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, No. 1:23-cv-423

# BRIEF OF PARENTS DEFENDING EDUCATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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## INTEREST OF AMICUS CURIAE[1]

Parents Defending Education ("PDE") is a nationwide, grassroots membership organization whose members include parents, students, and other concerned citizens. PDE's mission is to prevent—through advocacy, disclosure, and, if necessary, litigation—the politicization of K-12 education, including government attempts to coopt parental rights and to silence students who express opposing views.

This case directly implicates PDE's mission, and its outcome will have real-world consequences for PDE's members. Students have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The district court's legal errors affect the free-speech rights of students and thus the children of PDE's members. If the district court's decision is upheld, then K-12 students throughout the Sixth Circuit will be hindered in speaking on important political topics of our day. PDE's mission is to prevent such outcomes.

## INTRODUCTION

Public schools in the United States are supposed to be "the nurseries of democracy" and to "protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021). And students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus curiae* PDE contributed money intended to fund the brief's preparation or submission.

Public schools thus must "ensur[e] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 594 U.S. at 190. Especially for issues of public concern, like politics.

But not at Tri County Area School District. There, the District prohibited students from wearing apparel with the political slogan "Let's Go Brandon," even though such speech is political speech that is normally at the very heart of the First Amendment. And the district court upheld the District's speech restriction not because the phrase isn't a political slogan but because the phrase's origin is connected to profanity. *D.A. ex rel. B.A. v. Tri Cnty. Area Sch.*, 2024 WL 3924723 (W.D. Mich. Aug. 23).

The district court was wrong. To pass constitutional muster, the District, at a minimum, must show its prohibition of the phrase "Let's Go Brandon" falls under one of four narrow categories for restricting K-12 student speech. *See Kutchinski v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 356 (6th Cir. 2023). The District only asserts that its speech restriction is justified because of the exception for plainly profane, vulgar, and lewd speech. But the phrase "Let's Go Brandon" is at worst a euphemism that members of Congress have said during floor speeches, broadcast television has aired without censoring, and the sitting President has uttered during an interview on a news network. *See* Blue-Br.27-29, 9-10. The students' speech is core political speech that addresses a matter of public concern—speech that a public school can rarely, if ever, restrict. *See,*

*e.g.*, *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (plurality).

This Court should reverse the district court and hold that the First Amendment protects the students' political speech.

## ARGUMENT

### I. The District has joined the growing trend of schools using speech codes to punish student speech on topics of public concern.

The performance of political figures is a "sensitive political topi[c]" that is "undoubtedly [a] matte[r] of profound value and concern to the public." *Janus v. AFSCME*, 585 U.S. 878, 914 (2018) (cleaned up); *accord, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"). The First Amendment gives both sides the freedom to promote their beliefs in the marketplace of ideas, without the government tipping the scales. "[L]earning how to tolerate speech … of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022). Indeed, "tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). This is especially true where, as here, the "speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus*, 585 U.S. at 914 (cleaned up).

Yet there is a growing trend of schools adopting speech codes prohibiting controversial speech. In general, speech codes prohibit expression that would be constitutionally protected outside school, punishing students for unpopular speech by labeling it "harassment," "bullying," "hate speech," "incivility," etc. *See Spotlight on Speech Codes 2021*, Foundation for Individual Rights in Education (FIRE) at 10, perma.cc/S22E-76Q3. These policies are facially unconstitutional—imposing overbroad and often viewpoint-based restrictions on speech. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215-16 (3d Cir. 2001) (Alito, J.) (K-12 speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech").[2]

Not only do schools chill speech when adopting speech codes, but they have also used these speech codes to censor speech on important issues of our day, including politics. To give a few examples:

[2] *See also, e.g.*, *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668-69 (8th Cir. 2023) (K-12 policy prohibiting "intentional and/or persistent refusal ... to respect a student's gender identity" was unconstitutional); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-04 (W.D. Pa. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 990, 995 (E.D. Mich. 2003) (speech policy prohibiting "verbal assault" was overbroad because it allowed "curtailment of speech that questions the wisdom or judgment of school administrators and their policies, or challenges the viewpoints of [other] students"); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely unconstitutional).

- A student was punished for wearing a t-shirt that said, "There Are Only Two Genders." *L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024), *cert. pet. filed*, No. 24-410 (Oct. 9, 2024) (not a First Amendment violation).

- Two students were punished for wearing a shirt that said, "Save Girls' Sports" and "It's Common Sense. XX ≠ XY." Joseph, *California School Official Compared 'Save Girls Sports' Shirt to Swastika, Rebuked Girls Wearing It: Lawsuit*, Fox News (Nov. 20, 2024), perma.cc/NF3Q-ESFM; *T.S. ex rel. Starling v. Riverside Unified Sch. Dist.*, No. 5:24-cv-2480, Doc.1 (C.D. Cal. Nov. 11, 2024).

- A student was punished for promoting the view "All Lives Matter." *See B.B. v. Capistrano Unified Sch. Dist.*, 2024 WL 1121819 (C.D. Cal. Feb. 22), *appeal filed*, No. 24-1770 (9th Cir.) (not a First Amendment violation); Schow, *First Grader Punished After Drawing 'BLM' With 'Any Life' Underneath*, DailyWire (Mar. 21, 2024), perma.cc/KU3X-PGZK.

- A student was prohibited from wearing a sweatshirt that contained a picture of an AR-15 firearm with the word "Essential" written underneath, which expressed his view on the Second Amendment. *See C.G. v. Oak Hills Loc. Sch. Dist.*, 2023 WL 4763458 (S.D. Ohio Jul. 26) (no First Amendment violation).

- A student was reprimanded for having a "Don't Tread on Me" patch on his backpack. *See* Griffin, *Colorado Middle-Schooler Kicked Out of Class for 'Don't Tread on Me' Patch That Teacher Claims Originated with Slavery*, N.Y. Post (Aug. 30, 2023), perma.cc/5NA9-PGF3.

- And many more students have been punished for expressing views on topics of public concern. *E.g.*, Gstalter, *Principal Told Teen to Remove Trump 'MAGA' Apparel on School's 'America Pride Day,'* The Hill (Apr. 13, 2019), perma.cc/7X3M-D2PJ; Luca, *Colusa Teacher Threatens to Kick Student Out of Virtual Class Over 'Trump 2020' Flag*, ABC10 (Sept. 23, 2020), perma.cc/BKR4-658R; Daley, *High School Cheerleaders on Probation for Holding MAGA Sign at Football Game*, WCNC (Sept. 16, 2019), perma.cc/D46Y-ZKAL; Passoth, *Clark County School District Sued by Pro-Life Students Over Alleged First Amendment Violations*, Fox5 (Oct. 4, 2022), perma.cc/99M7-SUHZ.

Tri County Area School District is part of this unfortunate trend. It punished students for wearing clothing with the political slogan "Let's Go Brandon" because this

phrase's origin is connected to profanity. In doing so, the District punished speech at the heart of the First Amendment without a sufficient justification.

## II. The District unconstitutionally punished the students' speech.

**A.** The framers designed the Free Speech Clause of the First Amendment to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative*, 600 U.S. at 584. They did so because "they saw the freedom of speech 'both as an end and as a means.'" *Id.* "An end because the freedom to think and speak is among our inalienable human rights," and "[a] means because the freedom of thought and speech is indispensable to the discovery and spread of political truth." *Id.* (cleaned up). "'[I]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with an uninhibited marketplace of ideas." *Id.* at 584-85 (brackets omitted; quoting *W.V. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)). The First Amendment thus protects "an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up).

Students, too, have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker*, 393 U.S. at 506. America's public schools are "the nurseries of democracy," and "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. Schools must "ensur[e] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Given these bedrock principles, this Court has recognized only four "specific categories of speech that schools may regulate in certain circumstances," *id.* at 187:

> (1) "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds," *id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986));
>
> (2) "speech, uttered during a class trip, that promotes 'illegal drug use,'" *id.* at 187-88 (quoting *Morse*, 551 U.S. at 408);
>
> (3) "speech that others may reasonably perceive as 'bearing the imprimatur of the school,' such as that appearing in a school-sponsored newspaper," *id.* at 188 (alteration omitted; quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); and
>
> (4) on-campus and some off-campus speech that "'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker*, 393 U.S. at 513).

Public schools cannot restrict speech that would be protected outside the public-school setting beyond these four "narrow" categories. *See Kutchinski*, 69 F.4th at 356 (laying out the "four categories of student speech that schools may regulate"); *Saxe*, 240 F.3d at 212 ("Since *Tinker*, the Supreme Court has carved out a number of *narrow* categories of speech that a school may restrict." (emphasis added)).

But even if a school's speech regulation meets one of the four categories, the regulation may still violate the First Amendment. Public schools cannot engage in "viewpoint discrimination." *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008); *e.g.*, *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001); *Speech First v. Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) ("[E]ven if [the school] could (per *Tinker*) restrict harassing speech that disrupts the school's functions, it couldn't do so, as it has here, based on the viewpoint of that speech."); *Holloman v. Harland*, 370 F.3d

1252, 1280 (11th Cir. 2004) ("[T]his fundamental prohibition against viewpoint-based discrimination extends to public schoolchildren."). It cannot compel speech. *Barnette*, 319 U.S. at 642. And it cannot draft overbroad policies that violate the First Amendment in a "substantial" number of applications, *Saxe*, 240 F.3d at 215-16, or that are unconstitutionally vague, *Linn Mar*, 83 F.4th at 668-69.

When a public school restricts student speech, it "bears the burden of proving the constitutionality of its actio[n]." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 816 (2000); *accord Kennedy*, 597 U.S. at 524; *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 426 (7th Cir. 2022). That burden is generally "demanding." *Kutchinski*, 69 F.4th at 359.

**B.** Everyone agrees that wearing clothing with the phrase "Let's Go Brandon" is protected speech outside the K-12 context. The District thus has the demanding burden to justify its speech prohibition. The District failed to meet its burden. At a minimum, it failed to show its prohibition of the phrase "Let's Go Brandon" fits in one of the four narrow exceptions for K-12 student speech.

The District doesn't contend that categories two through four justify its speech restriction. That is, the District doesn't claim the students' speech promotes illegal drug use, can be reasonably seen as school-sponsored, or meets the *Tinker* standard by materially disrupting the school environment or invading the rights of others. Nor did the district court rest on those grounds. *See D.A.*, 2024 WL 3924723, at *4-13.

Instead, the District argued, and the district court agreed, that the prohibition satisfied the first category from *Bethel v. Fraser* about "vulgar" and "profane" speech.

Though the district court "agree[d] that political expression … deserves the highest protection under the First Amendment," it determined that the phrase "Let's Go Brandon" was not protected political speech because the phrase "originated as a profane personal insult directed at President Joe Biden." *D.A.*, 2024 WL 3924723, at *12-13. But the district court "stretches *Fraser* too far," *Morse*, 551 U.S. at 409 (plurality), and regardless, is wrong that the phrase "Let's Go Brandon" is profane.

*Fraser* doesn't cover a political slogan with a euphemism, especially when that slogan is nondisruptive and addresses a matter of public concern. "Political speech … is 'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (plurality). Because the students' speech "lies at the heart of the First Amendment's protection," "the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous," which is why such speech "is almost always beyond the regulatory authority of a public school." *Mahanoy*, 594 U.S. at 205 (Alito, J., concurring) (cleaned up).

The District's only conceivable justification for prohibiting the phrase "Let's Go Brandon" is "the school's interest in teaching good manners" by "punishing the use of vulgar [or profane] language." *Mahanoy*, 594 U.S. at 191. But contra the district court, that justification is virtually nonexistent—or easily outweighed—here. That's because the speech is political speech and at worst a euphemism.

To start, even if the phrase "Let's Go Brandon" could be understood to be connected to a phrase with profanity, the speech here is not akin to profanity because it is

not "delivered in a lewd or vulgar manner." *Morse*, 551 U.S. at 422-23 (Alito, J., concurring). As Appellants explain, "'Let's Go Brandon' … is a purposely non-profane substitute expression, often called euphemism." Blue-Br.27-29. Indeed, "members of Congress can and have used 'Let's Go Brandon' during floor speeches to express opposition to President Biden and his administration without violating strict rules of decorum." Blue-Br.5; *accord* Blue-Br.9. And it's a phrase permitted on broadcast television, including in an interview of the current President. *See* Blue-Br.9-10. There is thus no doubt that "Let's Go Brandon" is meaningfully less crude than using actual profanity. *Cf. Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) (criticizing the idea that "euphemism is to be the only permitted mode of expressing a controversial opinion" in the public-school setting). Plus, for a term to be vulgar or profane, it must "play no real part in the expression of ideas." *Iancu v. Brunetti*, 588 U.S. 388, 400 (2019) (Alito, J., concurring). But there's no meaningful dispute that every word in the phrase "Let's Go Brandon" plays a significant part in the expression of an idea. The political slogan itself is thus not profanity.

The Third Circuit's en banc decision in *B.H. ex rel. Hawk v. Easton Area School District* is instructive. 725 F.3d 293 (3d Cir. 2013) (en banc). There, the school banned middle schoolers from wearing "bracelets bearing the slogan 'I ♥ boobies! (KEEP A BREAST)' as part of a nationally recognized breast-cancer-awareness campaign," claiming "the bracelet ban [w]as an exercise of its authority to restrict lewd, vulgar, profane, or plainly offensive student speech under *Fraser*." *Id.* at 298, 300. The Third Circuit

disagreed. Per the Third Circuit, *Fraser* and *Morse* "sets up the following framework": (1) "plainly lewd[, vulgar, or profane] speech, which offends for the same reasons obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues"; (2) "speech that does not rise to the level of plainly lewd[, vulgar, or profane speech] but that a reasonable observer could interpret as lewd[, vulgar, or profane] may be categorically restricted as long as it cannot plausibly be interpreted as commenting on political or social issues"; and (3) "speech that does not rise to the level of plainly lewd[, vulgar, or profane speech] and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted." *Id.* at 298. The Third Circuit held that because the bracelets were "not *plainly* lewd" and "comment[ed] on a social issue," the school could not rely on *Fraser* to justify its speech restriction. *Id.* (emphasis added).

So too here. Clothing with the phrase "Let's Go Brandon" does not fall under the Third Circuit's better understanding of *Fraser*'s narrow exception. As explained, the phrase is not profanity, let alone "*plainly*" profanity. *Fraser*, 478 U.S. at 683 (emphasis added); *accord B.H.*, 725 F.3d at 298. But even if "a reasonable observer could interpret" the phrase to be profanity, the phrase still could not be restricted because it can "plausibly be interpreted as commenting on political or social issues." *B.H.*, 725 F.3d at 298. The phrase is clearly a criticism of the performance of President Biden and his administration—undoubtedly a political issue that is a matter of public concern. *See* Blue-Br.7-

11. *Fraser*'s profanity category thus doesn't apply, so the District violated the First Amendment when it restricted the students' non-disruptive speech.

The Second Circuit's decision in *Guiles v. Marineau* reinforces this conclusion. 461 F.3d 320 (2d Cir. 2006). There, the school punished a middle schooler for wearing a t-shirt criticizing President George W. Bush; specifically, the shirt called the president a "Chicken-Hawk-In-Chief"; "Crook"; "Cocaine Addict"; "AWOL, Draft Dodger"; and "Lying Drunk Driver," and had images of "alcohol" and "cocaine." *Id.* at 322-23. The school claimed *Fraser* justified banning the shirt, but the Second Circuit disagreed. In the Second Circuit's view, *Fraser* only "applies to the 'manner of the speech,'" namely "speech containing sexual innuendo and profanity." *Id.* at 328. The shirt didn't meet that standard because, even though the shirt's "images of a martini glass, alcohol, and lines of cocaine" and the shirt's messages "may cause school administrators displeasure and could be construed as insulting or in poor taste," they were not expressly vulgar, obscene, profane, or offensive. *Id.* at 329. That the speech was ""part of an anti-drug political message" reinforced the court's conclusion that *Fraser* didn't apply. *Id.*

The same is true here. Though the phrase "Let's Go Brandon" might give the District "displeasure," it is neither "plainly offensive as the sexually charged speech considered in *Fraser*" nor "as offensive as profanity used to make a political point." *Id.* If anything, the students' "Let's Go Brandon" apparel is far less vulgar than the shirt in *Guiles* and just as much of a political message. As in *Guiles*, the speech here is protected by the First Amendment.

Rather than follow *B.H.* or *Guiles*, the district court believed that *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), applied. 2024 WL 3924723, at *10. But the district court is wrong. *Boroff* didn't involve profanity but only *Fraser*'s language about "plainly offensive speech." 220 F.3d at 470-71. There, this Court upheld a public school's ban on Marilyn Manson t-shirts because it deferred to the school administrator's judgment that the shirts were "offensive" and "contrary to the educational mission of the school" since Manson was a "'goth' rock performer" who "promote[d] destructive conduct and demoralizing values" like using "illegal drugs." *Id.* at 466-67, 469. Here, by contrast, the District has only asserted that it prohibited the phrase "Let's Go Brandon" because of its connection to profanity, *e.g.*, District MSJ, R.38, PageID#362-95, and courts can't uphold a speech restriction based on a school's post hoc justification for its action, *see, e.g.*, *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25-26 (1st Cir. 2020) ("The defendants may not rely on post hoc rationalizations for the speech restrictions, but rather must rely only on the reasons originally provided to A.M. for her suspension."). Regardless, after *Boroff*, the Supreme Court made clear in *Morse* that *Fraser*'s plainly-offensive-language reference "should not be read to encompass any speech that could fit under some definition of 'offensive.'" *Morse*, 551 U.S. at 409 (plurality). Because *Boroff* involves a different exception that the Supreme Court narrowed and didn't involve speech addressing a matter of public concern, it is inapt. *See* Blue-Br.36-37. In any event, if the district court were right, then *Fraser* would swallow the *Tinker* standard and *Boroff* would conflict with several of this Court's

decisions and the Supreme Court's clarification in *Morse*. *See, e.g.*, *Defoe v. Spiva*, 625 F.3d 324, 332 & n.6 (6th Cir. 2010) ("*Tinker* governs this case because by wearing clothing bearing images of the Confederate flag, Tom Defoe engaged in 'pure speech,' which is protected by the First Amendment, and thus *Fraser* would not apply."); Blue-Br.36-37. The district court can't be right.

## CONCLUSION

The Court should reverse the district court.

Dated: December 11, 2024

Respectfully submitted,

*/s/ J. Michael Connolly*
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## CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 3,735 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: December 11, 2024 */s/ J. Michael Connolly*

## CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: December 11, 2024 */s/ J. Michael Connolly*