Court has held that schools can regulate student speech that is indecent, lewd, or vulgar when said at a school assembly, when student speech promotes illegal drug use, or when it may appear to be the speech of the school itself. *Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 594 U.S. 180, 187–88 (2021).

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[3] https://www.espn.com/racing/nascar/story/_/id/33328017/let-go-brandon-nascar-driver-brandon-brown-caught-unwinnable-culture-war.

Schools may also discipline students who use "profane" language. But these are exceptions to the rule, and—even taking these exceptions to their maximum logical boundaries—"Let's go Brandon" does not fall into any recognized prohibition. Nothing in the phrase itself is facially indecent, lewd, or vulgar. There is no reference to drug use. No one would read a student's shirt and assume he speaks for the school. Punishing speech for any reason that does not fall within one of the Supreme Court's approved exceptions is unacceptable.

ARGUMENT

I. Students cannot be punished for using profane language when their language is not profane.

Regulation of speech under the First Amendment should constitute a rare exception. In the context of this case, certain words or phrases are so profane, lewd, or vulgar that the government does not allow them in school, or in radio or TV broadcasts for that matter. But schools cannot prohibit non-profane words conveying the same message. Polite society avoids, and schools can prohibit, certain words, but generally not the meaning behind those words.

The government has long recognized that certain words are unacceptable for certain audiences. The Federal Communications Commission (FCC) has prohibited broadcasting "obscene, indecent, or profane language." 18 U.S.C. § 1464. The FCC explains that "[i]ndecent content portrays sexual or excretory organs or activities in a way that is patently offensive but does not meet the three-prong test for obscenity"

and "[p]rofane content includes 'grossly offensive' language that is considered a public nuisance." *Obscene, Indecent and Profane Broadcasts*, Federal Communications Commission (Jan. 13, 2021).[4] But the FCC interprets these restrictions narrowly. Indeed, while it does not publish a list of prohibited words, the Public Radio Exchange has noted specific words that "must be bleeped"—and there are not many. Public Radio Exchange, *A guide to broadcast obscenities and issuing content advisories*, PRX.[5] By contrast, substitute words for the "bleeped" words are acceptable. *Id*.

Consider the following scenarios:

1. Principal Jim Frederick comes upon a group of freshmen and hears:

   Joe: "That was a great movie!"

   Fred: Bulls***! It was awful. I hated it.

   Alan: No f***ing way! It was lousy.

   Tim: Bologna! Balderdash! B.S.!

   Tom: Bullcrap, Joe, are you out of your mind?

Now who should get in trouble? Four of them expressed the same sentiment disagreeing with Joe. But, certainly, schools can—and should—distinguish between

[4] https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts.

[5] https://help.prx.org/hc/en-us/articles/360044988133-A-guide-to-broadcast-obscenities-and-issuing-content-advisories (last visited Dec. 9, 2024).

the boys' profanity and non-profanity and punish the former incidents and not the latter.

2. Teacher Ms. Lee comes into her classroom and hears the kids complaining about the lack of heat in the room:

   Alice: Shucks, it's cold in here!

   Lisa: Shoot, I know, I'm absolutely freezing.

   John: S***, I am so cold I can't stand it.

Are all of these statements legally "equivalent"? *See D.A. by & through B.A. v. Tri Cnty. Area Sch.*, No. 1:23-CV-423, 2024 WL 3924723, at *12 (W.D. Mich. Aug. 23, 2024). The principal in this case and the district court judge might say so. But, in fact, they are not.

3. Bob is angry—very angry about his grade. He can express his anger and displeasure in several ways. Which of the following expressions is/are unacceptable (choose one or more):

   a. I am angry and disappointed!

   b. S***.

   c. Son of a gun.

   d. Son of a b****!

   e. G** d*** it.

   f. What the h***?!

g. What the heck?!

h. All of the above are acceptable

i. All of the above are unacceptable.

According to the Tri County area schools' reasoning, all of these statements express the same meaning as the sentiment contained in b, d, e, and f, so they are all prohibited, and Bob could be disciplined no matter which one he uses.

4. Question: Student Michael Frick is upset—about something. For which exclamations can he be disciplined?

   a. Shoot!

   b. Shucks!

   c. Oh, sugar!

   d. S***!

   e. F***!

Answer: It depends. If he attends Tri County Area Schools, all of the above—because the words express the same sentiment, and the principal in Tri County cannot distinguish between the actual words. If Michael attends a more sensible school district, the answer is only d and e.

5. Student A and Student B get into an argument. Student A is overheard saying "F*** you!" Student B retorts: "That is not nice. No freakin' way

am I going to put up with your profanity. I am reporting you to the principal."

Question: Did Student B say anything warranting discipline versus Student A's exclamation?

Analyzing this case requires not only familiarity with the law but also common sense—and a sense of humor. The principal in this case seems to lack a bit of both.

Of course, student speech cases can be challenging because the situations often deal with sensitive topics. Some involve socially uncomfortable issues like sex, *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), some challenge the notion that children ought to be seen and not heard, *see* cr8zyMom, *Considering a muzzle for my toddler...*, babycenter (July 13, 2016)[6], others—including the present case—involve politics, *see Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). But "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. At issue in this case is not just any speech, but political speech, which is free of profanity.

[6] https://community.babycenter.com/post/a63399292/considering-a-muzzle-for-my-toddler.

In one of its most recent school speech cases, the Supreme Court explicitly set out the "categories of student speech that schools may regulate in certain circumstances." *Mahanoy Area Sch. Dist.*, 594 U.S. at 187. Those categories are:

> (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech, uttered during a class trip, that promotes "illegal drug use,"; and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."

Id. at 187–88 (citing *Fraser*, 478 U.S. at 685; *Morse v. Frederick*, 551 U.S. 393, 409 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Tinker*, 393 U.S. at 513). Further, *Fraser* upheld a school's discipline of a student for violating the school's policy prohibiting "[c]onduct which materially and substantially interferes with the educational process . . . , including the use of *obscene, profane language* or gestures." *Fraser*, 478 U.S. at 678 (emphasis added). Several circuit courts have followed *Fraser*, explaining that "[u]nder *Fraser*, a school may categorically prohibit lewd, vulgar or profane[7] language." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 304 (3d Cir. 2013); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (same); *cf. Barr v. Lafon*, 538 F.3d 554,

[7] Profanity includes "obscene, vulgar, or insulting language." *Profanity*, *Black's Law Dictionary* (12th ed. 2024).

563–64 (6th Cir. 2008) ("[U]nder Fraser, a school may categorically prohibit vulgar, lewd, indecent, or plainly offensive student speech.").

Neither the school nor the district court have explained how Appellants, by wearing sweatshirts saying "Let's go Brandon," fall into any of the Supreme Court's categories. There is no sexual over or under-tone, no reference to drugs, and no appearance that the Appellants were speaking for the school—leaving available only the Court's profanity exception—which does not apply either. Rather, the district court mischaracterized the profanity exception in order to allow the school to ban language that has a "profane meaning": "Defendants' reasonably interpreted Let's Go Brandon as *having a profane meaning*. In a middle school, the phrase enjoys no more First Amendment protection [than] Matt Fraser's nominating speech—none at all." *D.A. by & through B.A.*, 2024 WL 3924723, at *11 (emphasis added). But that expansion of "profanity" would include virtually all "clean" substitutes for profanity. Under the district court's theory, the school could ban all substitutes for notorious curse words like the F-bomb, H***, S***, D***, B****, A**, etc. Further, under this theory, a school could ban nearly every exclamatory word or phrase—which is well beyond the limited First Amendment exception permitted by precedent.

II. ***Lewd*** **substitutes for profanity are unacceptable under** ***Fraser*****, but** ***non-lewd*** **substitutes for profanity are protected by the First Amendment.**

A. Schools may ban lewd speech, no matter the words.

Schools may restrict speech that has a meaning that the school deems

inappropriate for a school setting subject to Supreme Court directives. In the case of the F-word, the word itself is profane and therefore always inappropriate. The school should also be able to regulate lewd language, whether that language is a substitute for the F-bomb or a student's attempt to pull one over on school administrators. For example, in *Fraser*, Mr. Fraser delivered a speech filled with sexual innuendos to a high school assembly. *Fraser*, 478 U.S. at 678. Whether or not it included the F-bomb, the Court believed punishing Fraser was permissible because his conduct "undermine[d] the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* at 685. The overall speech was "offensively lewd and indecent" *Id.* That is not the case here. Rather, Appellants' use of euphemism was to convey a political opinion. Although it is highly unlikely that public schools' educational missions would include "unprovoked sexually explicit monologues such as Mr. Fraser's," *see id.* at 686, their educational missions certainly should include the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system," *see, e.g., id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

As previously mentioned, "Let's go Brandon" was derived from a "F*** Joe Biden" chant. ESPN, *supra*. The F-word has two distinct dictionary definitions. The first: "a rude word meaning to have sex with someone," and the second: "a rude

word used when expressing extreme anger, or to add force to what is being said." *F****, *Cambridge Dictionary*.[8] Surely when Appellants wore sweatshirts school that said "Let's go Brandon," they were expressing the latter.

The F-word is considered taboo and socially inappropriate, no matter the underlying meaning. To illustrate, consider alternative phrases for "F*** Joe Biden." If a student wore a shirt that said, "I want to have sex with Joe Biden," that would be lewd (not to mention bizarre), and the school could ban that speech accordingly. Conversely, a shirt that read "I hate Joe Biden," could not be banned under *Fraser* because it is neither lewd nor vulgar; it is political. Appellants' shirts were indisputably political in nature, not sexual.

B. The First Amendment protects Appellants' political statements.

Appellants' speech did not include any words that were vulgar, and their speech was not innuendo for a lewd or indecent message. Instead, the speech expressed a political message—displeasure with the Biden Administration.

In the context of an upcoming presidential election and with many politicians and pundits repeating the phrase, it is understood as a political statement. Appellants could have worn shirts that said "F*** Joe Biden" to express their displeasure with the President, but they chose instead to convey a similar message using language

[8] https://dictionary.cambridge.org/us/dictionary/english/fuck (last visited Dec. 11, 2024).

that is a clean, school-friendly alternative. Saying "Let's go Brandon" is *not* the same as "F*** Joe Biden." Hence, we do not even write out the f*** word but freely type "let's go."

It is common practice for people in polite society, professional, academic, and social settings to refer to the word "N*****" as "the N-word." Virtually everyone knows what the "N" stands for. Speaking the N-word in full is universally considered profane—and highly inflammatory. Anyone using that word is likely to be socially ostracized. When people hear someone substitute "the N-Word," in place of saying the actual N-word, no listeners wonder whether the speaker meant nincompoop, numbskull, or nobody. What does the speaker mean by saying the phrase "the N-word?" In the speaker's mind, it refers to the actual N-word, but it is nonetheless not profane to use the phrase "the N-word." Indeed, classroom and polite society's use of euphemisms such as "the N-word" furthers pedagogical interests while avoiding offense. If teachers and students cannot use euphemisms rather than actual profanity, schools will be hard-pressed to effectively discuss divisive topics such as race relations. For example, when students in English class discuss the classic book Huckleberry Finn—which uses the actual N-word as part of a larger condemnation of racism—we expect students to use the phrase "the N-word" rather than the actual word. The word is problematic, but the substitute is not.

Or consider a student wearing a shirt that portrays a promotional poster for

the movie *Straight Outta Compton*, the title of an album and biographical film about the music group named "N.W.A." The shirt does not include the full name of the music group. The "N" in N.W.A. stands for the N-word, which is profane and offensive. Because the shirt does not include the full written-out N-word, the First Amendment would not permit banning that shirt. However, this district court's reasoning would allow the school to punish a student for "'expressin' with full capabilities," N.W.A., *Express Yourself* (Ruthless Records 1988). Even though there is nothing vulgar or otherwise disruptive about the shirt, under the lower court's logic, if "school officials reasonably interpreted the [picture] as having a profane meaning," the school could require the student to change. *D.A. by and through B.A.*, 2024 WL 3924723, at *13. Such a standard is unworkable and unconstitutional. Students should not be punished as though they have used profane language *when they have not, in fact, used profane language*.

Many lawmakers have posted the phrase "Let's go Brandon" on social media or recited it verbally,[9] including on the House floor. Colleen Long, *How 'Let's Go Brandon' became code for insulting Joe Biden*, Associated Press (Oct. 30, 2021).[10]

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[9] Oddly, even President Biden repeated the phrase to a young child during a Christmas Eve phone call. Matthew S. Schwartz, *Man who said 'Let's go, Brandon' to Biden on Christmas Eve says he was only joking*, NPR (Dec. 26, 2021), https://www.npr.org/2021/12/26/1068173175/man-who-said-lets-go-brandon-to-biden-on-christmas-eve-says-he-was-only-joking.

[10] https://apnews.com/article/lets-go-brandon-what-does-it-mean-republicans-joe-biden-ab13db212067928455a3dba07756a160.

Appellants and politicians alike have used the phrase to express anger or dissatisfaction—not a sexual act. This phrase has become so popular precisely because it expresses the speaker's political views in a humorous, socially-palatable, and non-profane manner. Indeed, it conveys a shorthand message of political dissatisfaction, which also serves as a much more effective and light-hearted critique of the Biden Administration. In other words, "let's go" is not in danger of becoming the new "F-word."

The students' political message was expressed in a manner appropriate for a school setting. Indeed,

> there is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection.

Mahanoy Area Sch. Dist., 594 U.S. at 205.

Every day, people choose to express themselves using clean(er) language in certain contexts instead of resorting to full swear words. Appellants' shirt choice, fashionable or not, conveyed a political message without the use of profanity and fits squarely within the Supreme Court's "category of speech that is almost always beyond the regulatory authority of a public school." *Id.* These students expressed their opinions through G-rated language rather than wearing the F-word on their

chests. The law should not punish kids who are complying with societal norms while expressing their political viewpoints in a non-profane and humorous manner. The students' comparatively civil speech should be encouraged because, otherwise, students learn that polite society does not value self-censorship to avoid profane language.

The reporter's original gaffe or misdirection resulted in a cultural phenomenon—not a new profanity. Indeed, it is telling that the reporter's use of the statement, "Let's go Brandon" did not violate FCC decency regulations because it is not "obscene, indecent, or profane language," 18 U.S.C. § 1464, while the word the crowd was actually chanting would have elicited a bleep in order to comply with FCC rules. Schools should have at least as much common sense and respect for the First Amendment as the FCC. Whether it is "Let's go Brandon," "Orange man bad," "Lock him/her up," "He is a fascist," or "Trump too small," the First Amendment protects the expression of various insulting political phrases.

III. Appellants' conduct does not violate the *Tinker* standard.

Speech falling outside of the Supreme Court's limited categories of lewd, vulgar, or profane language "is subject to *Tinker's* general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). The students in *Tinker* were punished for wearing black armbands to protest the Vietnam

War. *Tinker*, 393 U.S. at 514. But that punishment was unconstitutional and violated the students' First Amendment rights. *Id.* Although the district court likens this case to *Fraser*, *Tinker* is a more accurate comparison. As did the armbands in *Tinker*, Appellants' "Let's go Brandon" apparel expressed a political opinion and "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others." *Id.* "In [these] circumstances, our Constitution does not permit officials of the State to deny their form of expression." *Id.*

Even the *Fraser* Court acknowledged the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." *Fraser*, 478 U.S. at 680. Central to *Tinker* is whether the student conduct disrupts school activities. *Tinker*, 393 U.S. at 514. Here, the school offers no evidence that Appellants' conduct disrupted any school activities or learning. Even the district court avers that,

> the general rule is that school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education. *Tinker* provides the exception—*schools cannot go so far as to limit nondisruptive discussion of political or social issues that the administration finds distasteful or wrong*. Drawing such a line may be difficult, but it must be left as a practical matter first to school administrators, with resort to the courts always available for cases like *Tinker* where the school goes too far.

D.A. by and through B.A., 2024 WL 3924723, at *7 (emphasis added) (quoting *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 342 (6th Cir. 2010)).

Here, the school went too far. The school has no "important policy" it is

advancing by punishing Appellants—it is simply suppressing speech. The "disruptive conduct" that is vital to the *Tinker* analysis is missing here and without it, the school has no justification for punishing Appellants' non-profane speech.

CONCLUSION

Amicus—calling upon the richness of the English language—respectfully asks, "What in tarnation was the lower court thinking?"—a non-profane way of saying, "Amicus respectfully requests that this court reverse the district court and enter judgment in favor of the Appellants."

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,658 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 11th day of December 2024.

Respectfully submitted,

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