**First Amendment Supreme Court Cases**

**Overview and Condensed Cases edited by NCC Staff**

**Tinker v. Des Moines Independent Community School District**

Argued: November 12, 1968 Decided: February 24, 1969

Petitioner: John F. Tinker (15), Christopher Eckhardt (16), and Mary Beth Tinker (13)

Decision: 7-2 Majority decision in favor of the Petitioners by Justices Fortas (author of opinion), Warren, Douglas, Brennan, White, and Marshall.

Dissenters: Justices Black, and Harlan.

http://www.princeton.edu/aci/cases-pdf/aci1.tinker.pdf

**Bethel School District No. 403 v. Fraser**

Argued: March 3, 1986 Decided: July 7, 1986

Respondent: Matthew Fraser

Decision: 7-2 Opinion, Justices Burger (author of opinion), White, Powell, Rehnquist, O'Connor, Brennan, Blackmun

Dissenters: Justices Marshall and Stevens

http://www.csustan.edu/cj/jjustice/CaseFiles/BETHELSCHOOLDIST-v-Fraser.pdf

**Hazelwood School District v. Kuhlmeier**

Argued: October 13, 1987 Decided: January 13, 1988

Respondents: Cathy Kuhlmeier, Leslie Smart, Lee Ann Tippett

Decision: 5-3 in favor of Hazelwood, Justices White, Rehnquist, Stevens, O'Connor, Scalia

Dissenters: Justices Brennan, Marshall, and Blackmun

http://www.splc.org/pdf/HazelwoodGuide.pdf

**Morse v. Frederick**

Argued: March 19, 2007 Decided: June 25, 2007

Petitioner: Deborah Morse Respondent: Joseph Frederick

Decision: 5-3 opinion, Justices Roberts (author of opinion), Scalia, Kennedy, Thomas, and Alito.

Dissenters: Justices Stevens, Souter, and Ginsburg.

http://www.scotusblog.com/movabletype/archives/06-278_All.pdf

**Snyder v. Blue Mountain School District**

Argued: June 2, 2009 Filed: June 13, 2011

Petitioner: J.S. (a minor) Terry Snyder and Steven Snyder (parents)

Decision: This case went to the United States Court of Appeals for the Third Circuit where it was decided that students who ridiculed their principals online could not be punished by school authorities because the speech was created off campus and did not substantially disrupt schools.

http://www2.ca3.uscourts.gov/opinarch/084138p.pdf

**Hawk v. Easton Area School District**

Argued: April 10, 2012 Filed: August 5, 2013

Petitioner: B.H. (a minor), Jennifer Hawk (mother) and K.M. (a minor), Amy McDonald-Martinez (mother)

Decision: The case went to the United States Court of Appeals for the Third Circuit where it was decided that the ban on the bracelets violated the students First Amendment rights. The case is currently pending in front of the Supreme Court.

http://www2.ca3.uscourts.gov/opinarch/112067p.pdf

*"[F]ree speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."*

# SUPREME COURT OF THE UNITED STATES

## TINKER v. DES MOINES SCHOOL DISTRICT

**393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)**

A small group of teen-aged students in Des Moines planned to wear black armbands to classes to protest the war in Vietnam. Hearing about the plan, school principals decided to forbid wearing armbands and to suspend students who disobeyed the order. Several students defied the principals' edict and were suspended. Their families sought an injunction from a U.S. district court forbidding the principals and the school district to discipline the children for their symbolic protest. The parents lost in the district court. That decision was affirmed by an equally divided court of appeals. The parents sought and obtained certiorari from the Supreme Court.

**Mr. Justice FORTAS delivered the opinion of the Court ....**

I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See West Virginia v. Barnette (1943); Stromberg v. California (1931). Cf. Thornhill v. Alabama, (1940); Edwards v. South Carolina (1963); Brown v. Louisiana (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. Cf. Cox v. Louisiana (1965); Adderly v. Florida (1966).

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In Meyer v. Nebraska (1923), and Bartels v. Iowa (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. See also Pierce v. Society of Sisters (1925); *Barnette*; Wieman v. Updegraff (1952) (concurring opinion); Sweezy v. New Hampshire (1957); Shelton v. Tucker (1960); Keyishian v. Board of Regents (1967);

Epperson v. Arkansas (1968).

In *Barnette*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures– Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See *Epperson*, *Meyer*. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students ....

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago (1949); and our history says that it is this sort of hazardous freedom– this kind of openness– that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where 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.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. [...]

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. ...

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol– black armbands worn to exhibit opposition to this Nation's involvement in Vietnam– was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. ...

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. [...]

*Reversed and remanded.*

**Mr. Justice STEWART, concurring .... Mr. Justice WHITE, concurring.**

While I join the Court's opinion, I deem it appropriate to note ... that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct

which sufficiently impinges on some valid state interest [....]

**Mr. Justice BLACK, dissenting ....**

[...] First, the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to 'pure speech' " and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., e.g., Giboney v. Empire Storage (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech– "symbolic" or "pure"– and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked" chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. ... [T]he armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. [...]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. Holding that the protest was akin to speech, which is protected by the First and Fourteenth Amendments, that court held that the school order was "reasonable" and hence constitutional. [...] Two cases upon which the Court today heavily relies

for striking down this school order used this test of reasonableness, Meyer v. Nebraska (1923), and Bartels v. Iowa (1923) [....] This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court in Ferguson v. Skrupa, after a thorough review of the old cases, was able to conclude in 1963:

> There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

[...] The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases–that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely– has long since been discarded.

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience" or that they are "unreasonable," "arbitrary," "irrational," "contrary to fundamental 'decency,' " or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother Fortas, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar .... Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. West Virginia v. Barnette, clearly reject[ed] the "reasonableness" test [....] Neither Thornhill v. Alabama; Stromberg v. California; Edwards v. South Carolina; nor Brown v. Louisiana related to schoolchildren at all, and none of these cases embraced Mr. Justice McReynolds' reasonableness test; and *Thornhill, Edwards, and Brown* relied on the vagueness of state statutes under scrutiny to hold them unconstitutional. [...]

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. ... The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, e.g., Cox v. Louisiana [....]

[...] This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

**Mr. Justice HARLAN, dissenting.**

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns– for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

## Editors' Notes

Clark v. Community for Creative Non-Violence (1984) sustained a District of Columbia ordinance that banned sleeping in public parks. A group advocating increased public assistance for the homeless had claimed they were exercising their rights to engage in symbolic speech by camping out in parks around the White House. For the majority, Justice White wrote that, even if sleeping in a park overnight was "expressive conduct to some extent protected by the First Amendment," it was subject to reasonable governmental regulation. He then applied the rule of Cantwell v. Connecticut (1940; reprinted below, p. 1014) that government could regulate "the time, place, and manner" of public demonstrations as long as its administration was neutral as to content of the message the demonstrators wished to convey. Here, White found, regulation "narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them."

# SUPREME COURT OF THE UNITED STATES

## BETHEL SCHOOL DIST. NO. 403 v. FRASER, 478 U.S. 675 (1986)

**Argued March 3, 1986 Decided July 7, 1986**

**CHIEF JUSTICE BURGER delivered the opinion of the Court.**

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

### I A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year- olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self- government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.[1]

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides:

> "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

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[1] "`I know a man who is firm - he's firm in his pants, he's firm in his shirt, his character is firm - but most . . . of all, his belief in you, the students of Bethel, is firm. "`Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts - he drives hard, pushing and pushing until finally - he succeeds.

"`Jeff is a man who will go to the very end - even the climax, for each and every one of you. "`So vote for Jeff for A. S. B. vice-president - he'll never come between you and the best our high school can be.'"

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

## B

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in Tinker v. Des Moines Independent Community School Dist.

## II

This Court acknowledged in Tinker v. Des Moines Independent Community School Dist., that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in Tinker as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in Tinker and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

## III

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

The First Amendment guarantees wide freedom in matters of adult public discourse. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school.

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students - indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine 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. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

The judgment of the Court of Appeals for the Ninth Circuit is Reversed.

**JUSTICE MARSHALL, dissenting.**

I dissent from the Court's decision, because in my view the School District failed to demonstrate that respondent's remarks were indeed disruptive. The District Court and Court of Appeals conscientiously applied Tinker v. Des Moines Independent Community School Dist, and concluded that the School District had not demonstrated any disruption of the educational process. I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission, nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education. Here the School District, despite a clear opportunity to do so, failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by respondent's speech. I therefore see no reason to disturb the Court of Appeals' judgment.

# SUPREME COURT OF THE UNITED STATES

## HAZELWOOD SCHOOL DISTRICT, ET AL. v. KUHLMEIER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[JANUARY 13, 1988]

**JUSTICE WHITE delivered the opinion of the Court.**

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

II.

A.

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.,* at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

The District Court thus found it "clear that Mr. Stergos [Journalism II teacher] was the final authority with respect to almost every aspect of the production and publication of *Spectrum,* including its content." *Ibid.* Moreover, after each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id.,* at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. [...]A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," *Cornelius,* 473 U. S., at 802, that existed in cases in which we found public forums to have been created.

B.

The question whether the First Amendment requires a school to tolerate particular student speech — the question that we addressed in *Tinker* — is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty

members and designed to impart particular knowledge or skills to student participants and audiences.

[...] We conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

III.

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent — indeed, as one who chose "playing cards with the guys" over home and family — was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

[Principal Reynolds] believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We

nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore reversed.

# SUPREME COURT OF THE UNITED STATES

## HAZELWOOD SCHOOL DISTRICT, ET AL. v. KUHLMEIER ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[JANUARY 13, 1988]

**JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join,**
**dissenting.**

"[A]t the beginning of each school year," *id.,* at 1372, the student journalists published a Statement of Policy — tacitly approved each year by school authorities — announcing their expectation that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment . . . . Only speech that `materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited." App. 26 (quoting *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503, 513 (1969)). The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51).

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I.

The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system . . . ." *Ambach* v. *Norwick,* 441 U. S. 68, 77 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of " `community values.' " *Board of Education* v. *Pico,* 457 U. S. 853, 864 (1982) (plurality opinion) (citation omitted).

[...] We have traditionally reserved the "daily operation of school systems" to the States and their local school boards. *Epperson* v. *Arkansas,* 393 U. S. 97, 104 (1968); see *Board of Education* v.

*Pico, supra,* at 863-864. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution.

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: The young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student-government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403* v. *Fraser,* 478 U. S. 675 (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, cf. *Tinker* v. *Des Moines Independent Community School Dist.,* 393 U. S. 503 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser, supra,* at 682, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker, supra,* at 506. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.,* at 309, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.,* at 508. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.,* at 509, or an unsavory subject, *Fraser, supra,* at 688-689 (**BRENNAN, J., concurring in judgment**), does not justify official suppression of student speech in the high school.

The Court today casts no doubt on *Tinker*'s vitality. Instead it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante,* at 271. On the other hand is censorship of expression that arises in the context of "school-sponsored. . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

II.

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning *Tinker* in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the *Tinker* test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression. *Ante,* at 271. None of the excuses, once disentangled, supports the distinction that the Court draws. *Tinker* fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A.

The Court is certainly correct that the First Amendment permits educators "to assure that participants learn whatever lessons the activity is designed to teach . . . ." *Ante,* at 271. That is, however, the essence of the *Tinker* test, not an excuse to abandon it. Under *Tinker,* school officials may censor only such student speech as would "materially disrup[t]" a legitimate curricular function.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices. . . ." *Ante,* at 271-272. But we need not abandon *Tinker* to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under *Tinker,* constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the *audience* or dissociate the *sponsor* from the expression. Censorship so motivated might well serve (although, as I demonstrate *infra,* at 285-289, cannot legitimately serve) some other school purpose. But it in no way furthers the curricular purposes of a student *newspaper,* unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

[...] The Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the [pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents . . . ." *Ante,* at 274. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose ‘playing cards with the guys’ over home and family . . . ." *Ante,* at 275.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when the paper was released . . . ." 795 F. 2d, at 1371. Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as " `too sensitive' for `our immature audience of readers,' " 607 F. Supp. 1450, 1459 (ED Mo. 1985), and in a later meeting he deemed them simply "inappropriate, personal, sensitive and unsuitable for the newspaper," *ibid.* The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B.

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences." *Ante,* at 271 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with `the shared values of a civilized social order' ") through school-sponsored student activities. *Ante,* at 272 (citation omitted).

Even in its capacity as educator the State may not assume an Orwellian "guardianship of the public mind," *Thomas* v. *Collins,* 323 U. S. 516, 545 (1945) (Jackson, J., concurring).

Just as a school board may not purge its state-funded library of all books that " `offen[d] [its] social, political and moral tastes,' " 457 U. S., at 858-859 (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages, than the State's prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

C.

But " `[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' " *Keyishian* v. *Board of Regents,* 385 U. S., at 602 (quoting *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960)). Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that "[a]ll . . . editorials appearing in this newspaper reflect the opinions of the *Spectrum* staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III.

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork," *Tinker,* 393 U. S., at 513. Nor did the censorship fall within the category that *Tinker* described as necessary to prevent student expression from "inva[ding] the rights of others," *ibid.*

even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools" *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958); see *Keyishian* v. *Board of Regents, supra,* at 602, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

IV.

The Court opens its analysis in this case by purporting to reaffirm *Tinker*'s time-tested proposition that public school students "do not `shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Ante,* at 266 (quoting *Tinker, supra,* at 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that *Tinker* itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," *Board of Education* v. *Pico,* 457 U. S., at 880 (BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," *Shanley* v. *Northeast Independent School Dist., Bexar Cty., Tex.,* 462 F. 2d 960, 972 (CA5 291*291 1972), the Court today "teach[es] youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education v. Barnette,* 319 U. S., at 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

# SUPREME COURT OF THE UNITED STATES

## DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

**CHIEF JUSTICE ROBERTS delivered the opinion of the Court.**

Our cases make clear that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 506 (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403v. Fraser, 478 U. S. 675, 682 (1986),* and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood School Dist.v. Kuhlmeier*, 484 U. S. 260, 266 (1988) (quoting *Tinker,supra,*at 506). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22-23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS."App. to Pet. For Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. 549 U. S. ___ (2006). We resolve the first question against Frederick, and therefore have no occasion to reach the second.

III.

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." 439 F. 3d, at 1117–1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." App. 24. She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy. *Id.*, at 25; see *ibid.* ("I told Frederick and the other members of his group to put the banner down because I felt that it violated the [school] policy against displaying … material that advertises or promotes use of illegal drugs").

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." 439 F. 3d, at 1116. […] Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

IV.

The question thus becomes whether a principal may, consistent with the First Amendment , restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

This Court's next student speech case was *Fraser*, 478 U. S. 675 . Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." *Id.*, at 678.

But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.*, at 683.

Our most recent student speech case, *Kuhlmeier*, concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U. S., at 271. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. […] This Court reversed [the ruling of Court of Appeals], holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so

long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, *supra*, at 273.

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 655–656 (1995) (quoting *Tinker*, *supra*, at 506). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 340 (1985) .

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. *Id.*, at 661. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.*, at 661–662 (citations and internal quotation marks omitted).

Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls*, *supra*, at 834, and n. 5.

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, Brief for United States as *Amicus Curiae* 1, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug prevention programs "convey a clear and consistent message that … the illegal use of drugs [is] wrong and harmful." 20 U. S. C. §7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. See Pet. for Cert. 17–21. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. *Earls*, *supra*, at 840 (Breyer, J., concurring). Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

*Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.*, at 508, 509. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92–95; App. to Pet. for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

*  *  *

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

**DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

**JUSTICE THOMAS, concurring.**

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969) , is without basis in the Constitution.

I.

The First Amendment states that "Congress shall make no law … abridging the freedom of speech." As this Court has previously observed, the First Amendment was not originally understood to permit all sorts of speech; instead, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942) ; see also *Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965) . In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools.

B.

A review of the case law shows that *in loco parentis* allowed schools to regulate student speech as well. Courts routinely preserved the rights of teachers to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals.

II.

*Tinker* affected a sea change in students' speech rights, extending them well beyond traditional bounds. The case arose when a school punished several students for wearing black armbands to school to protest the Vietnam War. *Tinker*, 393 U. S., at 504. Determining that the punishment infringed the students' First Amendment rights, this Court created a new standard for students' freedom of speech in public schools:

> "[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." *Id.*, at 509 (internal quotation marks omitted).

Accordingly, unless a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable. *Ibid.* ("[The school] must be able to show that its action

was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. *Ante*, at 10–14. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't—a standard continuously developed through litigation against local schools and their administrators. In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools.

III.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it "substantially interfere[d] with the requirements of appropriate discipline in the operation of the school." 393 U. S., at 509 (internal quotation marks omitted).

Local school boards, not the courts, should determine what pedagogical interests are "legitimate" and what rules "reasonably relat[e]" to those interests. 484 U. S., at 273.

* * *

I join the Court's opinion because it erodes *Tinker*'s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

# SUPREME COURT OF THE UNITED STATES

## DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

**JUSTICE ALITO, with whom JUSTICE KENNEDY joins, concurring.**

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use." See *post*, at 13 (Stevens, J., dissenting).

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." See Brief for Petitioners 21; Brief for United States as *Amicus Curiae* 6. This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*'s "substantial disruption" standard permits school officials to step in before actual violence erupts. See 393 U. S., at 508–509.

Speech advocating illegal drug use poses a threat to student safety that is just as serious, if not always as immediately obvious. As we have recognized in the past and as the opinion of the Court today details, illegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that the public schools may ban speech advocating illegal drug use. But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension.

# SUPREME COURT OF THE UNITED STATES

**DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

**JUSTICE BREYER, concurring in the judgment in part and dissenting in part.**

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more.

I.

Resolving the First Amendment question presented in this case is, in my view, unwise and unnecessary. In part that is because the question focuses upon specific content narrowly defined: May a school board punish students for speech that advocates drug use and, if so, when? At the same time, the underlying facts suggest that Principal Morse acted as she did not simply because of the specific content and viewpoint of Joseph Frederick's speech but also because of the surrounding context and manner in which Frederick expressed his views. To say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles. But to hold, as the Court does, that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" (and that "schools" may "restrict student expression that they reasonably regard as promoting illegal drug use") is quite a different matter. *Ante*, at 2, 14. This holding, based as it is on viewpoint restrictions, raises a host of serious concerns.

One concern is that, while the holding is theoretically limited to speech promoting the use of illegal drugs, it could in fact authorize further viewpoint-based restrictions. Illegal drugs, after all, are not the only illegal substances. What about encouraging the underage consumption of alcohol? Moreover, it is unclear how far the Court's rule regarding drug advocacy extends. What about a conversation during the lunch period where one student suggests that glaucoma sufferers should smoke marijuana to relieve the pain? What about deprecating commentary about an antidrug film shown in school? And what about drug messages mixed with other, more expressly political, content? If, for example, Frederick's banner had read "LEGALIZE BONG HiTS," he might be thought to receive protection from the majority's rule, which goes to speech "encouraging *illegal* drug use." Ante, at 2 (emphasis added). But speech advocating change in drug laws might also be perceived of as promoting the disregard of existing drug laws.

# SUPREME COURT OF THE UNITED STATES

**DEBORAH MORSE, ET AL., PETITIONERS v. JOSEPH FREDERICK**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 25, 2007]

**JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.**

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, see *ante*, at 8-12; and second, that deterring drug use by schoolchildren is a valid and terribly important interest, see *ante*, at 12-14. As to the first, I take the Court's point that the message on Frederick's banner is not necessarily protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS's rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." App. to Pet. for Cert. 53a. But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

I.

The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would "materially and substantially interfere with the requirements of discipline in the operation of the school," we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment. Id., at 509 (internal quotation marks omitted).

Two cardinal First Amendment principles animate both the Court's opinion in Tinker and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification [...]

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. *See Brandenburg v. Ohio*, 395 U. S. 444, 449 (1969) (*per curiam*)(distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action").

As other federal courts have long recognized, under *Tinker*,

> "regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. . . . *Tinker* requires a specific and significant fear of disruption, *not just some remote apprehension of disturbance*." *Saxe v. State College Area School Dist.*, 240 F. 3d 200, 211 (CA3 2001) (Alito, J.)

(emphasis added).

II.

But it is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively - and not very reasonably - thinks is tantamount to express advocacy. Cf. *Masses Publishing Co.v. Patten*, 244 F. 535, 540, 541 (SDNY 1917) (Hand, J.) (distinguishing sharply between "agitation, legitimate as such" and "the direct advocacy" of unlawful conduct).

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs [...]Therefore, just as we insisted in Tinker that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use - in other words, that it can most reasonably be interpreted as such - that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. *Ante*, at 7 (positing that the banner might mean, alternatively, "'[Take] bong hits.'" "'bong hits [are a good thing],'" or "'[we take] bong hits'"). Frederick's credible and uncontradicted explanation for the message - he just wanted to get on television - is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything. But most importantly, it takes real imagination to read a "cryptic" message (the Court's characterization, not mine, see *ibid*., at 6) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high-school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. See *Tinker*, 393 U. S., at 511 ("[Students] may not be confined to the expression of those sentiments that are officially approved"). If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs. See also *ante*, at 2 (**BREYER, J., concurring in judgment in part and dissenting in part**).

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." App. to Pet. for Cert. 53a; see also App. 83 (expressly defining "'drugs'" to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption - drinking causes far more fatal accidents than the misuse of marijuana - the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the

Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner - which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message - the breathtaking sweep of its opinion suggests it would.

III.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney*, 274 U. S., at 377 (Brandeis, J., concurring); *Abrams*, 250 U. S., at 630 (Holmes, J., dissenting); *Tinker*, 393 U. S., at 512. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

# UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

J.S. a minor, through her parents;

**TERRY SNYDER; STEVEN SNYDER, Appellants v.**

**BLUE MOUNTAIN SCHOOL DISTRICT;**
JOYCE ROMBERGER; JAMES McGONIGLE

On Appeal from the United States District Court for the Middle District of Pennsylvania

Argued June 2, 2009
Argued En Banc June 3, 2010

## OPINION OF THE COURT

**CHAGARES, Circuit Judge, with whom McKEE, Chief Judge, SLOVITER, AMBRO, FUENTES, SMITH, HARDIMAN, and GREENAWAY, JR., Circuit Judges, join.**

[…]This case arose when the School District suspended J.S. for creating, on a weekend and on her home computer, a MySpace profile (the "profile") making fun of her middle school principal, James McGonigle. The profile contained adult language and sexually explicit content. J.S. and her parents sued the School District under 42 U.S.C. § 1983 and state law, alleging that the suspension violated J.S.'s First Amendment free speech rights, that the School District's policies were unconstitutionally overbroad and vague, that the School District violated the Snyders' Fourteenth Amendment substantive due process rights to raise their child, and that the School District acted outside of its authority in punishing J.S. for out-of-school speech.

Because J.S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school, the School District's actions violated J.S.'s First Amendment free speech rights. We will accordingly reverse and remand that aspect of the District Court's judgment. However, we will affirm the District Court's judgment that the School District's policies were not overbroad or void-for- vagueness, and that the School District did not violate the Snyders' Fourteenth Amendment substantive due process rights.

I.

[…] On Sunday, March 18, 2007, J.S. and her friend K.L., another eighth grade student at Blue Mountain Middle School, created a fake profile of McGonigle, which they posted on MySpace, a social networking website. The profile was created at J.S.'s home, on a computer belonging to J.S.'s parents.

[…] Though disturbing, the record indicates that the profile was so outrageous that no one took its content seriously. J.S. testified that she intended the profile to be a joke between herself and her friends. At her deposition, she testified that she created the profile because she thought it was "comical" insofar as it was so "outrageous." App. 190.

McGonigle ultimately decided that the creation of the profile was a Level Four Infraction under the Disciplinary Code of Blue Mountain Middle School, Student-Parent Handbook, App.

65- 66, as a false accusation about a staff member of the school and a "copyright" violation of the computer use policy, for using McGonigle's photograph. At his deposition, however, McGonigle admitted that he believed the students "weren't accusing me. They were pretending they were me." App. 327.

Applying a variation of the Fraser and Morse standard, the District Court held that "as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it even though it arguably did not cause a substantial disruption of the school." App. 15-16. The Court asserted that the facts of this case established a connection between off-campus action and on-campus effect, and thus justified punishment, because: (1) the website was about the school's principal; (2) the intended audience was the student body; (3) a paper copy was brought into the school and the website was discussed in school; (4) the picture on the profile was appropriated from the School District's website; (5) J.S. created the profile out of anger at the principal for disciplining her for dress code violations in the past; (6) J.S. lied in school to the principal about creating the profile; (7) "although a substantial disruption so as to fall under Tinker did not occur . . . there was in fact some disruption during school hours"; and (8) the profile was viewed at least by the principal at school. App. 17 (emphasis added).

Ultimately, the District Court held that although J.S.'s profile did not cause a "substantial and material" disruption under Tinker, the School District's punishment was constitutionally permissible because the profile was "vulgar and offensive" under Fraser and J.S.'s off-campus conduct had an "effect" at the school. In a footnote, the District Court also noted that "the protections provided under Tinker do not apply to speech that invades the rights of others." App. 16 n.4 (citing Tinker, 393 U.S. at 513).

Next, the District Court held that the School District's policies were not vague and overbroad. The District Court first approached the issue in a somewhat backwards manner: it concluded that because the punishment was appropriate under the First Amendment, the policies were not vague and overbroad even though they can be read to apply to off-campus conduct. App. 21. Alternatively, the District Court held that the policy language was "sufficiently narrow . . . to confine the policy to school grounds and school-related activities." Id. (quoting the Handbook, which provides that the "[m]aintenance of order applies during those times when students are under the direct control and supervision of school district officials," and noting that the computer use policy incorporates the limitations of the Handbook).

III.

A.

The authority of public school officials is not boundless, however. The First Amendment unquestionably protects the free speech rights of students in public school. Morse, 551 U.S. at 396 ("Our cases make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" (quoting Tinker, 393 U.S. at 506)). Indeed, "[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 exercise of First Amendment rights in school, however, has to be "applied in light of the special characteristics of the school environment," Tinker, 393 U.S. at 506, and thus the constitutional rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," Fraser, 478 U.S. at 682. Since Tinker, courts have struggled to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment.

[…] Justice Alito also noted that the Morse decision "does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs." Id. at 423 (citations omitted). Moreover, Justice Alito engaged in a detailed discussion distinguishing the role of school authorities from the role of parents, and the school context from the "[o]utside of school" context. Id. at 424-25.

B.

There is no dispute that J.S.'s speech did not cause a substantial disruption in the school. The School District's counsel conceded this point at oral argument and the District Court explicitly found that "a substantial disruption so as to fall under Tinker did not occur." App. at 17. Nonetheless, the School District now argues that it was justified in punishing J.S. under Tinker because of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . ." Tinker, 393 U.S. at 514. […]("Tinker does not require school officials to wait until the horse has left the barn before closing the door. . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable.") […]("Tinker does not require school officials to wait until disruption actually occurs before they may act.").

The facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable.

Turning to our record, J.S. created the profile as a joke, and she took steps to make it "private" so that access was limited to her and her friends. Although the profile contained McGonigle's picture from the school's website, the profile did not identify him by name, school, or location. Moreover, the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously, and the record clearly demonstrates that no one did.[4] Also, the School District's computers block access to MySpace, so no Blue Mountain student was ever able to view the profile from school.[5] And, the only printout of the profile that was ever brought to school was one that was brought at McGonigle's express request. Thus, beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist McGonigle in dealing with the profile, no disruptions occurred.

If Tinker's black armbands – an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war – could not "reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," id. At 514, neither can J.S.'s profile, despite the unfortunate humiliation it caused for McGonigle.

Moreover, unlike the students in Doninger, Lowery, and LaVine, J.S. did not even intend for the speech to reach the school – in fact, she took specific steps to make the profile "private" so that only her friends could access it. The fact that her friends happen to be Blue Mountain Middle School students is not surprising, and does not mean that J.S.'s speech targeted the school. Finally, any suggestion that, absent McGonigle's actions, a substantial disruption would have occurred, is directly undermined by the record. If anything, McGonigle's response to the profile exacerbated rather than contained the disruption in the school.

The facts simply do not support the conclusion that the School District could have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile. Under Tinker, therefore, the School District violated J.S.'s First Amendment free speech rights when it suspended her for creating the profile.

C.

Thus, under the Supreme Court's precedent, the Fraser exception to Tinker does not apply here. In other words, Fraser's "lewdness" standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.

[…] the fact that another student printed J.S.'s profile and brought it to school at the express request of McGonigle does not turn J.S.'s off-campus speech into on-campus speech.

Accordingly, we conclude that the Fraser decision did not give the School District the authority to punish J.S. for her off- campus speech.

V.

What J.S. challenges here is not the policies themselves, but the interpretation of these policies that allows the School District to apply its regulations beyond the times when she was within the direct control and supervision of the School District, or beyond times when she was using a school computer. The misinterpretation of these policies by specific individuals, however, does not make the policies overbroad. Although the Handbook and AUP can be applied in a way that violates a student's constitutional rights, as happened in this case, the regulations themselves are not constitutionally infirm on the basis of being overbroad. For this reason, we will affirm the District Court's grant of summary judgment on this issue.

There can be no doubt that J.S. would have expected to have been punished under the Handbook and the AUP had she taken the same actions from a school computer or while on school grounds. In this sense, they establish a comprehensible normative standard that is appropriate for use in disciplining student misconduct.

As with the discussion of overbreadth above, J.S.'s argument seems to rely on specific individuals' misinterpretations of the policies, and not the invalidity of the policies themselves. It was the extension and application of these policies to speech undertaken from her personal computer at her parents' home to which she objects here. This punishment, however, was not allowed by the vagueness of the policies. Instead, it was implemented despite the fact that these policies quite clearly did not extend to the conduct at issue. As the policies are not unconstitutionally vague, much less vague in a manner that is "especially problematic," we will affirm the District Court's grant of summary judgment on this issue.

For the foregoing reasons, the District Court's judgment will be affirmed in part [First Amendment free speech rights of J.S.], reversed in part and remanded [Fourteenth Amendment due process right of J.S.'s parents].

**Smith, *Circuit Judge,* concurring with whom McKEE, *Chief Judge,* SLOVITER, FUENTES, and HARDIMAN, *Circuit Judges,* join.**

[...] I fully agree with the majority's conclusion that it violated J.S.'s First Amendment rights. I write separately to address a question that the majority opinion expressly leaves open: whether Tinker applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.

*Tinker*'s holding is expressly grounded in "the special characteristics of the school environment," 393 U.S. at 506, and the need to defer to school officials' authority "to prescribe and control conduct in the schools," *id*.at 507.1 The Court's later school-speech cases underscored *Tinker*'s narrow reach. *Tinker*, according to the Court's decision in Fraser, rests on the understanding that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," see 478 U.S. at 682, and that students area captive audience while at school, see *id*. at 684. See also *id*. at 688 n.1 (Brennan, J., concurring in judgment) (stating that the Court's school-speech cases "obviously do not [apply] outside of the school environment"). *Kuhlmeier*, moreover, described *Tinker* as "address[ing] educators' ability to silence a student's personal expression that happens to occur on the school premises." 484 U.S. at 271. Finally, in *Morse*, the Court took care to refute the contention that the plaintiff's speech, which took place at a school field trip, did not occur "at school." 551 U.S. at 401. In concluding that the plaintiff's suit was governed by the *Tinker* line of cases, the Court stressed that the field trip "occurred during normal school hours," that it "was sanctioned by [the principal] as an approved social event or class trip," that "[t]eachers and administrators were interspersed among the students and charged with supervising them," and that the "high school band and cheerleaders performed." Id. at 400–01. If *Tinker* and the Court's other school-speech precedents applied to off-campus speech, this discussion would have been unnecessary. See also id. at 406 ("'First . . . Amendment rights [] are different in public schools than elsewhere.'") (quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)).

I agree with Thomas and Porter, and I believe that various post-*Tinker* pronouncements of the Supreme Court support their *ratio decidendi*. Applying *Tinker* to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students' expressively activity no matter where it takes place, when it occurs, or what subject matter it involves – so long as it causes substantial disruption at school.

There is no First Amendment exception for offensive speech or for speech that lacks a certain quantum of social value. [...] It is worth pointing out, as well, that although speech like J.S.'s may appear to be worthless, it does enable citizens to vent their frustrations in nonviolent ways. We ought not to discount the importance in our society of such a "safety valve."

In any event, this case does not require us to precisely define the boundary between on- and off-campus speech, since it is perfectly clear that J.S.'s speech took place off campus. J.S. created the Myspace profile at home on a Sunday evening; she did not send the profile to any school employees; and she had no reason to know that it would make its way onto campus. In fact, she took steps to limit dissemination of the profile, and the Myspace website is blocked on school computers. If ever speech occurred outside of the school setting, J.S.'s did so.

Having determined that J.S.'s speech took place off campus, I would apply ordinary First Amendment principles to determine whether it was protected. I agree with the majority that this was protected speech. The speech was not defamatory, obscene, or otherwise unprotected.

* * *

J.S. said vulgar, offensive things about her principal on Myspace. And she went beyond that. She wrote cutting, mean-spirited things about members of his family. If we could suppress her speech without silencing other, more deserving speakers, public discourse would suffer no harm. But courts have long disclaimed the ability to draw a principled distinction between ― worthless "and ―valuable" speech. We must tolerate thoughtless speech like J.S.'s in order to provide adequate breathing room for valuable, robust speech—the kind that enriches the marketplace of ideas, promotes self-government, and contributes to self-determination. Without condoning her disrespectful and 10mean-spirited tone, I support J.S.'s right to say the things she said free from government punishment.

**FISHER, *Circuit Judge,* dissenting, with whom SCIRICA, RENDELL, BARRY, JORDAN, and VANASKIE, *Circuit Judges,* join.**

Today's holding severely undermines schools' authority to regulate students who "materially and substantially disrupt the work and discipline of the school." [...] While I agree with the majority's apparent adoption of the rule that off-campus student speech can rise to the level of a substantial disruption, I disagree with the Court's application of that rule to the facts of this case. The majority misconstrues the facts. In doing so, it allows a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and personal language. I fear that our Court leaves schools defenseless to protect teachers and school officials against such attacks and powerless to discipline students for the consequences of their actions.

I respectfully dissent from the majority's ruling that the Blue Mountain School District's ten-day suspension of J.S. for making false accusations against McGonigle violated her First Amendment right to free speech. The majority holds that "[t]he facts in this case do not support the conclusion that a forecast of substantial disruption was reasonable." Maj. Op. at 15. But the majority makes light of the harmful effects of J.S.'s speech and the serious nature of allegations of sexual misconduct. Broadcasting a personal attack against a school official and his family online to the school community not only causes psychological harm to the targeted individuals but also undermines the authority of the school. It was permissible for the School District to discipline J.S. because substantial disruption was reasonably foreseeable.

I.

I disagree with the majority's assessment that the four opinions of the Supreme Court on student speech "compel the conclusion that the School District violated J.S.'s First Amendment free speech rights." Maj. Op. at 11. In fact, the Supreme Court has never addressed whether students have the right to make off-campus speech that targets school officials with malicious, obscene, and vulgar accusations.

The Supreme Court has only briefly and ambiguously considered whether schools have the authority to regulate student off-campus speech. [...] But it is unclear if "in class or out of it" means to distinguish the classroom from the world beyond the schoolhouse gates, or if it simply means out of class but in the cafeteria, schoolyard, or other areas on school grounds.
The Court, however, did state in dicta that schools have more limited authority to regulate obscene speech outside of the school environment when it claimed that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." Id.at 404 (citing Cohen v. California, 403 U.S. 15 (1971)). But the Court did not address the issue of whether schools can regulate off-campus speech which causes substantial on-campus disruption under Tinker.

II.

I believe that the rule adopted by the Supreme Court in Tinker should determine the outcome of this case. Under Tinker, we must examine whether J.S.'s speech created a significant threat of substantial disruption at the Middle School. School authorities need not wait until the disruption actually occurs if they are able to "demonstrate any facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities." Tinker, 393 U.S. at 514. If the Middle School reasonably forecasted substantial disruption, then it had the authority to regulate J.S.'s speech. The majority seems to acknowledge just as much, but finds that "[t]he facts simply do not support the conclusion that the School District could

have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile." Maj. Op. at 21.

The majority is correct in finding it appropriate to distinguish the facts of Tinker, but it fails to heed several salient distinctions that compel the opposite conclusion. The speech in Tinker was political speech, was not directed at the school or at school officials, and was not vulgar, obscene, malicious, or harmful. Moreover, the majority misconstrues the facts of this case, making light of J.S."s accusations and underestimating its impact.

A.

Schools should foster an environment of learning that is vital to the functioning of a democratic system and the maturation of a civic body.

B.

If J.S.'s speech went unpunished, it would undermine McGonigle's authority and disrupt the educational process. Second, J.S.'s speech posed a reasonably foreseeable threat of disrupting the operations of the classroom.

It was foreseeable that J.S."s false accusations and malicious comments would disrupt McGonigle and Frain's ability to perform their jobs.

1.

J.S.'s speech posed a threat of substantial disruption to the educational environment. The majority fails to recognize the effects of accusations of sexual misconduct.

Such accusations interfere with the educational process by undermining the authority of school officials to perform their jobs. [...] J.S. did not only refer to her principal as a "dick" but launched a vulgar attack on his character and accused him of sexual misconduct. J.S. embarrassed, belittled, and possibly defamed McGonigle. If J.S. were not disciplined, it would demonstrate to the student body that this form of speech is acceptable behavior – whether on or off campus.

2.

The majority also overlooks the substantial disruptions to the classroom environment that follow from personal and harmful attacks on educators and school officials. J.S."s speechattacked McGonigle and Frain in personal and vulgar terms and broadcasted it to the school community. This kind of harassment has tangible effects on educators. It may cause teachers to leave the school and stop teaching altogether, and those who decide to stay are oftentimes less effective. See Jina S. Yoon, Teacher Characteristics as Predictors of Teacher-Student Relationships: Stress, Negative Affect, and Self-Efficacy, 30 Soc. Behav. & Personality 485, 491 (2002) ("Not only does teacher stress affect teachers' general attitude toward teaching, but also it is likely to influence the quality of their relationships with students."); Suzanne Tochterman & Fred Barnes, Sexual Harassment in the Classroom: Teachers as Targets, 7 Reclaiming Child & Youth 21, 22 (1998) (noting that educators who are subject to sexual harassment feel: "detachment; shame; horror; uncertainty; demoralization; fear; feelings of being unappreciated, targeted, objectified, belittled, and victimized; sadness; anger; avoidance; feeling defeated; blame; separation; and attack"). Educators become anxious and depressed and feel unable to relate to their students. Id. They lose their motivation to teach, and their students suffer as a result. "Even if the school official remains at the school, 'anxious, depressed or disengaged teachers are less able to sustain the academic engagement of their students,' thus harming student motivation and behavior." Waldman, supra at 646 (quoting Benoit Galand, et al., School

Violence and Teacher Professional Disengagement, 77 Brit. J. of Educ. Psychol. 465, 467 (2007)).

J.S.'s speech had a reasonably foreseeable effect on the classroom environment. In addition to causing a diminution in respect for authority and a diversion of school resources, J.S.'s speech posed reasonably foreseeable psychological harm to McGonigle and Frain that would impact their ability to perform their jobs. Being subject to such personal attacks, they may have been discouraged to interact with students and perhaps even motivated to leave without the institutional support of the School. Without effective punishment, McGonigle and Frain would have been less effective in fulfilling the educational mission of their positions. Furthermore, if the Middle School did not punish J.S., it was foreseeable that other students may have decided to personally attack McGonigle, Frain, or other members of the school. Cf. Morse, 551 U.S. at 409-10 (noting the "difficult" and "vitally important" role that school principals play and reasoning that "failing to act would send a powerful message to the students" in affirming school's 10-day suspension of student for speech promoting illegal drug use). The Middle School protected its employees against such a vicious and personal attack, thereby preventing substantial disruption of the classroom environment. I believe our Court errs in precluding schools from protecting teachers and officials against such harassment.

3.

The majority also draws conclusions from the fact that Superintendent Romberger had a duty to report allegations of misconduct and did not do so in this particular case. But the fact that Superintendent Romberger chose not to report the misconduct does not mean that it should not have been reported. Moreover, other schools who face this situation may properly choose to report allegations of misconduct. Our Court does a disservice when it treats allegations of sexual misconduct lightly and condones school districts for not taking action. The majority claims that no one could take the contents of J.S."s post seriously. Id. But stating that the principal of a middle school has sex in his office and is a "sex addict" who enjoys "hitting on children and their parents" are serious allegations that cannot be taken lightly by any school official or by our Court.

IV.

But I respectfully dissent from the decision that the suspension of J.S. for making false and malicious accusations against her principal in the form of lewd and offensive speech violated her First Amendment rights. In student free speech cases, courts must grapple with the issue of promoting freedom of expression while maintaining a conducive learning environment. I believe the majority has unwisely tipped the balance struck by Tinker, Fraser, Kuhlmeier, and Morse, thereby jeopardizing schools" ability to maintain an orderly learning environment while protecting teachers and school officials against harmful attacks.

# UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

B.H., a minor, by and through her mother; JENNIFER HAWK; K.M., a minor by and through her; AMY MCDONALD-MARTINEZ

v.

EASTON AREA SCHOOL DISTRICT, Appellant

On Appeal from the United States District Court For the Eastern District of Pennsylvania

Argued on April 10, 2012

Rehearing En Banc Ordered on August 16, 2012

Argued En Banc February 20, 2013

## OPINION OF THE COURT

**SMITH, *Circuit Judge*, with whom McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, FISHER, and VANASKIE, *Circuit Judges* join.**

Once again, we are asked to find the balance between a student's right to free speech and a school's need to control its educational environment. In this case, two middle-school students purchased bracelets bearing the slogan "I ♥ boobies! (KEEP A BREAST)" as part of a nationally recognized breast-cancer-awareness campaign. The Easton Area School District banned the bracelets, relying on its authority under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), to restrict vulgar, lewd, profane, or plainly offensive speech, and its authority under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to restrict speech that is reasonably expected to substantially disrupt the school. The District Court held that the ban violated the students' rights to free speech and issued a preliminary injunction against the ban.

We agree with the District Court that neither *Fraser* nor *Tinker* can sustain the bracelet ban. The scope of a school's authority to restrict lewd, vulgar, profane, or plainly offensive speech under *Fraser* is a novel question left open by the Supreme Court, and one which we must now resolve. We hold that *Fraser*, as modified by the Supreme Court's later reasoning in *Morse v. Frederick*, 551 U.S. 393 (2007),

sets up the following framework: (1) plainly lewd 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 but that a reasonable observer could interpret as lewd 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 and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted. Because the bracelets here are not plainly lewd and because they comment on a social issue, they may not be categorically banned under *Fraser*. The School District has also failed to show that the bracelets threatened to substantially disrupt the school under *Tinker*. We will therefore affirm the District Court.

## I.

### A. Factual background

In mid- to late September, four or five teachers asked the eighth-grade assistant principal, Amy Braxmeier, whether they should require students to remove the bracelets. The seventh-grade assistant principal, Anthony Viglianti, told the teachers that they should ask students to remove "wristbands that have the word 'boobie' written on them," App. 343, even though there were no reports that the bracelets had caused any in-school disruptions or inappropriate comments.

Later that day, a school security guard noticed B.H. wearing an "I ♥ boobies! (KEEP A BREAST)" bracelet and ordered her to remove it. B.H. refused. After meeting with Braxmeier, B.H. relented, removed her bracelet, and returned to lunch. No disruption occurred at any time that day.

The following day, B.H. and K.M. each wore their "I ♥ boobies! (KEEP A BREAST)" bracelets to observe the Middle School's Breast Cancer Awareness Day. The day was uneventful—until lunchtime. Once in the cafeteria, both girls were instructed by a school security guard to remove their bracelets. Both girls refused. Hearing this encounter, another girl, R.T., stood up and similarly refused to take off her bracelet. Confronted by this act of solidarity, the security guard permitted the girls to finish eating their lunches before escorting them to Braxmeier's office. Again, the girls' actions caused no disruption in the cafeteria, though R.T. told Braxmeier that one boy had immaturely commented either that he also "love[d] boobies" or that he "love[d] her boobies."

Braxmeier spoke to all three girls, and R.T. agreed to remove her bracelet. B.H. and K.M. stood firm, however, citing their rights to freedom of speech. The Middle School administrators were having none of it. They punished B.H. and K.M. by giving each of them one and a half days of in-school suspension and by forbidding them from attending the Winter Ball. The administrators notified the girls' families, explaining only that B.H. and K.M. were being disciplined for "disrespect," "defiance," and "disruption."

B. Procedural history

It soon became clear that the School District's rationale for disciplining B.H. and K.M. had shifted. Although B.H.'s and K.M.'s disciplinary letters indicated only that they were being disciplined for "disrespect," "defiance," and "disruption," the School District ultimately based the ban on its dress-code policy6 together with the bracelets' alleged sexual innuendo. According to the School District's witnesses, the Middle School assistant principals had conferred and concluded that the bracelets "conveyed a sexual double entendre" that could be harmful and confusing to students of different physical and sexual developmental levels. Sch. Dist.'s Br. at 9. And the principals believed that middle-school students, who often have immature views of sex, were particularly likely to interpret the bracelets that way. For its part, the Foundation explained that no one there "ever suggested that the phrase 'I (Heart) Boobies!' is meant to be sexy." App. 150. To that end, the Foundation had denied requests from truck stops, convenience stores, vending machine companies, and pornographers to sell the bracelets.

III.

The School District defends the bracelet ban as an exercise of its authority to restrict lewd, vulgar, profane, or plainly offensive student speech under *Fraser*. As to the novel question of *Fraser*'s scope, jurists seem to agree on one thing: "[t]he mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404.7 On this point, we think the Supreme Court's student- speech cases are more consistent than they may first appear. As we explain, *Fraser* involved only *plainly* lewd speech. We hold that, under *Fraser*, a school may also categorically restrict speech that—although not *plainly* lewd, vulgar, or profane—could be interpreted by a reasonable observer as lewd, vulgar, or profane so long as it could not also plausibly be interpreted as commenting on a political or social issue. Because the "I ♥ boobies! (KEEP A BREAST)" bracelets are not plainly lewd and express support for a national breast-cancer- awareness campaign—unquestionably an important social issue—they may not be categorically restricted under *Fraser*.

A. The Supreme Court's decision in *Fraser*

Under *Tinker*'s "general rule," the government may restrict school speech that threatens a specific and substantial disruption to the school environment or that "inva[des] . . . the rights of others." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211, 214 (3d Cir. 2001) (citing *Tinker*, 393 U.S. at 504). Since *Tinker*, the Supreme Court has identified three "narrow" circumstances in which the government may restrict student speech even when there is no risk of substantial disruption or invasion of others'

rights. *Id.* at 212. First, the government may categorically restrict vulgar, lewd, profane, or plainly offensive speech in schools, even if it would not be obscene outside of school. *Fraser*, 478 U.S. at 683, 685. Second, the government may likewise restrict speech that "a reasonable observer would interpret as advocating illegal drug use" and that cannot "plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422 (Alito, J., concurring); *see also id.* at 403 (majority opinion) ("[T]his is plainly not a case about political debate over the criminalization of drug use or possession."). And third, the government may impose restrictions on school- sponsored speech that are "reasonably related to legitimate pedagogical concerns"—a power usually lumped together with the other school-specific speech doctrines but that, strictly speaking, simply reflects the government's more general power as sovereign over government-sponsored speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

It is important to recognize what was not at stake in *Fraser*. *Fraser* addressed only a school's power over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non- lewd.

And because it was plainly lewd, the Court did not believe that Fraser's speech could plausibly be interpreted as political or social commentary.

## B. How far does a school's authority under *Fraser* extend?

The School District asks us to extend *Fraser* in at least two ways: to reach speech that is ambiguously lewd, vulgar, or profane and to reach speech on political or social issues. The first step is justified, but the second is not.

### 1. Under *Fraser*, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter.

### 2. *Fraser* does not permit a school to restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue.

A school's leeway to categorically restrict ambiguously lewd speech, however, ends when that speech could also plausibly be interpreted as expressing a view on a political or social issue. Justices Alito and Kennedy's concurrence in *Morse* adopted a similar protection for political speech that could be interpreted as illegal drug advocacy. Their narrower rationale protecting political speech limits and controls the majority opinion in *Morse*, and it applies with even greater force to ambiguously lewd speech.

Justice Alito would have protected political or social speech reasonably interpreted to advocate

illegal drug use, and that protection applies even more strongly to ambiguously lewd speech. In *Morse*, the Court added a new categorical exception to *Tinker*: student speech that a reasonable observer could interpret as advocating illegal drug use but that cannot plausibly be interpreted as addressing political or social issues. *Id.* at 422. The exception was justified because illegal drugs pose an "immediately obvious," "grave" and "unique threat to the physical safety of students." *Id.* at 425. Despite that threat, however, the Court held that speech advocating illegal drug use is not categorically unprotected if it "can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use." *Id.* at 422 (internal quotation marks omitted). Even with that limitation, the Court made clear that this new exception to *Tinker* "stand[s] at the far reaches of what the First Amendment permits." *Id.* at 425.

If speech posing such a "grave" and "unique threat to the physical safety of students" can be categorically regulated only when it cannot "plausibly be interpreted as commenting on any political or social issue"—and that regulation nonetheless "stand[s] at the far reaches of what the First Amendment permits"—then there is no reason why ambiguously lewd speech should receive any less protection when it also "can plausibly be interpreted as commenting on any political or social issue." *Id.* at 422, 425. […] It would make no sense to afford a T-shirt exclaiming "I ♥ pot! (LEGALIZE IT)" protection under *Morse* while declaring that a bracelet saying "I ♥ boobies! (KEEP A BREAST)" is unprotected under *Fraser*.

Consequently, we hold that the *Fraser* exception does not permit ambiguously lewd speech to be categorically restricted if it can plausibly be interpreted as political or social speech.

### 3. Under *Fraser*, schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary.

As the Supreme Court made clear in *Fraser*, though, schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted to comment on a political or social issue. *Fraser*, 478 U.S. at 682 ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's ["Fuck the Draft"] jacket."). That is true by definition. Plainly lewd speech "offends for the same reasons obscenity offends" because the speech in that category is "no essential part of any exposition of ideas" and thus carries very "slight social value." *Id.* at 683 (quoting *Pacifica Found.*, 438 U.S. at 746 (plurality opinion)). As with obscenity in general, obscenity to minors, and all other historically unprotected categories of speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required" because "the balance of competing interests is clearly struck." *Stevens*, 130 S. Ct. at 1585–86 (quoting *New York v. Ferber*, 458 U.S. 747, 763–64 (1982)). In other words, we do not engage in a case-by-case determination of whether obscenity to minors—and by extension, plainly lewd speech under *Fraser*—carries social value. As a result, schools may continue to regulate plainly lewd, vulgar, profane, or offensive speech under *Fraser* even if a particular instance of such speech can "plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422 (Alito, J., concurring).

In *Tinker*, *Hazelwood*, and *Morse*, the Supreme Court independently evaluated the meaning of the student's speech and the reasonableness of the school's interpretation and actions. There is no reason the

school's authority under *Fraser* should receive special treatment. More importantly, such an approach would swallow the other student-speech cases, including *Tinker*, effectively eliminating judicial review of student-speech restrictions. *See Guiles*, 461 F.3d at 327 (making this point). That is precisely why the Supreme Court in *Morse* explicitly rejected total deference to school officials:

> The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." . . . The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

*Morse*, 551 U.S. at 423 (Alito, J., concurring).

The School District invokes a parade of horribles that, in its view, would follow from our framework: protecting ambiguously lewd speech that comments on political or social issues—like the bracelets in this case— will encourage students to engage in more egregiously sexualized advocacy campaigns, which the schools will be obliged to allow. *See* Pa. Sch. Bd. Ass'n Amicus Br. in Supp. of Appellant at 19 (listing examples, including "I ♥ Balls!" apparel for testicular cancer, and "I ♥ Va Jay Jays" apparel for the Human Papillomaviruses); App. 275–76 (raising the possibility of apparel bearing the slogans "I ♥ Balls!" or "I ♥ Titties!"). Like all slippery- slope arguments, the School District's point can be inverted with equal logical force. If schools can categorically regulate terms like "boobies" even when the message comments on a social or political issue, schools could eliminate all student speech touching on sex or merely having the potential to offend.

We have no reason to think either that the parents of middle-school students will be willing to allow their children to wear apparel advocating political or social messages in egregious terms or that a student will overcome the typical middle-schooler's embarrassment, immaturity, and social pressures by wearing such apparel. And many of the School District's hypotheticals pose no worries under our framework. A school could categorically restrict an "I ♥ tits! (KEEP A BREAST)" bracelet because, as the Supreme Court explained in *Pacifica*, the word "tits" (and also presumably the diminutive "titties") is a patently offensive reference to sexual organs and thus obscene to minors.

To recap: Under the government's sovereign authority, a school may categorically ban obscenity, fighting words, and the like in schools; the student- speech cases do not supplant the government's sovereign powers to regulate speech. […] Under *Fraser*, a school may categorically restrict plainly lewd, vulgar, or profane speech that "offends for the same reasons obscenity offends" regardless of whether it can plausibly be interpreted as commenting on social or political issues. *Saxe*, 240 F.3d at 213 (quoting *Fraser*, 478 U.S. at 685). As we have explained, see *supra* at 20–21, plainly lewd speech cannot, by definition, be plausibly interpreted as political or social commentary because the speech offends for the

same reason obscenity offends and thus has slight social value. *Fraser* also permits a school to categorically restrict ambiguous speech that a reasonable observer could interpret as having a lewd, vulgar, or profane meaning so long as it could not also plausibly be interpreted as commenting on a social or political issue. But *Fraser* does not permit a school to categorically restrict ambiguous speech that a reasonable observer could interpret as having a lewd, vulgar, or profane meaning and could plausibly interpret as commenting on a social or political issue. And of course, if a reasonable observer could not interpret the speech as lewd, vulgar, or profane, then *Fraser* simply does not apply. As always, a school's other powers over student speech under *Tinker*, *Kuhlmeier*, and *Morse* remain as a backstop.

### 4. The Middle School's ban on "I ♥ boobies!" (KEEP A BREAST)" bracelets.

Under this framework, the School District's bracelet ban is an open-and-shut case. The "I ♥ boobies! (KEEP A BREAST)" bracelets are not plainly lewd. The slogan bears no resemblance to Fraser's "pervasive sexual innuendo" that was "plainly offensive to both teachers and students." *Fraser*, 478 U.S. at 683. Teachers had to request guidance about how to deal with the bracelets, and school administrators did not conclude that the bracelets were vulgar until B.H. and K.M. had worn them every day for nearly two months. In addition, the Middle School used the term "boobies" in announcing the bracelet ban over the public address system and the school television station. What's more, the bracelets do not contain language remotely akin to the seven words that are considered obscene to minors on broadcast television. *Pacifica Found.*, 438 U.S. at 745– 46 (plurality opinion); *LaVine*, 257 F.3d at 989 (concluding that speech was not vulgar, lewd, obscene, or plainly offensive because it was "not 'an elaborate, graphic, and explicit sexual metaphor' as was the student's speech in *Fraser*, nor [did] it contain the infamous seven words that cannot be said on the public airwaves" under *Pacifica*). Indeed, the term "boobie" is no more than a sophomoric synonym for "breast." And as the School District also concedes, a reasonable observer would plausibly interpret the bracelets as part of a national breast-cancer-awareness campaign, an undeniably important social issue. Oral Arg. Tr. at 10:11–16; *see also K.J. ex rel. Braun v. Sauk Prairie Sch. Dist.*, No. 11-CV-622, slip op. at 14 (W.D. Wis. Feb. 6, 2012) ("When one reads the entire phrase, it is clearly a message designed to promote breast cancer awareness."). Accordingly, the bracelets cannot be categorically banned under *Fraser*.

## IV.

Under *Tinker*'s "general rule," the government may restrict school speech "that threatens a specific and substantial disruption to the school environment" or "inva[des] . . . the rights of others." *Saxe*, 240 F.3d at 211 (citing *Tinker*, 393 U.S. at 504).

Here, the record of disruption is even skimpier. When the School District announced the bracelet ban, it had no more than an "undifferentiated fear or remote apprehension of disturbance." *Sypniewski*, 307 F.3d at 257. The bracelets had been on campus for at least two weeks without incident. *B.H.*, 827 F. Supp. 2d at 408; *see also* App. 13 ("[N]one of the three principals had heard any reports of disruption or student misbehavior linked to the bracelets. Nor had any of the principals heard reports of inappropriate comments about 'boobies.'"). That track record "speaks strongly against a finding of likelihood of disruption." *Sypniewski*, 307 F.3d at 254.

The School District instead relies on two incidents that occurred after the ban. In one, a female student told a teacher that she believed some boys had remarked to girls about their "boobies" in relation to the bracelets— an incident that was never confirmed. *B.H.*, 827 F. Supp. 2d at 408. In the other, two female students were discussing the bracelets during lunch, and a boy interrupted them to say "I want boobies" while "making inappropriate gestures with two spherical candies." *Id.* The boy was suspended for a day. *Id.*

Given that Tinker's black armband—worn to protest a controversial war and divisive enough to prompt reactions from other students—was not a substantial disruption, neither is the "silent, passive expression" of breast-cancer awareness.24*Tinker*, 393 U.S. at 508. If anything, the fact that these incidents did not occur until *after* the School District banned the bracelets suggests that the ban "*exacerbated* rather than contained the disruption in the school." *J.S.*, 650 F.3d at 931 (drawing this same conclusion on a similar record).

According to the School District, the "I ♥ boobies! (KEEP A BREAST)" bracelet was "deemed inappropriate for school due to the likelihood of a resultant increase in student-on-student sexual harassment." Sch. Dist.'s Br. at 54.

That argument suffers from several flaws, not the least of which is the School District's failure to raise it in the District Court and that Court's consequent failure to address it. […] Even assuming that protecting students from harassment under Title IX would satisfy *Tinker*'s rights- of-others prong,25 the School District does not explain why the bracelets would breed an environment of pervasive and severe harassment.

The bracelet ban cannot be upheld on the authority of *Tinker*.

V.

The ban prevents B.H. and K.M. from exercising their right to freedom of speech, which "unquestionably constitutes irreparable injury." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

The School District complains that unless the bracelet ban stands, it "has no clear guidance" on how to enforce its dress code. Appellant's Br. at 60. But the injunction addresses only the School District's ban of the "I ♥ boobies! (KEEP A BREAST)" bracelets. It does not enjoin the School District's regulation of other types of apparel, such as the "Save the ta-tas" T-shirt or testicular-cancer-awareness apparel bearing the phrase "feelmyballs.org." Whether the injunction stays or goes, the School District will have to continue making individualized assessments of whether it may restrict student speech consistent with the First Amendment, just as school administrators have always had to do.

Lastly, granting the preliminary injunction furthers the public interest. The School District argues that the injunction eliminates its "authority to manage its student population" and thus harms the public. Appellant's Br. at 61. Again, that hyperbolic protest ignores the narrow breadth of the injunction, which addresses only the constitutionality of the bracelet ban under the facts of this case. More importantly, allowing a school's unconstitutional speech restriction to continue "vindicates no public interest." *K.A.*, 2013 WL 915059, at 11 (citation omitted). For these reasons, the District Court did not abuse its discretion by enjoining the School District's bracelet ban.

* * * * *

School administrators "have a difficult job," and we are well-aware that the job is not getting any easier. *Morse*, 551 U.S. at 409. Besides the teaching function, school administrators must deal with students distracted by cell phones in class and poverty at home, parental under- and over-involvement, bullying and sexting, preparing students for standardized testing, and ever-diminishing funding. When they are not focused on those issues, school administrators must inculcate students with "the shared values of a civilized social order." *Fraser*, 478 U.S. at 683; *see also McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) ("Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.").

We do not envy those challenges, which require school administrators "to make numerous difficult decisions about when to place restrictions on speech in our public schools." *Morgan v. Swanson*, 659 F.3d 359, 420 (5th Cir. 2011) (en banc) (majority opinion of Elrod, J.). And the School District in this case was not unreasonably concerned that permitting "I ♥ boobies! (KEEP A BREAST)" bracelets in this case might require it to permit other messages that were sexually oriented in nature. But schools cannot avoid teaching our citizens- in-training how to appropriately navigate the "marketplace of ideas." Just because letting in one idea might invite even more difficult judgment calls about other ideas cannot justify suppressing speech of genuine social value. *Tinker*, 393 U.S. at 511 ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' (rather) than through any kind of authoritative selection.'" (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967))); *see id.* at 511 ("[S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" (citation omitted)).

We will affirm the District Court's order granting a preliminary injunction.

# UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

**B.H.,** a minor, by and through her mother**; JENNIFER HAWK; K.M.,** a minor by and through her**; AMY MCDONALD-MARTINEZ v. EASTON AREA SCHOOL DISTRICT,** Appellant

On Appeal from the United States District Court For the Eastern District of Pennsylvania

Argued on April 10, 2012

Rehearing En Banc Ordered on August 16, 2012

Argued En Banc February 20, 2013

**HARDIMAN, *Circuit Judge,* dissenting with whom CHARGERS, JORDAN, GREENAWAY, JR., and GREENBERG, join.**

Today the Court holds that twelve-year-olds have a constitutional right to wear in school a bracelet that says ―I ♥ boobies! (KEEP A BREAST).‖ Because this decision is inconsistent with the Supreme Court's First Amendment jurisprudence, I respectfully dissent.

I.

My colleagues conclude that the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), cannot justify the Easton Area School District's bracelet ban "because [the bracelets] comment on a social issue." Maj. Typescript at 6. This limitation on the ability of schools to regulate student speech that could reasonably be deemed lewd, vulgar, plainly offensive, or constituting sexual innuendo finds no support in *Fraser* or its progeny. The Majority's "high value speech" modification of *Fraser* is based on the following two premises it derives from the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007): first, that Justice Alito's concurrence in *Morse* is the "controlling" opinion in that case, Maj. Typescript at 21 n.10, 43, 45, 47; and second, that *Morse* "modified" the Supreme Court's decision in *Fraser*, Maj. Typescript at 6, 46–51. Both premises are wrong.

A.

The Majority implies that Justice Alito's concurrence provides a definitive, "controlling" answer to fill the void left by the *Morse* majority opinion, but the Supreme Court has disavowed this approach: "The Court would be in an odd predicament if a concurring minority of the Justices could force the majority to address a point they found it unnecessary (and did not wish) to address, under compulsion of [the dissent's] new principle that silence implies agreement." *Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001). Put another way, a majority "holding is not made coextensive with the concurrence because [the majority] opinion does not expressly preclude (is consistent with[]' . . .) the concurrence's approach." *Id.*

I also find it significant that, in the six years since *Morse* was decided, nine of ten appellate courts have cited as its holding the following standard articulated by Chief Justice Roberts in his opinion for the Court: "[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use," *Morse*, 551 U.S. at 403. Not one of these courts indicated that Justice Alito's concurrence controls, or that his dicta regarding "political or social speech" altered or circumscribed the Court's holding in *Morse*. We too have articulated the import of *Morse* consistent with these eight appellate courts: "[I]n *Morse*, the Court held that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107 (3d Cir. 2013) (citation omitted). This widespread consensus is further proof that Chief Justice Roberts's majority opinion, not Justice Alito's concurrence, is the controlling opinion in *Morse*.

For the reasons stated, I would not read Justice Alito's concurrence as altering or circumscribing a majority opinion for the Court that he joined *in toto*. Thus, the Court's holding in *Morse* remains the familiar articulation that has been consistently stated, time and again, by this Court and eight other Courts of Appeals: "[A] principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." *Morse*, 551 U.S. at 403.

B.

The District Court concluded that only the standards of *Tinker* and *Fraser* are implicated, and neither party ever argued otherwise. *See B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 394 (E.D. Pa. 2011) ("The two Supreme Court cases examining student speech that are most relevant to this case are *Fraser* and *Tinker*."). The School District primarily contends that the "I ♥ boobies!" bracelets are proscribable because they express sexual innuendo that can reasonably be classified in the middle school context as lewd, vulgar, and indecent speech. Plaintiffs rejoin that the word "boobies" is neither inherently sexual nor vulgar, especially when conspicuously tied to breast cancer awareness. Until the case reached the *en banc* Court, no party or judge had suggested that *Morse* provided the governing standard for this dispute. And rightly so, because this is a *Fraser* case, not a *Morse* case, and there are critical differences between the two.

The fact that courts have maintained analytical separation among the different *Tinker* carve-outs makes sense because the Supreme Court created each one for a unique purpose. In *K.A.* we addressed

these "vital interests that enable school officials to exercise control over student speech even in the absence of a substantial disruption." *K.A.*, 710 F.3d at 107. The vital interest at issue in *Morse* that "allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use" is "the special characteristics of the school environment, and the governmental interest in stopping student drug abuse." *Id.* (quoting *Morse*, 551 U.S. at 408). *Fraser* allowed schools to punish "lewd, indecent, or offensive speech," 478 U.S. at 683, to further "society's . . . interest in teaching students the boundaries of socially appropriate behavior," *K.A.*, 710 F.3d at 107 (quoting *Fraser*, 478 U.S. at 681). And in *Kuhlmeier*, the interest that "entitle[s] [educators] to exercise greater control over [school-sponsored publications]" is "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *K.A.*, 710 F.3d at 107 (quoting *Kuhlmeier*, 484 U.S. at 271). The Court's willingness to curtail the First Amendment rights of students to enable schools to achieve these important goals vindicates the principle that "the rights of students must be applied in light of the special characteristics of the school environment." *Morse*, 551 U.S. at 397 (quoting *Kuhlmeier*, 484 U.S. at 266). Because each case was intended to address a separate concern, I disagree with the Majority that language qualifying one type of carve-out applies equally to the others.

In sum, the Majority's approach vindicates any speech cloaked in a political or social message even if a reasonable observer could deem it lewd, vulgar, indecent, or plainly offensive. In both cases, the inappropriate language is identical, but the speech is constitutionally protected as long as it meets the Majority's cramped definition of "politics" or its as-yet-undefined notion of what constitutes "social commentary." *Fraser* repudiated this very idea. "The First Amendment guarantees wide freedom in matters of adult public discourse . . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers *a political point*, the same latitude must be permitted to children in a public school." *Fraser*, 478 U.S. at 682 (emphasis added).

## II.

In this close case, the "I ♥ boobies! (KEEP A BREAST)" bracelets would seem to fall into a gray area between speech that is plainly lewd and merely indecorous. Because I think it objectively reasonable to interpret the bracelets, in the middle school context, as inappropriate sexual innuendo and double entendre, I would reverse the judgment of the District Court and vacate the preliminary injunction.

The District Court correctly ascertained the standard of review to apply in a case that arises under *Fraser*, but proceeded to misapply that standard. First, by emphasizing whether Plaintiffs *intended* a vulgar or sexual meaning in their "I ♥ boobies!" bracelets and determining that a non- sexual, breast-cancer-awareness interpretation of the bracelets was reasonable, the Court inverted the proper question. Instead of asking whether it was reasonable to view the bracelets as an innocuous expression of breast cancer awareness, the District Court should have asked whether the school officials' interpretation of the bracelets—*i.e.*, as expressing sexual attraction to breasts—was reasonable. So long as the School

District's interpretation was objectively reasonable, the ban did not contravene the First Amendment or our school-speech jurisprudence.

Notwithstanding the facts supporting Plaintiffs' case, I conclude that "I ♥ boobies!" can reasonably be interpreted as inappropriate sexual double entendre. In the middle school context, the phrase can mean both "I support breast-cancer- awareness measures" and "I am attracted to female breasts." Many twelve- and thirteen-year-old children are susceptible to juvenile sexualization of messages that would be innocuous to a reasonable adult. Indeed, at least one bracelet- wearer acknowledged that "immature" boys might read a lewd meaning into the bracelets and conceded that she understood why the school might want to ban the bracelets, *B.H.*, 827 F. Supp. 2d at 399, and other students parroted the phrase on the bracelets while conveying sexual attraction to breasts. Another school administrator has concluded that the bracelets at issue here "elicit attention by sexualizing the cause of breast cancer awareness." *Sauk Prairie*, No. 11-cv- 622, at 4. And as Judge Crabb, the only other federal judge to consider these bracelets, put it in *Sauk Prairie*, "hints of vulgarity and sexuality" in the bracelets "attract attention and provoke conversation, a ploy that is effective for [KABF's] target audience of immature middle [school] students." *Id.* at 15. Finally, as the Gender Equality amicus brief points out, breasts are ubiquitously sexualized in American culture.

The Easton Area Middle School principals' willingness to say "boobies" to the entire school audience does not imply that the word does not have a sexual meaning; it merely suggests that "boobies" is not plainly lewd. Moreover, although KABF's decision not to market its products through porn stars and at truck stops is laudable, the interest such organizations have shown in the bracelets is further evidence that the bracelets are read by many to contain a sexual meaning. And the "I ♥ boobies!" bracelets' breast cancer message is not *so* obvious or overwhelming as to eliminate the double entendre. For one thing, the bracelets come in many colors other than the shade of pink widely associated with the fight against breast cancer.

Additionally, although Plaintiffs and their amici argue that the casual language of the "I ♥ boobies!" bracelets is intended to make breast cancer issues more accessible and less stigmatized for girls and young women, that purpose does not undermine the plausibility of a sexual interpretation of the bracelets. Nor does the fact that these Plaintiffs' mothers were happy not only to purchase the bracelets for their teenage daughters but also to wear them render the bracelets immune from school regulation. The mothers' intent that the bracelets convey a breast-cancer-awareness message, like Plaintiffs' own subjective motive, is irrelevant to interpreting the meaning of the speech.

Plaintiffs rely on the initial statements by teachers at the middle school that the word "breast" alone in any context and the phrases "breast cancer awareness" and "keep-a- breast.org" could also be banned to argue that the School District has left them no other means to convey their breast- cancer-awareness message. But those words were not banned—indeed, students are permitted to wear KABF's "check y♥urself!! (KEEP A BREAST)" bracelets—and the administrators changed their position prior to the evidentiary hearing, opining that such phrases would *not* be inappropriate at school. Also significant is the fact that the Easton Area Middle School has not stifled the message of breast cancer awareness; in the course of a robust breast cancer awareness campaign it merely imposed a permissible restriction on the *way* in which that message may be expressed. *See Saxe*, 240 F.3d at 213 ("*Fraser* speaks to the form and

manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint." (citation omitted)).

If indecency were permitted in schools merely because it was intended to advance some laudable goal, Matthew Fraser's speech would have been constitutionally protected insofar as he intended to win the attention of his classmates while advocating the election of his friend.

Finally, if we were to hold that the breast cancer message here makes any sexual reading of the bracelets unreasonable, schools would be obliged to permit more egregiously sexual advocacy messages. As Ms. DiVietro acknowledged, "other bodily parts in the human anatomy . . . can get cancer and . . . other types of slang terms" would have to be condoned. App. 275. DiVietro raised the specter of an "I ♥ Balls" slogan to support testicular cancer awareness. *Id.* at 275–76. These examples are not speculative. The Testicular Cancer Awareness Project sells "feelmyballs" bracelets to encourage male self-examinations and general awareness. *See* Testicular Cancer Awareness Project, http://www.feelmyballs.org/shop/front.php (last visited June 3, 2013). If middle school students have a constitutional right to wear "I ♥ boobies!" bracelets, it would be difficult to articulate a limiting principle that would disallow these other catchy phrases, so long as they were aimed at some socially beneficial objective.

Simply stated, the District Court correctly articulated the proper standard of review to be applied in cases that implicate *Fraser* (such as this one), but it strayed from that standard when evaluating the reasonableness of Plaintiffs' intended meaning. For that reason, and because the School District's reading of "I ♥ boobies!" as inappropriate sexual double entendre was a reasonable interpretation in the middle school context, I would hold that Plaintiffs cannot demonstrate a likelihood of success on the merits of their claim. Accordingly, the District Court abused its discretion in granting a preliminary injunction.

* * *

With respect, I dissent.

# UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

B.H., a minor, by and through her mother; JENNIFER HAWK; K.M., a minor by and through her; AMY MCDONALD-MARTINEZ

v.

EASTON AREA SCHOOL DISTRICT, Appellant

On Appeal from the United States District Court For the Eastern District of Pennsylvania

Argued on April 10, 2012

Rehearing En Banc Ordered on August 16, 2012

Argued En Banc February 20, 2013

**GREENAWAY, JR.,** ***Circuit Judge,*** **dissenting, with whom CHARGES, JORDAN, HARDIMAN and GREENBERG join.**

My colleagues have determined today that "I ♥ boobies" is an ambiguous phrase that may connote an attraction to female breasts, but which falls under the protection of the First Amendment in the middle school context because it may plausibly be interpreted as commenting on a political or social issue.

The Majority's test leaves school districts essentially powerless to exercise any discretion and extends the First Amendment's protection to a breadth that knows no bounds. As such, how will similarly-situated school districts apply this amorphous test going forward? The Majority's test has two obvious flaws. First, what words or phrases fall outside of the ambiguous designation other than the "seven dirty words"? Second, how does a school district ever assess the weight or validity of political or social commentary? The absence of guidance on both of these questions leaves school districts to scratch their heads.

The other practical problem which arises from application of the Majority's test is judging the validity of political and social comment. In the context of these social awareness campaigns, when would the students‟ involvement not invoke political or social comment? The constriction of "plausibly be interpreted as" adds little to our discourse. For instance,

when would a student using a term that is admittedly ambiguous not be able to assert that the use of the offending word, term, or phrase is speech that is commenting on a political or social issue? What is the balancing that a school district can/should/may engage in to determine the merit or value of the proposed political or social comment? The unabashed invocation of a lewd, vulgar, indecent or plainly offensive term is not what is at issue here; what is at issue is the notion that we have established a test which effectively has no parameters. The political or social issue prong entirely eviscerates the school district's authority to effectively evaluate whether the student's speech is indeed protected. This shortcoming in the application of the test exemplifies its inherent weakness — a failure to resolve the conundrum school districts face every day.

In light of the Majority's approach, school districts seeking guidance from our First Amendment jurisprudence in this context will find only confusion. I cannot adhere to this approach. I respectfully dissent.