No. 13-

IN THE

Supreme Court of the United States

EASTON AREA SCHOOL DISTRICT,

Petitioner,

v.

B.H., A MINOR, BOTH AND THROUGH HER MOTHER; JENNIFER HAWK; K.M., A MINOR BY AND THROUGH HER MOTHER; AMY MCDONALD-MARTINEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1968), this Court held that the First Amendment does not preclude school administrators from regulating student speech that they have "reason to anticipate…would substantially interfere with the work of the school or impinge upon the rights of the students." Characterized by First Amendment jurisprudence as an exception to *Tinker*, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 685, 685 (1986) this Court held that school administrators may restrict student speech for its vulgar or lewd manner. *Fraser* departed from the *Tinker* effects-based standard in order to support the "work of the schools," which includes imparting the values of civil discourse. This Court stated, "The determination of what manner of speech is inappropriate properly rests with the school board." *Id.* at 683. Moreover, also viewed as a *Tinker* carve out, in the case of *Morse v. Frederick*, 551 U.S. 393, 408 (2007), this Court stated that school administrators may restrict speech that they "reasonably regard as promoting illegal drug use." *Morse* allowed a type of viewpoint preclusion, even absence disruption, whereas *Fraser* is constrained to manner-based restrictions.

The questions presented are:

1. Did the Third Circuit err in constructing a new test for the application of *Fraser* that would prohibit regulation of lewd expression in the public schools, even in the absence of issue preclusion?

2. Did the Third Circuit misapply the narrowest grounds doctrine to hold that *Morse* dictated a modification of the holding in *Fraser* by creating a two-part test for regulation of expression controlled by *Fraser*?

3. Did the Third Circuit abuse its discretion in failing to give due deference to school administrators' objectively reasonable determination that a sexual double entendre constituted lewd or vulgar speech which could be prohibited under Fraser?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner, the Easton Area School District, was the defendant before the United States District Court of the Eastern District of Pennsylvania and the appellant before the Third Circuit Court of Appeals. The Easton Area School District is a public school district of the second class, operating under Pennsylvania Public School Code of 1949, 24 P.S. § 1-101, *et seq.*

Respondents are B.H., through her mother Jennifer Hawk, and K.M., through her mother, Amy McDonald-Martinez. Before the United States District Court of the Easton District of Pennsylvania, Respondents were the plaintiffs; before the Third Circuit Court of Appeals, Respondents were the appellees.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS..... iv

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISION INVOLVED..... 1

STATEMENT OF THE CASE 1

DISTRICT COURT PROCEEDINGS..... 12

COURT OF APPEALS *EN BANC* OPINION..... 12

REASONS FOR GRANTING THE WRIT 14

I. SCHOOL ADMINISTRATORS SHOULD HAVE THE AUTHORITY TO PROHIBIT SPEECH REASONABLY DEEMED LEWD, PARTICULARLY WHERE THE BAN DOES NOT PRECLUDE THE VIEWPOINT OF THE SPEAKER. 15

Table of Contents

Page

II. THE THIRD CIRCUIT APPLIED AN INCORRECT LEGAL STANDARD BASED UPON ITS MISAPPLICATION OF THE NARROWEST GROUNDS DOCTRINE. 22

III. ON THE CONTROLLING OPINION IN MORSE, TWO COURTS OF APPEALS HAVE ENTERED DECISIONS IN CONFLICT WITH THE DECISIONS OF OTHER COURT OF APPEALS. 25

IV. THE THIRD CIRCUIT'S OPINION REJECTS THE APPLICATION OF LOCAL COMMUNITY STANDARDS IN THE DECISION OF WHAT IS ACCEPTABLE EXPRESSION IN SCHOOLS.. 28

CONCLUSION 34

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 5, 2013 . . . . . 1a

APPENDIX B — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED APRIL 12, 2011 . . . . . 94a

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 5, 2013. . . . . 131a

APPENDIX D — POLICIES OF THE BOARD OF EDUCATION, EASTON AREA SCHOOL DISTRICT, REGARDING STUDENT DRESS. 137a

APPENDIX E — MEMORANDUM ISSUED BY DIRECTOR OF TEACHING AND LEARNING (K-12), STEPHEN FURST. 143a

APPENDIX F — PHOTOCOPY OF B.H. AND K.M.'S "I LOVE BOOBIES!" BRACELETS 145a

Table of Appendices

Page

APPENDIX G — PHOTOCOPY OF T-SHIRTS WORN BY EASTON AREA SCHOOL DISTRICT ADMINISTRATORS ON THE SCHOOL DISTRICT'S BREAST CANCER AWARENESS DAY 147a

APPENDIX H — UNPUBLISHED OPINION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, FILED FEBRUARY 6, 2012. . . . 149a

TABLE OF CITED AUTHORITIES

Page

CASES

Alexander v. Sandoval,
532 U.S. 275 (2001). 24

B.H. ex rel. Hawk v. Easton Area Sch. Dist.,
725 F.3d 293 (3d Cir. 2013) . . . . . *passim*

Boim v. Fulton Cnty. Sch. Dist.,
494 F.3d 978 (11th Cir. 2007). 22

Bragg v. Swanson,
371 F. Supp. 2d 814 (W.D. Va. 2005). 34

Broussard ex rel. Lord v.
School Board of Norfolk,
801 F. Supp. 1526 (D. Va. 1992). 20, 32, 33

Corder v. Lewis Palmer Sch. Dist. No. 38,
566 F.3d 1219 (10th Cir. 2009). 22

Defoe ex rel. Defoe v. Spiva,
625 F.3d 324 (6th Cir. 2010). 17, 22

DePinto v. Bayonne Bd. of Educ.,
514 F. Supp. 2d 633 (D.N.J. 2007). 20

D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60,
647 F.3d 754 (8th Cir. 2011). 22

Doninger v. Niehoff,
527 F.3d 41 (2d Cir. 2008) 33

Page

Doninger v. Niehoff,
642 F.3d 334 (2d Cir. 2011) 22

FCC v. Pacifica Foundation,
438 U.S. 726 (1978). 19, 31

Fraser v. Bethel Sch. Dist. No. 403,
755 F.2d 1356, 1363 (9th Cir. 1985) . . . . . *passim*

Guiles ex rel. Guiles v. Merineau,
461 F.3d 320 (2d Cir. 2006) 33

Hardwick ex rel. Hardwick v. Heyward,
711 F.3d 426 (4th Cir. 2013). 22

J.A. v. Fort Wanye Comty Sch.,
No. 1:12-cv-155 JVB, 2013 WL 4479229
(N.D. Ind. Aug. 20,2013) . . . . . *passim*

K.J. v. Sauk Prairie School District,
22-CV-622-BBC (W.D. Wis. Feb.
6, 2012). 20, 27, 30, 33

Marks v. United States,
430 U.S. 188 (1977). 23, 24

Memoirs v. Massachusetts,
383 U.S. 413 (1966). 23

Mercer v. Harr,
No. H-04-3454, 2005 WL 1828581 (S.D. Tex. 2005) . .33

Page

Morgan v. Plano Indep. Sch. Dist.,
589 F.3d 740 (5th Cir. 2009) 25, 26

Morse v. Frederick,
551 U.S. 393 (2007). . . . . *passim*

Nuxoll ex rel. Nuxoll v.
Indian Prairie Sch. Dist. # 204,
523 F.3d 668 (7th Cir. 2008) 26, 27

Poling v. Murphy,
872 F.2d 757 (6th Cir. 1989). 31

Ponce v. Socorro Indep. Sch. Dist.,
508 F.3d 765 (5th Cir. 2007) 25, 26

Pyle v. South Hadley School Committee,
861 F. Supp. 157 (D. Mass. 1994) 20, 21, 32, 33

Quarterman v. Byrd,
453 F.2d 54 (4th Cir. 1971). 31

Redding v. Safford Unified Sch. Dist., No. 1,
531 F.3d 1071 (9th Cir. 2008). 22

R.O. v. Ithaca City Sch. Dist.,
645 F.3d 533 (2d Cir. 2011) 33

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001) 31

Page

Scott *v. Sch. Bd. of Alachua County,*
324 F.3d 1246 (11th Cir.2003), *cert. denied,* 540 U.S. 824, 124 S.Ct. 156, 157 L.Ed.2d 46 (2003) 17

Smith ex rel. Smith v. Mt. Pleasant Public Schs.,
285 F. Supp. 2d 987 (E.D. Mich. 2003). 33

Tinker v. Des Moines Independent Community School District,
393 U.S. 503 (1968). 12, 17, 31, 34

Vasquez v. Hillery,
474 U.S. 254 (1986) 24

Zamecnik v. Indian Prairie Sch. Dist. No. 204,
636 F.3d 874 (7th Cir. 2011) 22

STATUTES

First Amendment to the Constitution . . . . . *passim*

28 U.S.C. § 1254(1). 1

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Jahn, Karon L., *School Dress Codes v. the First Amendment: Ganging Up on Student Attire*, paper presented at the annual meeting of Speech Communication Association, Chicago, Ill., October 30, 1992, microformed on Commission of Free Speech Panel Proposal Educational Resources Information Center) 32

Page

Myhra, Alison G., *No Shirt, No Shoes, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 Seton Hall Const. L. J. 337 (1999). 30

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The *en banc* opinion of the Third Circuit Court of Appeals is available at 725 F.3d 293. The opinion of the Eastern District Court of Pennsylvania is available at 827 F. Supp. 2d 392. Both opinions and orders are reproduced as Appendices, Appendix A and Appendix B, to this Petition.

JURISDICTION

A rehearing *en banc* was ordered on August 16, 2012. On August 5, 2013, the *en banc* judgment was entered. On October 28, 2013, Justice Alito granted an extension of time to file this petition for a writ of certiorari, to an including December 3, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

In relevant part, the First Amendment of the Constitution of the United States requires that "Congress shall make no law…abridging the freedom of speech."

STATEMENT OF THE CASE

The Easton Area School District (hereinafter referred to as "the School District"), located on the border of Pennsylvania and New Jersey, is an urban/suburban school district and serves a student population of about 9,200 students in an area with a population of about 62,000 individuals. (App.Vol. II at 202). Due to the student

population, the School District divided its middle school into two buildings: Grades 5 and 6 are contained in one building (hereinafter referred to as the 5/6 Building) and grades 7 and 8 are contained in another building (hereinafter referred to as the 7/8 Building). (App. Vol. II at 203). The 5/6 Building and the 7/8 Building are housed in one entire complex but administered separately. (App. Vol. II at 203). Within the framework of School District policies, the administrators of both buildings make autonomous decisions with respect to disciplinary matters. (App. Vol. II at 203-04). One such School District policy is the dress code which provides the following:

> The dress speech and work habits of the student should in every way possible support the seriousness of the educational enterprise. The following examples are considered to be in poor taste and will merit disciplinary actions: No clothing imprinted with nudity, vulgarity, obscenity, profanity and double entendre pictures or slogans…

(App. Vol. II at 98, 392; Vol. III at 131-32). Within the framework of the School District's dress code, both building principals make independent determinations regarding violations. (App. Vol. II at 203-04, 404). A true and correct copy of the School District's dress and relevant expression Policies, applicable at all times relevant to this case, are appended hereto in Appendix D.

The School District's Board of Directors adopted October 28, 2010 as the district-wide Breast Cancer Awareness Day to observe the national Breast Cancer Awareness Month of October. (App. Vol. II at 208,

357). As part of its ongoing promotion of breast cancer awareness and research, over $3,000 was raised for the School District's annual "Susan G. Komen Passionately Pink for the Cure" drive. (App. Vol. II at 208-09, 357, 359). The message of breast cancer awareness was similarly promoted in the 7/8 Building and included instruction for all students with respect to breast health and breast cancer. (App. Vol. II at 208-09, 235-36, 336-39). To promote breast cancer awareness, the 7/8 Building principals encouraged students and staff to wear pink, T-shirts, and pins, within the parameters of the dress code, *supra*, on Breast Cancer Awareness Day. (App. Vol. II at 208, 269; Vol. III at 412-13). The administration of the 7/8 Building never stifled the message of awareness of breast cancer and, in fact, supported this message. (App. Vol. II at 238). A true and correct photocopy of the T-shirts worn by the Easton Area School District administrators is appended hereto in Appendix G.

The administration of the 7/8 Building is as follows: Angela DiVietro, Principal; Amy Braxmeier, Grade 8 Assistant Principal; and Anthony Viglianti, Grade 7 Assistant Principal. (App. Vol. II at 173, 201, 203, 258). In the 7/8 Building, the classroom teachers are responsible for noticing and reporting dress code violations. (App. Vol. II at 268). Pursuant to the School District-wide dress code, students in the 7/8 Building have been asked to remove apparel with the following double entendres: (1) Hooters restaurant, (2) Big Peckers restaurant, and (3) "Save the ta-tas." (App. Vol. II at 255-56). Any student wearing an item containing a sexual double entendre message or any other dress code violation was asked to remove the item and will receive no disciplinary consequences if compliant with the directive. (App. Vol. II at 267). Therefore, students

were only given consequences for defiance, not dress code violations independently. (App. Vol. II at 267 371-72).

In September 2010, the beginning of the 2010-2011 school year, teachers in the 7/8 Building reported to Mr. Viglianti and Ms. Braxmeier that they were noticing students wearing bracelets containing the phrase "I ♥ Boobies!" and did not believe that the bracelets were appropriate under the school dress code. (App. Vol. II at 228, 260). Further, teachers in the 7/8 Building reported that the bracelets were causing a distraction for students in their classrooms. (App. Vol. III Deposition of A. DiVietro at 20; Vol. II at 261, 268). Also, during the September through November 2010 timeframe, there were instances of sexual harassment in the 7/8 Building particularly focused on girls' breasts. (App. Vol. II at 230-31, 314, 360-71). A girl in the 7/8 Building, who was wearing an "I ♥ Boobies!" bracelet, reported to Ms. Braxmeier that boys approached the girls at her lunch table and stated that they "love boobies." (App. Vol. II at 231). Another girl reported to Ms. Braxmeier that, while she was having a conversation with other girls at her lunch table about the "I ♥ Boobies!" bracelets, a boy interrupted them and stated "I love boobies" and, while playing with fireball candies, chanted "boobies, boobies." (App. Vol. II at 231). There were also instances that were not reported to Ms. Braxmeier in which some boys were "immature" regarding the "I ♥ Boobies!" slogan and approached other middle school girls about "boobies." (App. Vol. II at 135; Vol. III at 442). Further, during the same timeframe, there were instances of boys touching girls in an unwanted sexual manner. (App. Vol. II at 230-31).

As of September and October of 2010, the School District as a whole had not officially banned or, aside from the dress code itself, offered any guidance regarding the "I ♥ Boobies!" phrase (App. Vol. II at 230, 238, 260, 346[1]). After meeting with Ms. Braxmeier and Mr. Viglianti, Ms. DiVietro, 7/8 Building Principal, decided that, due to the inherent sexual message, bracelets stating "I ♥ Boobies!" were inappropriate for the 7/8 Building students to wear in school. (App. Vol. II at 228, 238, 260, 268). The Principal and Assistant Principals believed that the phrase "I ♥ Boobies!" conveyed a sexual double entendre which is prohibited by the School District-wide dress code policy. (App. Vol. II at 228, 262, 264). Moreover, the unique age group of the 7/8 Building, which ranged from 11 to 14 years old, was considered in the principals' decisions to ban the "I ♥ Boobies!" phrase, specifically because of the wide variety of sexual and physical development of its student population. (App. Vol. II at 23, 230, 238, 261). Accordingly, Grade 7 Assistant Principal, Anthony Viglianti, sent an email in September of 2010 to the 7/8 Building teachers informing them that "I ♥ Boobies!" bracelets were against the dress code and students seen wearing the bracelets should be individually asked to remove the bracelet. (App. Vol. II at 228, 343). Although the administration

1. The memo from Stephen Furst sent to the School District administration was to support the decision of the 7/8 Building principals to ban the "I ♥ Boobies!" bracelets. (App. Vol. II at 347-46). The ban in effect at the time that B.H. and K.M. were suspended was only the ban instituted by the 7/8 Building principals. The District-wide ban did not occur until November 9, 2010 via the directive of Mr. Furst, long after the Plaintiffs in this case were suspended pursuant to the Building 7/8 ban. A true and correct copy of the memorandum issued by Mr. Furst is appended hereto as Appendix E.

never made an official determination with respect to the appropriateness of "keepabreast.org," the bracelets were not permitted to be turned inside out because students were quickly and easily returning their bracelets back to the "I ♥ Boobies!" side. (App. Vol. II at 280).

Because of the sexual message conveyed via the "I ♥ Boobies!" phrase, on October 27, 2010, the day before Breast Cancer Awareness Day, the 7/8 Building issued a televised morning announcement instructing students not to wear "I ♥ Boobies!" bracelets in school. (App. Vol. II at 268, 344). Also, Mr. Viglianti made another announcement at the end of the day reminding students not to wear "I ♥ Boobies!" bracelets. (App. Vol. II at 268, 344). B.H. and K.M., two students in the 7/8 Building, asked their mothers whether they could wear "I ♥ Boobies!" bracelets in defiance of the ban. (App. Vol. II 81, 116-17; A. Martinez Dep. at 21-22; J. Hawk Dep. at 7-8). Both girls' mothers gave their approval or acquiesced to their daughters wanting to wear "I ♥ Boobies!" bracelets. (App. Vol. II at 116; A. Martinez Dep. at 21-22; J. Hawk Dep. at 7-8). Ms. Martinez, K.M.'s mother, and Ms. Hawk, B.H.'s mother, both believe that students in school should be able to use any word to express their viewpoints of cancer awareness. (Vol. II J. Hawk Dep. at 11-12; A. Martinez at 17-18).

On October 27, 2010, John Border, School District Security, was informed by a cafeteria worker that B.H. was wearing an "I ♥ Boobies!" bracelet. (App. Vol. II at 220). Mr. Border asked B.H. to remove "I ♥ Boobies!" bracelet, but she would not. (App. Vol. II at 220). After B.H. refused to remove the bracelet, Mr. Border escorted B.H. to Ms. Braxmeier. (App. Vol. II at 220-22). Ms. Braxmeier pleaded with B.H. to remove the bracelet. (App.

Vol. II at 221-22). As per the standard dress code violation procedure, Ms. Braxmeier informed B.H. that if she removed the bracelet, she would not issue any disciplinary consequences. (App. Vol. II at 221-22). B.H. stated that it was her "right" to wear the bracelet and that it was her generation, "not [y]our generation." (App. Vol. II at 222). After further discussion, B.H. removed the bracelet with no further disciplinary consequences and returned to the cafeteria. (App. Vol. II at 222).

On October 28, 2010, the 7/8 Building celebrated Breast Cancer Awareness Day. (App. Vol. III at 235-36). On this day, faculty and students wore pink as well as other pins and T-shirts, within the dress code, which demonstrated support for breast cancer awareness. (App. Vol. III at 235-36). On this day, Mr. Border was apprised that B.H. was wearing an "I ♥ Boobies!" bracelet again during lunch period. (App. Vol. II at 222). Mr. Border approached B.H. and asked her to remove her bracelet but B.H. refused to comply. (App. Vol. II at 222). At that time, K.M. stood up in the cafeteria and stated that she was wearing an "I ♥ Boobies!" bracelet and was not going to take it off. (App. Vol. II at 222). Then, a third girl, R.T., stood up and said that she was also wearing an "I ♥ Boobies!" bracelet as was not going to take it off. (App. Vol. II at 222). Mr. Border escorted the three girls to Ms. Braxmeier's office. (App. Vol. II at 223-24). On their way to Ms. Braxmeier's office, B.H. and K.M. gave each other a high-five because they were proud of themselves for defying the ban. (App. Vol. II at 118-19, 234). K.M. wanted to be "caught" wearing the bracelet because she believed that students should not be punished for wearing clothing that the student believes is appropriate. (App. Vol. II at 131). Both K.M. and B.H. believe that, when used in

the context of cancer awareness, any word for the female breast would be appropriate. (App. Vol. II at 101-02, 131, 138). B.H. believes that the existence of the "keep a breast" phrase on the bracelet negates any possible prurient understanding of "I ♥ Boobies!" (App. Vol. II at 102-03). Both girls knowingly defied the ban. (App. Vol. III Dep. K.M. at 31; Dep. B.H. at 33-34; App. Vol. II at 235).

When B.H., K.M., and R.T. arrived in her office, Ms. Braxmeier spoke with each girl individually about the "I ♥ Boobies!" bracelet. First, Ms. Braxmeier spoke with R.T. (App. Vol. II at 234). R.T. agreed to remove her bracelet. (App. Vol. III A. Braxmeier Dep. at 20). In the course of her discussion with Ms. Braxmeier, R.T. explained that she understood why students should not wear the "I ♥ Boobies" bracelets. (App. Vol. III A. Braxmeier Dep. at 20, 26, 67). Specifically, R.T. stated that some boys were "immature" and have been approaching girls and commenting "I love your boobies" or "I love boobies." (App. Vol. III A. Braxmeier Dep. at 20, 26, 67). After removing her bracelet, R.T. was free to leave with no disciplinary consequences. (App. Vol. II at 234).

Ms. Braxmeier spoke with K.M individually about whether there was any way within the school dress code that K.M. could express her support for breast cancer awareness. (App. Vol. III at 235). K.M. said there was not. (App. Vol. III at 235). Ms. Braxmeier gave K.M. suggestions about other things she could do such as wearing pink. (App. Vol. III at 235). However, K.M. refused to express herself in any other way aside from wearing an "I ♥ Boobies!" bracelet. (App. Vol. III at 235). After discussing the bracelets with K.M., Ms. Braxmeier spoke with B.H. individually about her "I ♥ Boobies!"

bracelet. (App. Vol. II at 237). Ms. Braxmeier asked B.H. if there was a way within the dress code that she could express her support for breast cancer awareness. (App. Vol. II at 237). B.H. stated that there was not and refused to remove her "I ♥ Boobies!" bracelet. (N.T. 12/16/2010 at 238). Because they refused to remove the "I ♥ Boobies!" bracelets when asked, B.H. and K.M. were sent to in-school suspension for the remainder of the day and were also given a full day of in-school suspension. (App. Vol. II at 206, 302-03).[2] Also, B.H. and K.M. were prohibited from attending the School District's Winter Ball.[3]

"I ♥ Boobies!" bracelets were a fad in the public school. (App. Vol. II at 72, 92; Vol. III at 442). B.H. first purchased an "I ♥ Boobies!" bracelet because she saw people wearing them "walking around the mall" and she saw "a lot of [her] friends wearing the bracelet." (App. Vol. II at 72). Only subsequent to her decision to purchase an "I ♥ Boobies!" bracelet did B.H. discover that the bracelets were intended to promote breast cancer awareness. (N.T. 12/16/2010 at 22). K.M. first saw the bracelets over the summer and purchased one because she thought "the bracelet was really cool." (App. Vol. III at 442). While K.M.'s proffered intent for wearing the "I ♥ Boobies!" bracelet was also for an awareness message, she acknowledged that "[s]ome friends were wearing [the bracelets] just to wear them…" (App. Vol. III at 442).

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2. Unlike out-of-school suspension which is considered a more serious punishment, B.H. and K.M. were permitted to stay in school and complete their school work to avoid getting behind in their classes.

3. Pursuant to an agreement of the parties, the girls were permitted to attend the dance.

The "I ♥ Boobies" bracelets worn by the Plaintiffs, B.H. and K.M., included a pink, black, green, and white-colored bracelets. (App. Vol. II at 77-78). The pink, black, and green bracelets had a one-inch band. The outside of the bracelet contained the phrase "I ♥ Boobies!" in approximately three quarters of an inch lettering with the phrase "(Keep-A-Breast)" in lettering measuring approximately one quarter of an inch. The web address, keep-a-breast.org, was contained on the inside of the bracelets. (App. Vol. II at 112; Vol. III at 406-07, 409). The white bracelet, which was also worn by both K.M. and B.H., has a band measuring approximately one and three-quarter-inch in width. That bracelet contained the phrase "I ♥ Boobies!" in approximately half-inch lettering. (App. Vol. II at 78-79, 96). The white bracelet also contained the phrase "Glamour Kills" in approximately three-quarters-inch lettering. (App. Vol. II at 78, 96, 113). Both K.M. and B.H. acknowledged that "Glamour Kills" is a clothing line, unrelated to breast cancer awareness. (App. Vol. II at 96-97).

"I ♥ Boobies!" bracelets are marketed and distributed by the Keep-A-Breast Foundation, which is based in Los Angeles, California. (App. Vol. II at 154). The Keep-A-Breast Foundation sells "I ♥ Boobies!" bracelets and other merchandise to retailers, including Zumiez, Tilly's, and the website loserkids.com, which are called "lifestyle stores," meaning that the shops are targeted at 13 through 30-year-olds who are interested in action sports and music. (App. Vol. II at 146). Truck stops, 7-Elevens, vending machine companies, and "porn stars" have expressed interest in promoting the "I ♥ Boobies!" bracelets. (App. Vol. II at 151-52, 163). Kimberly McAtee, Peer Marketing Manager of Keep-A-Breast, did not

see a sexual message in the interest of porn stars in the "I ♥ Boobies!" accessories. (App. Vol. II at 163). In her management capacities with the Keep-A-Breast Foundation, Ms. McAtee has received "a lot" of emails from teachers and principals requesting more information regarding the organization and its purpose. (App. Vol. II at 155-56). While Ms. McAtee maintained that some school administrators are not bothered by the "I ♥ Boobies!" phrase, she also admitted that she is aware of other school administrators who believe the expression is inappropriate. (App. Vol. II at 165).

The "I ♥ Boobies!" bracelets and message were a vehicle for the commercial advertising. (App. Vol. II at 160-63). In exchange for a donation, Keep-A-Breast allows other businesses to market their commercial products using the "I ♥ Boobies!" slogan. (App. Vol. II at 160-63). This is termed "co-branding" or "cause marketing." (App. Vol. II at 161). Keep-A-Breast does "a lot" of co-branding, according to Ms. McAtee. (App. Vol. II at 160). Because of co-branding, the "I ♥ Boobies!" bracelets were used as a platform for the "Glamour Kills" clothing line to market its products. (Vol. II at 97, 161). On Glamour Kills' press release web site, young women's sexuality is used to market its clothing. (Vol. II at 97, 168). In addition to "Glamour Kills," Keep-A-Breast co-brands with the following businesses: Etnies Kleen Canteen, Etnies shoes, and SJC Snare Drum brand apparel. (App. Vol. II at 161-63; Vol. III K. McAtee Dep. at 44-46). Additionally, Keep-A-Breast targets a youth market with its "Plastic Sucks" campaign. (App. Vol. II at 162).

DISTRICT COURT PROCEEDINGS

Petitioners sued the School District, claiming that the First Amendment prohibited the School District from disciplining K.M. and B.H. for refusing to remove their "I ♥ Boobies!" bracelets. The School District defended its decision as a proper exercise of its authority, under *Fraser*, to regulate student speech reasonably interpreted as vulgar or lewd. Alternatively, the School District argued that its decision was justified under *Tinker*, a standard that allows school district officials to regulate speech that interferes with the rights of students, one such right being to attend school free from an unnecessarily sexually hostile environment.

The Eastern District Court of Pennsylvania granted Petitioners' Motion for Preliminary Injunction. To justify its holding, the District Court conducted a piecemeal analysis of the "I ♥ Boobies!" expression, reasoning that each component part of the phrase is not inherently sexual, thus the entire phrase cannot, under *Fraser*, reasonably be interpreted as vulgar or lewd. To conclude that the word "boobies" is not inherently sexual, the district court conducted an etymological analysis, explaining that "booby" has multiple meanings, including a bird and "stupid fellow." Since the district court's grant of the Respondents' Motion for Preliminary Injunction on April 12, 2011, the students of the 7/8 Building administration have been testing the administration with dress code violations.

COURT OF APPEALS *EN BANC* OPINION

Arguing that *Fraser* or its progeny does not support the district court's dissected and etymological analysis of

the "I ♥ Boobies!" phrase, the School District appealed the district court's decision to the Third Circuit Court of Appeals. After a three-judge panel heard the parties' original arguments, the Court of Appeals, *sua sponte*, ordered a rehearing *en banc*. Notwithstanding the five-Justice majority opinion in *Morse*, the Court of Appeals, in a nine-to-five ruling, refashioned the *Fraser* standard by engrafting the language of Justice Alito's concurrence in *Morse* into this Court's holding in *Fraser*. In so doing, the Court of Appeals rejected the deference paid by *Fraser* to the reasonable vulgarity and lewdness determination and propounded a new *Fraser* test, beginning with an analysis of whether the speech at issue is "plainly lewd," a determination made by the courts, not school district administrators. According to the Court of Appeals' holding, speech "plausibly" containing "social or political" commentary may not be banned, unless the speech is "plainly lewd." In the absence of social or political messages, speech may be banned that is "ambiguously lewd," a new category of speech created by the Court of Appeals.

Judge Hardiman, joined by four judges, authored one of two strongly dissenting opinions, opining that the majority's reliance on Justice Alito's concurrence in *Morse* "flows from a misunderstanding of the Supreme Court's 'narrowest grounds' doctrine…" *Id.* at 325 (Hardiman, J., dissenting). Moreover, as opined by Judge Hardiman, even if Justice Alito's concurrence is controlling, *Morse* and *Fraser* are two separate analytical frameworks, thus *Morse*, applying to pro-drug speech, does not modify *Fraser*, applying to lewd or vulgar speech. In applying an exception to Fraser for social or political speech, Judge Hardiman noted the inconsistencies posed by the

majority's opinion. Noted by Judge Hardiman, one such inconsistency is that the speech given by Matthew Fraser, at issue in the *Fraser* case, could not be regulated if given for a presidential, mayoral, or school board candidate, as opposed to a class election.

Judge Greenaway, Jr., joined by four dissenting judges authored the second of two strongly dissenting opinions. As his chief criticism of the majority opinion, Judge Greenaway focused on the practical problems with the majority's test. Additionally, Judge Greenaway opined that the majority opinion signifies a departure from local values.

REASONS FOR GRANTING THE WRIT

Introduction

This Petition should be granted for three reasons. *First*, the Third Circuit's decision undermines Fraser's basic premise that vulgar, lewd, profane, or obscene expression can be constitutionally prohibited in the public school environment, even if the same expression by adults might be protected by the First Amendment. Although Fraser did not specifically address the question of whether school authority is limited to excluding only ambiguously lewd speech that cannot be reasonably related to a political or social issue, there is no suggestion in *Fraser*, or its progeny, that student speech full of sexual innuendo or scatological implications must be tolerated by the Constitution just because an argument can be made to connect them with some political or social cause. Nevertheless, Circuit Courts of Appeals are divided on whether Fraser applies to speech with a *bona fide* political or social message.

Second, the Third Circuit's opinion misapplied the narrowest grounds doctrine and inappropriately conflates *Morse* and *Fraser*, two separate analytical frameworks. While District Courts and Courts of Appeals have generally applied *Morse* and Fraser as two separate standards, with the *Morse* Majority applied as the only controlling opinion, the Third Circuit is one of only two Circuit Court of Appeals to give controlling authority to Justice Alito's concurrence, resulting in a confusion of the law that this Court should resolve.

Third, the Third Circuit abused its discretion by refashioning *Fraser* to prohibit the regulation of lewd expression, even where the message expressed has not been suppressed in the school forum.

I. SCHOOL ADMINISTRATORS SHOULD HAVE THE AUTHORITY TO PROHIBIT SPEECH REASONABLY DEEMED LEWD, PARTICULARLY WHERE THE BAN DOES NOT PRECLUDE THE VIEWPOINT OF THE SPEAKER.

The Third Circuit's modification of *Fraser* undermines the underlying premise of *Fraser* that local school authority has the inherent right and obligation to discourage lewd expression and encourage civility and decorum in discourse in the school setting. The Third Circuit's unsupported distinction between what is "patently" lewd and what is "ambiguously" lewd creates an unworkable metaphysical dichotomy of meaning, which nevertheless remains "lewd." If there were to be a patch to fix the hole left in *Fraser* as to its applicability to political speech, it should be placed not on the side of the decorum

of expression but on whether banning the expression at issue has the effect of completely proscribing a particular viewpoint from the school setting.

"The mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404. In *Fraser*, this Court gave school districts discretion to instruct students on the habits of "civilized social order":

> 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.

Id. at 683. *Fraser* indicated that school administrators have the authority to regulate the manner of student speech, even that speech containing a political message:

> 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. However, *Fraser* did not specifically address the circumstance of administrators regulating speech subject to two interpretations, one being of political or social value, and the other being

lewdness. Moreover, in *Fraser*, this Court distinguishes between the political message of the black armbands in *Tinker* and the sexual innuendo in Matthew Fraser's speech. *Fraser*, 478 U.S. at 680 ("The marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Matthew Fraser's] speech in this case seems to have been given little weight by the Court of Appeals.")

Regarding *Fraser*'s applicability to political speech, Circuit Courts of Appeals have issued conflicting opinions. The Eleventh Circuit upheld a school district's ban on the Confederate flag, in part, under *Fraser. Scott v. Sch. Bd. of Alachua County,* 324 F.3d 1246, 1249 (11th Cir.2003), *cert. denied,* 540 U.S. 824, 124 S.Ct. 156, 157 L.Ed.2d 46 (2003). However, on the contrary, the Sixth Circuit has declined to apply *Fraser* to "protected political speech." *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 335 (6th Cir. 2010).

Morse, likewise, did not address the issue of political speech, containing two plausible meanings. In *Morse*, this Court specifically declined to address the issue of political speech and noted that "this is plainly not a case about political debate." *Morse*, 551 U.S. at 402-03.

Consistent with the work of the schools, school principals should have the authority to prohibit school speech for its lewd manner, notwithstanding the student's political or social awareness intention. Indeed, Matthew Fraser's speech was "plausibly political." Matthew Fraser's speech was itself characterized by the Ninth Circuit as "student political speech-making" and "campaign speech." *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1985). As explained by Judge

Hardiman, joined by four other judges in dissent, the speech given by Matthew Fraser, at issue in the Fraser holding, was "plausibly political":

> As the Majority rightly notes, the *Fraser* Court opined that there was a marked distinction between the *political* 'message' of the armbands in *Tinker* and the *sexual* content of Fraser's speech. That does not mean, however, that it was *implausible* to conclude that Fraser's speech was political. If it were truly implausible to interpret Fraser's speech as commenting on any political or social issue," one must wonder why the United States Court of Appeals for the Ninth Circuit characterized Fraser's speech as "student political speech-making" and a "campaign speech. The three appellate judges who heard Fraser's case were deemed by the Supreme Court to have erred when they likened his speech to *Tinker*'s armband, but that does not mean that it was "implausible" for those three judges to view Fraser's speech as political. It was, after all, a *campaign* speech.

B.H., 725 F.3d at 333 (Hardiman, J., dissenting)(internal quotations and citations omitted). Accordingly, while a student campaign speech may not be viewed as definitively political, an attempt to engage in an electoral process within a public school district must be considered at least "plausibly political."

Matthew Fraser's entire speech was comprised of innuendo. None of the "seven dirty words" considered "plainly lewd" by the Third Circuit were used in the

speech. *See B.H.*, 725 F.3d at 318 (holding that George Carlin's "seven dirty words" were plainly lewd)(citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). No explicitly sexual reference was made. All of the references made by Matthew Fraser were subject to two interpretations, thus, according to the Third Circuit's standard, the speech was "ambiguously lewd," as opposed to "plainly lewd."

With the possibility of reasonable courts judging Matthew Fraser's speech to be "plausibly political," the Third Circuit's refashioning of *Fraser* would shield the speech given by Matthew Fraser from the purview of administrator regulation. In other words, *Fraser* would not pass the Third Circuit's *Fraser* test. However, *Fraser* does not speak to the issue of whether lewd speech can remain protected if found to be "plausibly political". Certiorari should be granted to expressly allow, consistent with the work of the schools, school administrators to prohibit students from using lewd language to convey political or social messages, particularly where the ban does not have the effect of completely precluding the issue from the school forum and the same message can be conveyed in a more decorous manner.

Aside from the Third Circuit Court of Appeals in the instant matter, federal courts have consistently recognized that schoolchildren are not constitutionally entitled to use lewd language to communicate a political or social message. In fact, two federal courts addressing the same "I ♥ Boobies!" bracelets, held that, because the bracelets contained a double entendre, the administrators' determination of lewdness was reasonable, thus not in violation of the students' First Amendment rights. *J.A. v. Fort Wayne Cmty. Sch.*, 1:12-CV-155 JVB, 2013 WL

4479229 *4 (N.D. Ind. Aug. 20, 2013).; *K.J. v. Sauk Prairie School District*, 22-CV-622-BBC (W.D. Wis. Feb. 6, 2012)

Moreover, in *Broussard ex rel. Lord v. School Board of Norfolk*, 801 F. Supp. 1526 (D. Va. 1992), for example, the defendant school punished Kimberly Ann Broussard for wearing a shirt containing the phrase "Drugs Suck!". At trial, Kimberly Ann testified that "the shirt's message was that it is 'not right to use drugs,' a message that she wanted to convey to others. She intended the shirt to be provocative in its anti-drug message." *Id.* at 1533. Because the use of the word "suck" in its meaning of "disapproval" has sexual connotations, the court held that the school district reasonably banned Kimberly Ann's "Drugs suck!" shirt due to the vulgarity of its mode of expressing her anti-drug sentiment. *Id.* at 1536-37; *see also DePinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633, 644 (D.N.J. 2007) (explaining that *Broussard* appears to "fall squarely within a reasonable interpretation of 'lewd,' 'vulgar,' 'obscene,' and 'plainly offensive').

Additionally, in *Pyle v. South Hadley School Committee*, 861 F. Supp. 157 (D. Mass. 1994), the District Court of Massachusetts held that high school students could not wear a shirt that contained the phrase "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick." The plaintiffs in *Pyle* argued that the court should be responsible for weighing administrators' decisions on its own scale of offensiveness and conclude that the T-shirts were not vulgar. *Id.* at 159. The court explained as follows:

> The question becomes, who decides what is "vulgar"? The question in most cases is easy: *assuming general reasonableness, the citizens of the community, through their elected representatives on the school board and the*

> *school administrators appointed by them, make the decision.* On questions of coarseness or ribaldry in school, federal courts do not decide how far is too far.
>
> This is because people will always differ on the level of crudity required before a school administrator should react. The T-shirts in question here may strike people variously as humorous, innocuous, stupid or indecent. In assessing the acceptability of various forms of vulgar expression in the secondary school, however, the limits are to be debated and decided within the community; the rules may even vary from one school district to another as the diversity of the culture dictates. *The administrator here acted within reason, and the court's inquiry need go no further.*

Id. at 159 (emphasis added).

Courts have recognized that administrators may prohibit schoolchildren from using lewd language to convey a political or social message. By refusing to give local school administrators the authority to make reasonable lewdness determinations, the Third Circuit effectively disarms teachers and administrators from discouraging an unnecessarily sexualized school environment and impairs their ability to instruct students in a more appropriate manner of expression to engage in political discourse in their local communities. Certiorari should be granted to give definitive authority to school administrators to restrict speech reasonably deemed lewd, notwithstanding the political or social message intended by the student.

II. THE THIRD CIRCUIT APPLIED AN INCORRECT LEGAL STANDARD BASED UPON ITS MISAPPLICATION OF THE NARROWEST GROUNDS DOCTRINE.

Nine courts of appeal, addressing *Morse*, have applied the *Morse* Majority opinion as the controlling opinion.[4] Notwithstanding the fact that Chief Justice Roberts'

4. *See B.H.*, 725 F.3d at 329 n.1 (Hardiman, J. dissenting) (citing *Doninger v. Niehoff,* 642 F.3d 334, 345 (2d Cir.2011) ("[T]he Supreme Court has determined that public schools may 'take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use' because of the special nature of the school environment and the dangers posed by student drug use." (citations omitted)); *Hardwick ex rel. Hardwick v. Heyward,* 711 F.3d 426, 435 (4th Cir. 2013); *Defoe ex rel. Defoe v. Spiva,* 625 F.3d 324, 332–33 (6th Cir. 2010) ("As this Court has already recognized, however, the *Morse* holding was a narrow one, determining no more than that a public school may prohibit student expression at school or at school-sponsored events during school hours that can be 'reasonably viewed as promoting drug use.' " (citation omitted)); *Zamecnik v. Indian Prairie Sch. Dist. No. 204,* 636 F.3d 874, 877 (7th Cir. 2011) (noting that promoting "the use of illegal drugs, [is] a form of advocacy in the school setting that can be prohibited without evidence of disruption" (citation omitted)); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d 754, 761 (8th Cir. 2011) ("Chief Justice Roberts reviewed the Court's approach in these prior decisions before holding 'that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.' " (citation omitted)); *Redding v. Safford Unified Sch. Dist. No. 1,* 531 F.3d 1071, 1094 (9th Cir. 2008), *rev'd on other grounds,* 557 U.S. 364, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009); *Corder v. Lewis Palmer Sch. Dist. No. 38,* 566 F.3d 1219, 1228 (10th Cir. 2009); *Boim v. Fulton Cnty. Sch. Dist.,* 494 F.3d 978, 984 (11th Cir. 2007)).

opinion was joined in full by four other Justices, including Justice Alito, the Third Circuit characterized and applied Justice Alito's concurrence in *Morse* as the controlling opinion of the case.

In *Marks v. United States*, 430 U.S. 188 (1977), addressing the case of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a plurality opinion, where no more than three Justices joined *in toto* any one opinion, this Court established the "narrowest grounds" doctrine to ascertain the *Memoirs* holding. More specifically, in *Marks*, this Court articulated the following standard:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..'

Id. at 193. Based upon the above reasoning, this Court held that, because three Justices joined the plurality opinion and Justices Black and Douglas "concurred on broader grounds," the judgments on the narrowest grounds constituted the controlling opinion. *Id.* at 193-94.

Unlike *Memoirs*, in *Morse*, five Justices, including Justice Alito, voted in favor of both the reasoning and judgment of the *Morse* Majority. In the instant matter, the Court of Appeals "extended the [narrowest grounds] doctrine to give controlling weight to any concurring justice who articulates the narrowest ground support a decision if that justice's vote was necessary to reach a majority." *J.A. v. Fort Wanye Commty Schs.*, No. 1:12-

cv-155 JVB, ** 7-8 (N.D. Ind. Aug. 20, 2013)(declining to apply the narrowest grounds doctrine to modify Fraser under analogous fact pattern). As explained by Judge Hardiman in his dissenting opinion, an opinion joined by four other judges, "we have never applied the *Marks* rule to hold that a concurrence may co-opt an opinion joined by at least five Justices." *B.H.*, 725 F.3d at 327 (Hardiman, J., dissenting); *see also Vasquez v. Hillery*, 474 U.S. 254, 262 n.4 (1986)(explaining that "a statement of legal opinion joined by five Justices of this Court does not carry the force of law" is an "unprecedented argument").

In *Morse*, this Court specifically declined to address the issue of political speech and noted that "this is plainly not a case about political debate." *Morse*, 551 U.S. at 402-03. Notwithstanding the five-Justice Majority's expressed refusal to address the result had Joseph Frederick's banner been political, the Third Circuit erroneously enlisted Justice Alito's concurrence to address "plausibly political" speech, a point this Court found unnecessary to address. The Third Circuit's approach has been expressly rejected by this Court: "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…" *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001). Stated differently, a majority opinion "is not made coextensive with the concurrence because [the majority] opinion does not expressly preclude the dissent's approach." *Id.*; *see also B.H.*, 725 F.3d at 327 (Hardiman, J. dissenting).

Justice Alito, along with three other Justices and the Chief Justice, joined in the *Morse* Majority opinion. Justice Alito's concurrence merely expressed a caveat

that the generalized standard of "educational mission" could be abused by school authorities to ban an unpopular viewpoint. Moreover, even if Justice Alito's concurrence controls *Morse*, the concerns expressed were not targeted at *Fraser*, but rather at the more amorphous standard of "educational mission." Therefore, even if the Third Circuit correctly applied Justice Alito's concurrence as the controlling opinion in *Morse*, the *Morse* holding, addressing the narrow circumstance of lawful viewpoint preclusion, does not apply to *Fraser*, addressing manner-based restrictions.

Accordingly, the Court of Appeals misapplied the narrowest grounds doctrine, resulting in a misconstruction of the *Morse* majority opinion, which became the basis for the Third Circuit's decision.

III. ON THE CONTROLLING OPINION IN *MORSE*, TWO COURTS OF APPEALS HAVE ENTERED DECISIONS IN CONFLICT WITH THE DECISIONS OF OTHER COURT OF APPEALS.

As stated, *supra* note 5, nine out of ten courts addressing *Morse* gave controlling authority to the *Morse* Majority opinion. However, in addition to the Third Circuit's decision in *B.H.*, the Fifth Circuit Court of appeals gave controlling authority to Justice Alito's concurrence in *Morse*. In *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009), the Fifth Circuit Court of Appeals gave controlling authority to Justice Alito's concurrence in *Morse*. *Id.* at 745 (citing *Ponce v. Socorro Indep. Sch. Dist.,* 508 F.3d 765, 768 (5th Cir. 2007)).

In *Ponce*, *supra*, the Fifth Circuit articulated as follows:

> We are guided by the Supreme Court's recent decision in *Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). But before applying *Morse* to the case before us, some extended analysis of the case and particularly of Justice Alito's concurring, and controlling, opinion is necessary. That concurring opinion appears to have two primary purposes: providing specificity to the rule announced by the majority opinion, and, relatedly, ensuring that political speech will remain protected within the school setting. Taken together, the majority and concurring opinions in *Morse* explain well why the actions of the school administrators here satisfy the requirements of the First Amendment.

Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007).[5]

However, on the contrary, the Seventh Circuit explicitly declined to give controlling authority to Justice Alito's concurrence. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008); *see also J.A. v. Fort Wayne Cmty. Sch.*, 1:12-CV-155 JVB, 2013 WL 4479229 *4 (N.D. Ind. Aug. 20, 2013)("However, the Seventh Circuit has already expressly rejected the argument that Alito's opinion controls *Morse.*") In *Nuxoll*,

5. The Fifth Circuit Court of Appeals, in neither *Ponce* nor *Morgan*, cited the narrowest grounds doctrine as authority for is interpretation of *Morse.*

supra, the Seventh Circuit Court of Appeals stated as follows:

> The plaintiff calls Justice Alito's concurrence the 'controlling' opinion in *Morse* because Justices Alito and Kennedy were part of a five-Justice majority, so that their votes were crucial to the decision. But they joined the majority opinion, not just the decision, and by doing so they made it a majority opinion and not merely, as the plaintiff believes, a plurality opinion. The concurring Justices wanted to emphasize that in allowing a school to forbid student speech that encourages the use of illegal drugs the Court was not giving schools carte blanche to regulate student speech. And they were expressing their own view of the permissible scope of such regulation.

Id.

Moreover, when addressing an analogous fact pattern, involving student restriction from the "I ♥ Boobies!" expression, the District Court of the Northern District of Indiana specifically declined to give controlling authority to Justice Alito's concurrence in *Morse*. *J.A. v. Fort Wayne Cmty. Sch.*, 1:12-CV-155 JVB, 2013 WL 4479229 *4 (N.D. Ind. Aug. 20, 2013). Likewise, in the case of *K.J. v. Sauk Prairie Sch. Dist.*, 22-CV-622-BBC (W.D. Wis. Feb. 6, 2012), the Western District of Wisconsin, although not directly addressing the applicability of Justice Alito's concurrence, in an analogous fact pattern, involving student restriction from the "I ♥ Boobies!" expression, did not apply the language of Justice Alito's concurrence as controlling authority.

Accordingly, there is a divide in Court of Appeals' authority regarding the controlling authority of Justice Alito's concurrence in *Morse*. This Court may wish to clarify the controlling opinion in *Morse*.

IV. THE THIRD CIRCUIT'S OPINION REJECTS THE APPLICATION OF LOCAL COMMUNITY STANDARDS IN THE DECISION OF WHAT IS ACCEPTABLE EXPRESSION IN SCHOOLS.

As explained by Judge Greenaway, in dissent, the Third Circuit's standard effectively removes local values from the schoolhouse, resulting in a powerless administration:

> 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.

B.H., 725 F.3d at 339 (Greenaway, J. dissenting).

The Third Circuit's test allows school district administrators the narrow authority to remove "plainly lewd" speech from the public school discourse. However,

contrary to *Fraser*, the Majority's decision in *B.H.* leaves it to the courts to decide what is plainly lewd. *B.H.*, 725 F.3d at 308 ("It remains the job of judges, nonetheless, to determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive.") Only when the speech is not plainly lewd, as defined by the courts, or "plausibly political or social commentary," as defined by the students, does the Third Circuit's construction of *Fraser* allow for deference to local school administrators:

> Our approach to lewd speech provides the same degree of deference to schools as the Court did in *Morse.* We defer to a school's reasonable judgment that an observer could interpret ambiguous speech as lewd, vulgar, profane, or offensive only if the speech could not plausibly be interpreted as commenting on a political or social issue.

Id. at 317.

The standard that should be applied is one of deference to the objectively reasonable determination of school administrators. In *J.A. v. Fort Wayne Cmty. Sch.*, 1:12-CV-155 JVB, 2013 WL 4479229 *4 (N.D. Ind. Aug. 20, 2013), a case involving an identical fact pattern to the instant matter, the Northern District Court of Indiana stated as follows:

> This Court will ask solely whether the school made an objectively reasonable decision in determining that the bracelet was lewd, vulgar, obscene or plainly offensive.

Id. Likewise, in *K.J. v. Sauk Prairie School District*, 22-CV-622-BBC (W.D. Wis. Feb. 6, 2012), a case also involving an identical fact pattern to the instant matter, the Western District of Wisconsin Court stated as follows:

> I conclude that school officials violate the First Amendment by prohibiting expression that they determine is lewd or vulgar only if their determination is unreasonable. A reasonableness standard permits judicial scrutiny to protect students' First Amendment rights while preventing courts from interfering with the ability of administrators to manage their schools to promote a civil and mature discourse.

B.H., 725 F.3d at 339 (Greenaway, J., dissenting).

Deference to school principals' judgments when carrying-out the daily work of their schools is firmly established by case law and statute, particularly with regard to enforcing a school dress code. *See* Myhra, Alison G., *No Shirt, No Shoes, No Education: Dress Codes and Freedom of Expression Behind the Postmodern Schoolhouse Gates*, 9 Seton Hall Const. L. J. 337, 369 (1999)("In the Court's view, values inculcation will ensure that students are socialized in a way that preserves the community and, indeed, democracy itself.") In *Fraser*, this Court stated that instructing on matters of appropriateness is the "work of the schools," thus, school administrators should be afforded discretion to prohibit lewd speech. *Fraser*, 478 U.S. at 683("The determination of what *manner* of speech in the classroom or in school assembly is inappropriate properly rests with the school

board."); *but cf. Tinker*, 393 U.S. at 508-09 (explaining that the control of student *viewpoints* is not the work of the schools and should only be done when the expression of student viewpoints substantially interferes with the work of the schools).[6] *See also Morse*, 551 U.S. at 401(giving deference to the principal's reasonable pro-drug-use interpretation of Frederick's banner while there were other possible interpretations); *Fraser*, 478 U.S. at 683 ("The inculcation of these values is truly the 'work of the schools'… The determination of what manner of speech is inappropriate properly rests with the school board."); *Poling v. Murphy,* 872 F.2d 757, 762 (6th Cir. 1989) ("Local control over the public schools, after all, is one of this nation's most deeply rooted and cherished traditions."); *Quarterman v. Byrd*, 453 F.2d 54, 56-57 (4th Cir. 1971) ("In prescribing general conduct within the school, the school authorities must have a wide latitude of discretion, subject only to a standard of reasonableness.").

The way that "obscenity offends" is community dependent. *See e.g. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (defining "indecent" by the "contemporary *community standards* for the broadcast medium…"); *see Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001)(explaining that Fraser allows school administrators to prohibit speech that "offends for the same reason

6. There is no conceivable construction of this case that would indicate viewpoint preclusion, particularly because the record reflects that B.H. and K.M. were counseled by principals Amy Braxmeier and Angela DiVietro on the district-wide breast cancer awareness day. Also, it was never the word "boobies" that was singled out for removal from the middle school; it was the phrase "I ♥ Boobies!", a phrase that conveys a prurient interest, that was banned.

obscenity offends.") For the community of the Easton Area Middle School, particularly the 7/8 Building, the views of appropriateness held by the 12 and 13-year-old Plaintiffs, their mothers, and the Keep-A-Breast Foundation did not and cannot represent the locally accepted standards of appropriateness. While the two minor Plaintiffs of this case and their mothers believe that any word may be used provided it is being used to raise cancer awareness, it is the 7/8 Building administration, as duly delegated agents of the elected members of the School Board, that is ultimately answerable to the Easton voting community and, therefore, is in the best position to represent the community standard of appropriateness, particularly in the middle school context. *See Fraser*, 478 U.S. at 696 (Stevens, J., dissenting)(explaining that the Court applies contemporary *community standards* in evaluating speech with sexual connotations); *see also Pyle*, 861 F. Supp. at 170 ("the school board…is in the best position to weigh the strengths and vulnerabilities of the town's 785 high school students."); *and see Broussard ex rel. Lord*, 801 F. Supp. at 1536 ("school boards, school administrators, principals, and teachers must be permitted to govern schools attended by children."); *and see also* Jahn, Karon L., *School Dress Codes v. the First Amendment: Ganging Up on Student Attire*, paper presented at the annual meeting of Speech Communication Association, Chicago, Ill., October 30, 1992, at 12, microformed on Commission of Free Speech Panel Proposal (Educational Resources Information Center)(explaining the safety concerns that motivate student dress code decisions in the public school; surveying the reasons for school principal decisions regarding dress). Therefore, the community standard for appropriate communication must be vested with the administration, mitigated by a standard of deferential reasonableness.

Also, when in-school speech has been banned by district administrators as vulgar or lewd innuendo, particularly when sexuality is involved, not a single court in this country, aside from the Third Circuit and District Court in the instant case, which has refused to defer to the reasonable sensibilities of a school principal. See *J.A. v. Fort Wayne Cmty. Sch.*, 1:12-CV-155 JVB, 2013 WL 4479229 *4(N.D. Ind. Aug. 20, 2013)(holding that the "I ♥ Boobies!" phrase was reasonably deemed lewd) and *K.J. v. Sauk Prairie School District*, 22-CV-622-BBC (W.D. Wis. Feb. 6, 2012))(holding that the "I ♥ Boobies!" phrase was reasonably deemed lewd); *R.O. v. Ithaca City Sch. Dist.*, No. 09-1651 (2d Cir. May 18, 2011) (holding that a school acted reasonably under *Fraser* in banning a cartoon featuring people in various sexual positions); *Smith ex rel. Smith v. Mt. Pleasant Public Schs.*, 285 F.Supp. 2d 987 (E.D. Mich. 2003) (holding that student use of the terms "skank" and "tramp" when expressing his viewpoint regarding the inappropriateness of school policy and the corruption of teachers is punishable by the defendant district under *Fraser*); *Mercer v. Harr*, No. H-04-3454, 2005 WL 1828581 (S.D. Tex. 2005); *Pyle v. South Hadley School Committee*, 861 F.Supp. 157 (D. Mass 1994); *Broussard ex rel. Lord v. School Board of Norfolk*, 801 F. Supp. 1526, 1534-36 (D. Va. 1992); *and see also Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (student posted an independent blog outside of school which called school administrators "douche bags" and encouraged others to contact the superintendent "to piss her off more;" court concluded that, had the speech occurred on campus, the student could be punished pursuant to *Fraser*). *Compare with Guiles ex rel. Guiles v. Merineau*, 461 F.3d 320, 327 (2d Cir. 2006) (holding that symbols and pictures on a T-shirt are not "vulgar" pursuant to the *Fraser* standard

which the court noted, applies to sexual innuendos); *see also Bragg v. Swanson*, 371 F. Supp. 2d 814, 823 (W.D. Va. 2005) (holding that a symbol—i.e. the confederate flag—was not vulgar as such to satisfy the standard set forth in *Fraser*).

The Third Circuit's importation of judicial values to govern the daily decisions of deportment for public school children is a major departure from First Amendment jurisprudential deference to local values in the public school. While *Tinker* firmly established that speech may not be banned simply to avoid a controversial viewpoint, Fraser firmly established that speech may be banned if reasonably understood to convey a lewd double entendre. As explained in Fraser, it is the work of the schools to instruct students on how to engage in political discourse without the use of lewd language. Because lewdness is a value judgment, based upon the morals of the community, as stated in Fraser, the determination of lewdness is best left to the reasonable judgment of elected school boards and school administrators.

CONCLUSION

Fraser does not specifically address the circumstance of student speech that contains a political or social message that is banned for is lewd manner, absent viewpoint discrimination. Therefore, this Court should grant certiorari to determine whether the First Amendment protects student speech, reasonably deemed lewd, even though that contains a political or social message. Because Matthew Fraser's speech, being a campaign speech, was "plausibly political," the Third Circuit's decision is in apparent contradiction with *Fraser*. However, Court of

Appeals have entered contradictory decisions regarding the applicability of *Fraser* to speech containing political or social commentary. Also, district courts have consistently held that, notwithstanding political or social awareness commentary, speech reasonably deemed lewd may be banned, pursuant to *Fraser*. Accordingly, certiorari should be granted to clarify the applicability of *Fraser* to speech containing political or social commentary.

For the aforementioned reasons, along with the other reasons set forth in this Petition, Petitioners respectfully request that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 5, 2013

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-2067

B.H., A MINOR, BY AND THROUGH HER MOTHER; JENNIFER HAWK; K.M., A MINOR BY AND THROUGH HER MOTHER; AMY MCDONALD-MARTINEZ

v.

EASTON AREA SCHOOL DISTRICT,

Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 5-10-cv-06283)
District Judge: Honorable Mary A. McLaughlin

Argued on April 10, 2012
Rehearing *En Banc* Ordered on August 16, 2012
Argued *En Banc* February 20, 2013

Before: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, and GREENBERG, *Circuit Judges*

Appendix A

(Opinion Filed: August 5, 2013)

OPINION

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*

As a "leading youth focused global breast cancer organization," the Keep A Breast Foundation tries to educate thirteen- to thirty-year-old women about breast cancer. Br. of *Amicus Curiae* KABF at 13. To that end, it often partners with other merchants to co-brand products that raise awareness. And because it believes that young women's "negative body image[s]" seriously inhibit their awareness of breast cancer, the Foundation's products often "seek[] to reduce the stigma by speaking to young

people in a voice they can relate to." *Id.* at 14-15. If young women see such awareness projects and products as cool and trendy, the thinking goes, then they will be more willing to talk about breast cancer openly.

To "start a conversation about that taboo in a light-hearted way" and to break down inhibitions keeping young women from performing self-examinations, the Foundation began its "I ♥ Boobies!" initiative. *Id.* at 20-21. Part of the campaign included selling silicone bracelets of assorted colors emblazoned with "I ♥ Boobies! (KEEP A BREAST)" and "check y♥urself! (KEEP A BREAST)." *Id.* at 21-22. The Foundation's website address (www.keep-a-breast.org) and motto ("art. education. awareness. action.") appear on the inside of the bracelet. *Id.*

As intended, the "I ♥ Boobies" initiative was a hit with young women, quickly becoming one of the Foundation's "most successful and high profile educational campaigns." *Id.* at 20-21. Two of the young women drawn to the bracelets were middle-school students B.H. and K.M. They purchased the bracelets with their mothers before the 2010-2011 school year—B.H. because she saw "a lot of [her] friends wearing" the bracelets and wanted to learn about them, and K.M. because of the bracelet's popularity and awareness message. App. 72, 92, 106, 442.

But the bracelets were more than just a new fashion trend. K.M.'s purchase prompted her to become educated about breast cancer in young women. The girls wore their bracelets both to commemorate friends and relatives who had suffered from breast cancer and to promote awareness

among their friends. Indeed, their bracelets started conversations about breast cancer and did so far more effectively than the more-traditional pink ribbon. App. 73-74. That made sense to B.H., who observed that "no one really notices" the pink ribbon, whereas the "bracelets are new and . . . more appealing to teenagers." App. 74.

B.H., K.M., and three other students wore the "I ♥ boobies! (KEEP A BREAST)" bracelets at Easton Area Middle School during the 2010-2011 school year. A few teachers, after observing the students wear the bracelets every day for several weeks, considered whether they should take action. The teachers' responses varied: One found the bracelets offensive because they trivialized breast cancer. Others feared that the bracelets might lead to offensive comments or invite inappropriate touching. But school administrators also believed that middle-school boys did not need the bracelets as an excuse to make sexual statements or to engage in inappropriate touching. *See, e.g.*, Viglianti Test., App. 196, 198 (testifying that such incidents "happened before the bracelets" and were "going to happen after the bracelets" because "sexual curiosity between boys and girls in the middle school is . . . a natural and continuing thing").

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.[1]

With Breast Cancer Awareness Month approaching in October, school administrators anticipated that the "I ♥ boobies! (KEEP A BREAST)" bracelets might reappear.[2] The school was scheduled to observe Breast Cancer Awareness Month on October 28, so the day before, administrators publicly announced, for the first time, the ban on bracelets containing the word "boobies." Using the word "boobies" in his announcement, Viglianti notified students of the ban over the public-address system, and a student did the same on the school's television station. The Middle School still encouraged students to wear the traditional pink, and it provided teachers who donated to Susan G. Komen for the Cure with either a pin bearing the slogan "Passionately Pink for the Cure" or a T-shirt reading "Real Rovers Wear Pink."

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.

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1. In mid-October before the ban was publicly announced, school administrators received some unrelated reports of inappropriate touching, but neither the word "boobies" nor the bracelets were considered a cause of these incidents.

2. The Middle School permits students to wear the Foundation's "check y♥urself (KEEP A BREAST)" bracelets.

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."

News of the bracelets quickly reached the rest of the Easton Area School District, which instituted a district-wide ban on the "I ♥ boobies! (KEEP A BREAST)" bracelets, effective on November 9, 2010. The only bracelet-related incident reported by school administrators occurred weeks after the district-wide ban: Two girls were talking about their bracelets at lunch when a boy who overheard them interrupted and

said something like "I want boobies." He also made an inappropriate gesture with two red spherical candies. The boy admitted his "rude" comment and was suspended for one day.[3]

This was not the first time the Middle School had banned clothing that it found distasteful. Indeed, the School District's dress-code policy prohibits "clothing imprinted with nudity, vulgarity, obscenity, profanity, and double entendre pictures or slogans."[4] Under the policy, seventh-grade students at the Middle School have been asked to remove clothing promoting Hooters and Big Pecker's Bar & Grill, as well as clothing bearing the phrase "Save the ta-tas" (another breast-cancer-awareness slogan). Typically, students are disciplined only if they actually refuse to remove the offending apparel when asked to do so.

B. ***Procedural history***

Through their mothers, B.H. and K.M. sued the School District under 42 U.S.C. § 1983.[5] Compl., ECF No.

3. After the district-wide ban was in place, there were several incidents of middle-school boys inappropriately touching girls, but they were unrelated to the "I ♥ boobies! (KEEP A BREAST)" bracelets.

4. B.H. and K.M. do not assert a facial challenge to the constitutionality of the dress-code policy.

5. The District Court had both federal-question jurisdiction under 28 U.S.C. § 1331 and § 1983 jurisdiction under 28 U.S.C. § 1343(a)(3). *See Max v. Republican Comm. of Lancaster Cnty.*, 587 F.3d 198, 199 n.1 (3d Cir. 2009).

1 ¶ 3, B.H. v. Easton Area Sch. Dist., No. 5:10-CV-06283-MAM (E.D. Pa. Nov. 15, 2010). They sought a temporary restraining order allowing them to attend the Winter Ball and a preliminary injunction against the bracelet ban. *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 394 (E.D. Pa. 2011). At the District Court's urging, the School District reversed course and permitted B.H. and K.M. to attend the Winter Ball while retaining the option to impose a comparable punishment if the bracelet ban was upheld. *Id.* The District Court accordingly denied the motion for a temporary restraining order. *Id.*

The District Court conducted an evidentiary hearing on the request for a preliminary injunction. 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 policy[6] together with the bracelets' alleged sexual innuendo. According to the School District's witnesses, the Middle School assistant principals had conferred and

6. Even the Middle School administrators seemed unsure which words would be prohibited by the dress code. When deposed, Viglianti and principal Angela DiVietro testified that the word "breast" (as in apparel stating "keep-a-breast.org" or "breast cancer awareness") would be inappropriate because the word "breast" "can be construed as [having] a sexual connotation." App. 490, 497. At the District Court's evidentiary hearing, they reversed course. Viglianti stated that "keep-a-breast.org" would be appropriate "[i]n the context of Breast Cancer Awareness Month," and DiVietro no longer believed the phrase "breast cancer awareness" was vulgar to middle-school students.

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.

After the evidentiary hearing, the District Court preliminarily enjoined the School District's bracelet ban. According to the District Court, B.H. and K.M. were likely to succeed on the merits because the bracelets did not contain lewd speech under *Fraser* and did not threaten to substantially disrupt the school environment under *Tinker*. The District Court could find no other basis for regulating the student speech at issue. The School District appealed, and the District Court denied its request to stay the injunction pending this appeal.

II.

Although the District Court's preliminary injunction is not a final order, we have jurisdiction under 28 U.S.C. § 1292(a)(1), which grants appellate jurisdiction over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions." *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*,

307 F.3d 243, 252 n.10 (3d Cir. 2002). We review the District Court's factual findings for clear error, its legal conclusions *de novo*, and its ultimate decision to grant the preliminary injunction for abuse of discretion. *Id.* at 252. Four factors determine whether a preliminary injunction is appropriate:

> (1) whether the movant has a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denying the injunction; (3) whether there will be greater harm to the nonmoving party if the injunction is granted; and (4) whether granting the injunction is in the public interest.

Id. (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 170 (3d Cir. 2001)). The District Court concluded that all four factors weighed in favor of B.H. and K.M. In school-speech cases, though, the first factor—the likelihood of success on the merits—tends to determine which way the other factors fall. *Id.* at 258. Because the same is true here, we focus first on B.H. and K.M.'s burden to show a likelihood of success on the merits. *Id.*

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*.

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7. The rest of the Supreme Court's student-speech jurisprudence might fairly be described as opaque. *See Morse*, 551 U.S. at 418 (Thomas, J., concurring) ("I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not . . . ."); *id.* at 430 (Breyer, J., concurring in part and dissenting in part) ("[C]ourts have described the tests these cases suggest as complex and often difficult to apply."); *see, e.g.*, *Doninger v. Niehoff*, 642 F.3d 334, 353 (2d Cir. 2011) ("The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle with which standard applies in any particular case."); *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326, 331 (2d Cir. 2006) (acknowledging "some lack of clarity in the Supreme Court's student-speech cases" and stating that the "exact contours of what is plainly offensive [under *Fraser*] is not so clear").

Appendix A

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

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Of course, there are exceptions. When acting as sovereign, the government is empowered to impose time, place, and manner restrictions on speech, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), make reasonable, content-based decisions about what speech is allowed on government property that is not fully open to the public, *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674-75 (1998), decide what viewpoints to espouse in its own speech or speech that might be attributed to it, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005), and categorically restrict unprotected speech, such as obscenity, *see Miller v. California*, 413 U.S. 15, 23 (1973).[8]

8. Other examples of categorically unprotected speech include child pornography, *see New York v. Ferber*, 458 U.S. 747, 764-65 (1982), advocacy that imminently incites lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (per curiam), fighting words, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), true threats, *see Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), commercial speech that is false, misleading, or proposes illegal transactions, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562, 566-67 (1980), and some false statements of fact, *see United States v. Alvarez*, 132 S. Ct. 2537, 2546-47 (2012).

Sometimes, however, the government acts in capacities that go beyond being sovereign. In those capacities, it not only retains its sovereign authority over speech but also gains additional flexibility to regulate speech. *See In re Kendall*, 712 F.3d 814, 825, 58 V.I. 718 (3d Cir. 2013) (collecting examples). One of those other capacities is K-12 educator. Although "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" the First Amendment has to be "applied in light of the special characteristics of the school environment" and thus students' rights to freedom of speech "are not automatically coextensive with the rights of adults in other settings." *Morse*, 551 U.S. at 396-97 (internal quotation marks and citations omitted).

The Supreme Court first expressed this principle nearly a half century ago. In 1965, the United States deployed over 200,000 troops to Vietnam as part of Operation Rolling Thunder—and thus began the Vietnam War. That war "divided this country as few other issues [e]ver have." *Tinker*, 393 U.S. at 524 (Black, J., dissenting). Public opposition to the war made its way into schools, and in one high-profile case, a group of high-school and middle-school students wore black armbands to express their opposition. *Id*. at 504 (majority opinion). School officials adopted a policy prohibiting the armbands and suspending any student who refused to remove it when asked. *Id*. Some students refused and were suspended. *Id*. The Supreme Court upheld their right to wear the armbands. *Id*. at 514. *Tinker* held that school officials may not restrict student speech without a reasonable forecast that the speech would substantially disrupt the school

environment or invade the rights of others. *Id.* at 513. As nothing more than the "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on [the students'] part," the students' armbands were protected by the First Amendment. *Id.* at 508.

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."[9] *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

9. We have not yet decided whether *Tinker* is limited to on-campus speech. *See J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 926 & n.3 (3d Cir. 2011) (*en banc*) (declining to reach this issue); *see also id.* at 936 (Smith, J., concurring) ("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.").

of drug use or possession.").[10] 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.[11]

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10. As we explain in Part III.B(2), the limitations that Justice Alito's concurrence places on the majority's opinion in *Morse* are controlling.

11. *Compare Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009) (discussing the government-speech doctrine and explaining that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message" (citing *Johanns*, 544 U.S. at 562)), *with Kuhlmeier*, 484 U.S. at 271, 273 (reaffirming the government's same authority to control speech that might be "reasonably perceive[ed] to bear the imprimatur of the school" in its role as K-12 educator); *see also* Eugene Volokh, *The First Amendment and the Government as K-12 Educator*, The Volokh Conspiracy (Oct. 31, 2011, 6:26 PM), http://www.volokh.com/2011/10/31/the-first-amendment-and-the-government-as-k-12-educator/ ("[*Kuhlmeier*] generally reflects broad government-as-speaker law, and not special rules related to the government as K-12 educator."); Michael J. O'Connor, Comment, *School Speech in the Internet Age: Do Students Shed Their Rights When They Pick Up a Mouse?*, 11 U. Pa. J. Const. L. 459, 469 (2009) ("Hazelwood . . . simply illustrates the idea that the school speech arena is not isolated from developments in wider First Amendment jurisprudence. . . . Hazelwood recognizes that schools are government actors and therefore are entitled to control speech that could be reasonably viewed as originating with them."); Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. Rev. 1691, 1711-12 (2009) (similar).

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

The first exception is at issue here. We must determine the scope of the government's authority to categorically restrict vulgar, lewd, indecent, or plainly offensive speech under *Fraser*. *Fraser* involved a high-school assembly during which a student "nominated a peer for class office through an 'an elaborate, graphic, and explicit sexual metaphor.'" *Saxe*, 240 F.3d at 212 (quoting *Fraser*, 478 U.S. at 677). Fraser's speech "glorif[ied] male sexuality":

> 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 [the candidate] 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.

Fraser, 478 U.S. at 687 (Brennan, J., concurring). In response, "[s]ome students hooted and yelled; some by gestures simulated the sexual activities pointedly alluded to in [Fraser's] speech." *Id.* at 678 (majority opinion). Still "[o]ther students appeared to be bewildered and embarrassed by the speech." *Id.* The school suspended

Fraser and took him out of the running for graduation speaker. *Id.*

The Supreme Court upheld Fraser's suspension. *Id.* at 683. Rather than requiring a reasonable forecast of substantial disruption under *Tinker*, the Court held that lewd, vulgar, indecent, and plainly offensive student speech is categorically unprotected in school, even if it falls short of obscenity and would have been protected outside school. *Saxe*, 240 F.3d at 213 (discussing *Fraser*); *Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); *Fraser*, 478 U.S. at 688 (Blackmun, J., concurring) ("If [Fraser] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate."). For this proposition, the Court relied on precedent holding that the government can restrict expression that would be obscene from a minor's perspective—even though it would not be obscene in an adult's view—where minors are either a captive audience or the intended recipients of the speech. *See Fraser*, 478 U.S. at 684-85 (relying on *Ginsberg v. New York*, 390 U.S. 629, 635-37 & nn.4-5 (1968) (upholding criminal punishment for selling to minors any picture depicting nudity); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 870 (1982) (plurality opinion) (acknowledging that the Free Speech Clause would allow a local board of education to remove "pervasively vulgar" books from school libraries); and *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (rejecting a Free Speech Clause challenge to the FCC's

broad leeway to regulate indecent-but-not-obscene material on broadcast television during hours when children were likely to watch)).

Fraser did no more than extend these obscenity-to-minors[12] cases to another place where minors are a captive audience—schools. Indeed, as the Court explained, schools are tasked with more than just "educating our youth" about "books, the curriculum, and the civics class." *Id.* at 681. Society also expects schools to "teach[] students the boundaries of socially appropriate behavior," including the "fundamental values of 'habits and manners of civility' essential to a democratic society." *Id.* at 681, 683 (citation omitted). Consequently, Fraser's "sexually explicit monologue" was not protected. *Id.* at 685.

It is important to recognize what was not at stake in *Fraser*. *Fraser* addressed only a school's power

12. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (2011) (describing *Ginsberg* as regulating "obscenity for minors"); *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (reaffirming the government's power under *Pacifica* and *Ginsberg* to "'protect[] the physical and psychological well-being of minors' which extended to shield them from indecent messages that are not obscene by adult standards" (quoting *Sable Comm'cns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989))); *Pacifica Found.*, 438 U.S. at 767 (Brennan, J., dissenting) (agreeing with the majority that the government could regulate "variable obscenity" or "obscenity to minors" on broadcast television, but disagreeing with the majority that the Carlin monologue met that standard); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975) (describing *Ginsberg* as involving "obscenity as to minors"); *Ginsberg*, 390 U.S. at 635 n.4 (using the label "variable obscenity").

over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non-lewd. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008) ("[*Fraser's*] reference to 'plainly offensive' speech must be understood in light of the vulgar, lewd, and sexually explicit language that was at issue in [that] case."); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (interpreting *Fraser* as limited to "per se vulgar, lewd, obscene, or plainly offensive" school speech). After all, the Court believed Fraser's speech to be "plainly offensive to both teachers and students—indeed to any mature person."[13] *Fraser*, 478 U.S. at 683.

And because it was plainly lewd, the Court did not believe that Fraser's speech could plausibly be interpreted as political or social commentary. In hindsight, it might be tempting to believe that Fraser's speech was political because it was made in the context of a student election. *Cf. Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 898 (2010) (describing the importance of political speech as the "means to hold officials accountable to the people"). But that kind of revisionist history is belied by both the logic and language of *Fraser*. "*Fraser* permits a school

13. Of course, Fraser's speech might "seem[] distinctly lacking in shock value" today, especially "from the perspective enabled by 25 years of erosion of refinement in the use of language." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011); *see also Fraser*, 478 U.S. at 691 (Stevens, J., dissenting) (noting that Clark Gable's famous use of the word "damn" in "Frankly, my dear, I don't give a damn" "shocked the Nation" when Justice Stevens was a high school student but had become "less offensive" by the time of *Fraser*). Any such change in perspective, however, is irrelevant to our examination of the Court's interpretation of Fraser's speech and its reasoning.

to prohibit words that 'offend for the same reasons that obscenity offends.'" *Saxe*, 240 F.3d at 213 (quoting *Fraser*, 478 U.S. at 685). Obscenity, in turn, offends because it is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Fraser*, 478 U.S. at 683 (quoting *Pacifica Found.*, 438 U.S. at 746 (plurality opinion)). In other words, obscenity and obscenity to minors, like "other historically unprotected categories of speech," have little or no political or social value. *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 1585 (2010). By concluding that Fraser's speech met the obscenity-to-minors standard, the Court necessarily implied that his speech could not be interpreted as having "serious" political value. *Miller*, 413 U.S. at 24.

In fact, the majority in *Fraser* made this explicit. "[T]he *Fraser* [C]ourt distinguished its holding from *Tinker* in part on the absence of any political message in Fraser's speech." *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326, 328 (2d Cir. 2006). In the Court's own words, there was a "marked distinction between the political 'message' of the armbands in *Tinker* and the *sexual* content of [Fraser's] speech." *Fraser*, 478 U.S. at 680 (emphasis added); *see also Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 332 (6th Cir. 2010) ("*Tinker* governs this case because by wearing clothing bearing images of the Confederate flag, Tom Defoe engaged in 'pure speech,' which is protected by the First Amendment, and thus *Fraser* would not apply."). Several courts of appeals have similarly interpreted *Fraser*. *Guiles*, 461 F.3d at 326, 328; *Newsom ex rel. Newsom v. Albemarle Cnty. Sch.*

Bd., 354 F.3d 249, 256 (4th Cir. 2003) (explaining that *Fraser* "distinguish[ed] *Tinker* on the basis that the lewd, vulgar, and plainly offensive speech was 'unrelated to any political viewpoint' (quoting *Fraser*, 478 U.S. at 685)); *Chandler*, 978 F.2d at 532 n.2 (Goodwin, J., concurring) (concluding that *Fraser* does not apply because "this case clearly involves political speech"). And the Supreme Court later characterized *Fraser's* reasoning the same way. *Morse*, 551 U.S. at 404 (noting that *Fraser* was "plainly attuned" to the sexual, non-political "content of Fraser's speech"). In fact, *Morse* refused to "stretch[] *Fraser*" so far as to "encompass any speech that could fit under some definition of 'offensive'" out of a fear that "much political and religious speech might be perceived as offensive to some." *Id.* at 409. *Fraser* therefore involved plainly lewd speech that did not comment on political or social issues.

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.[14] The first step is justified, but the second is not.

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14. *Fraser* differs from this case in a third way: *Fraser* involved speech at an official school assembly, whereas the School District's bracelet ban extends to the entire school day, not just school-sponsored functions. But like other courts of appeals, we do not think that this difference matters. *See, e.g., R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 542 (2d Cir. 2011) ("[W]e have not interpreted *Fraser* as limited either to regulation of school-sponsored speech or to the spoken word."); *Chandler*, 978 F.2d at 529 (concluding that restriction of vulgar,

lewd, and plainly offensive speech under *Fraser* is not limited to speech "given at an official school assembly"); *Bystrom by and through Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 753 (8th Cir. 1987) ("It is true that [*Fraser*] involved a speech given before a student assembly . . . . [But] [t]his possible difference, in our view, does not amount to a legal distinction making the *Bethel* rule inapplicable here."). As we explained, *Fraser* reflected an extension of the Court's obscenity-to-minors jurisprudence, which permits the government to restrict lewd speech to children where children are either a captive audience or the intended recipients of the speech. Children are just as much of a captive audience in the hallways, cafeteria, or locker rooms as they are in official school assemblies and classrooms. Naturally, then, we have never described a school's authority under *Fraser* as being limited to official school functions and classrooms. *See, e.g., J.S.*, 650 F.3d at 927 ("The first exception is set out in *Fraser*, which we interpreted to permit school officials to regulate "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech *in school*." (emphasis in original) (quoting *Saxe*, 240 F.3d at 213)). Although Justice Brennan's concurrence and Justice Stevens's dissent in *Fraser* suggested that this difference might matter, nothing in the majority opinion endorsed their distinction. *See Fraser*, 478 U.S. at 689 (Brennan, J., concurring) (opining that Fraser's "speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty"); *id.* at 696 (Stevens, J., dissenting) ("It seems fairly obvious that [Fraser's] speech would be inappropriate in certain classroom and formal social settings. On the other hand, in a locker room or perhaps in a school corridor the metaphor in the speech might be regarded as rather routine comment."). Indeed, if *Fraser* were so limited, then a school's authority under *Fraser* would largely merge with its power to reasonably regulate school-sponsored speech under *Kuhlmeier*, yet we have always viewed *Fraser* and *Kuhlmeier* as separate exceptions to *Tinker. See, e.g., J.S.*, 650 F.3d at 927.

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

Although *Fraser* involved plainly lewd, vulgar, profane, or offensive speech that "offends for the same reasons obscenity offends," *Saxe*, 240 F.3d at 213 (quoting *Fraser*, 478 U.S. at 685), student speech need not rise to that level to be restricted under *Fraser*. We conclude that schools may also categorically restrict ambiguous speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive—unless, as explained below, the speech could also plausibly be interpreted as commenting on a political or social issue. After all, *Fraser* made clear that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 478 U.S. at 683. The Supreme Court's three other student-speech cases suggest that courts should defer to a school's decisions to restrict what a reasonable observer would interpret as lewd, vulgar, profane, or offensive. *See Morse*, 551 U.S. at 403 (explaining that, under *Tinker*, courts determine whether school officials have "reasonably conclude[d]" that student speech will substantially disrupt the school); *id.* at 405 (explaining that, under Kuhlmeier, courts uphold a school's reasonable, pedagogically related restrictions on speech that an observer could reasonably attribute to the school); *id.* at 422 (Alito, J., concurring) (explaining that schools may restrict student speech that could "reasonably be regarded as encouraging illegal drug use" and that could not plausibly be interpreted as commenting on a political

or social issue). This makes sense. School officials know the age, maturity, and other characteristics of their students far better than judges do. Our review is restricted to a cold and distant record. And we must take into account that these same officials must often act "suddenly and unexpectedly" based on their experience. *Id.* at 409-10 (majority opinion); *see, e.g.*, *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416-17 (3d Cir. 2003) ("There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students. Human sexuality provides the most obvious example of age-sensitive matter . . . ." (citing *Fraser*, 478 U.S. at 683-84)); *Sypniewski*, 307 F.3d at 266 ("What is necessary in one school at one time will not be necessary elsewhere and at other times.").

It remains the job of judges, nonetheless, to determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive. *See Morse*, 551 U.S. at 402 (taking the same approach with respect to the message of drug advocacy on Frederick's banner); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2988 (2010) ("This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question."). Whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive depends on the plausibility of the school's interpretation in light of competing meanings; the context, content, and form of the speech; and the age and maturity of the

students. *See, e.g., Chandler*, 978 F.2d at 530 (analyzing the word "scab" on buttons worn by students during a teacher strike to determine whether it was a vulgar, offensive epithet or just "common parlance" and concluding that, at the motion-to-dismiss stage, *Fraser* did not apply).

Although this is a highly contextual inquiry, several rules apply. A reasonable observer would not adopt an acontextual interpretation, and the subjective intent of the speaker is irrelevant. *See Morse*, 551 U.S. at 401-02 (explaining that Frederick's desire to appear on television "was a description of [his] *motive* for displaying the banner" and "not an interpretation of what the banner sa[id]"); *see also Saxe*, 240 F.3d at 216-17 (noting that students' intent to offend or disrupt does not satisfy *Tinker*). And *Fraser* is not a blank check to categorically restrict any speech that touches on sex or any speech that has the potential to offend. *See Morse*, 551 U.S. at 401, 409 (refusing to "stretch[] *Fraser*" so far as "to encompass any speech that could fit under some definition of 'offensive' and rejecting the argument that the "BONG HiTS 4 JESUS" message on Frederick's banner could be banned under *Fraser*, even though it "is no doubt offensive to some"); *accord* Eugene Volokh, *May 'Jesus Is Not a Homophobe' T-shirt Be Banned From Public High School As 'Indecent' And 'Sexual'?*, The Volokh Conspiracy (Apr. 4, 2012, 3:36 PM), http://www.volokh.com/2012/04/04/may-jesus-was-not-a-homophobe-T-shirt-be-banned-from-public-high-school-as-indecent-and-sexual/ ("But *Fraser* . . . hardly suggested that all speech on political and religious questions related to sexuality and sexual orientation could be banned from public high school."). After all, a school's mission to mold students into citizens

capable of engaging in civil discourse includes teaching students of sufficient age and maturity how to navigate debates touching on sex.

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's concurrence, joined by Justice Kennedy, provided the crucial fourth and fifth votes in the five-to-four majority opinion. But the two justices conditioned their votes on the "understanding that (1) [the majority opinion] 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 (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422 (Alito, J., concurring); *see id.* at 425 (regarding the categorical regulation of *non-political* advocacy of ambiguous illegal drug advocacy "as standing at the far reaches of what the First Amendment permits" and "join[ing] the opinion of

the Court with the understanding that the opinion does not endorse any further extension"). The purpose of Justice Alito's concurrence was to "ensur[e] that political speech will remain protected within the school setting" (subject, as always, to *Tinker's* substantial-disruption principle). *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007).

Because the votes of Justices Alito and Kennedy were necessary to the majority opinion and were expressly conditioned on their narrower understanding that speech plausibly interpreted as political or social commentary was protected from categorical regulation, that limitation is a binding part of *Morse*. This conclusion requires a minor detour. The most familiar situation in which we follow the narrowest rationale was expressed by the Supreme Court in *Marks v. United States*: when "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. 188, 193 (1977) (internal quotation marks and citations omitted). But that situation is not the only one in which we tally the justices' views and look for the narrowest rationale. The Supreme Court and this Court have both applied the narrowest-grounds approach in circumstances beyond those posed by *Marks*, including to determine holdings in majority opinions (not just plurality opinions involving "no single legal rationale explain[ing] the result")[15] and to count even dissenting justices' votes that, by definition, could not "explain the

15. *See* discussion of *Horn* and *Bishop infra* pp. 30-33.

result" (not just the votes of those who "concurred in the judgments").[16] *See United States v. Johnson*, 467 F.3d 56, 65 (1st Cir. 2006) (noting that the Supreme Court has "moved away" from adhering to the strict circumstances in *Marks*).

And it makes sense that the limitations in Justice Alito's concurrence would narrow the majority opinion. When an individual justice's vote is not needed to form a majority, "the meaning of a majority opinion is to be found within the opinion itself" because "the gloss that an individual [j]ustice chooses to place upon it is not authoritative." *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring). But when an individual justice joins the majority and is essential to maintaining the majority, and then writes separately, "the opinion is *not* a majority opinion except to the extent that it accords with his views." *Id*. at 462 n.3 (Scalia, J., dissenting). Of course, that linchpin justice's opinion "cannot add to what the majority opinion holds" by "binding the other four [j]ustices to what they have not said" because his views would not be the narrowest grounds. *Id*. But that justice's separate opinion "can assuredly narrow what the majority opinion holds, by

16. *See, e.g., Nichols v. United States*, 511 U.S. 738, 746 (1994) (combining the views of four dissenters and Justice Stewart in *Baldasar v. Illinois*, 446 U.S. 222 (1980), to form a "holding"); *Donovan*, 661 F.3d at 182 ("[W]e have looked to the votes of dissenting Justices if they, combined with votes from plurality or concurring opinions, establish a majority view on the relevant issue."); *Student Pub. Interest Research Grp. of N.J., Inc. v. AT&T Bell Labs.*, 842 F.2d 1436, 1451 & n.16 (3d Cir. 1988) (same).

explaining the more limited interpretation adopted by that necessary member of the majority." *Id.* In that case, the linchpin justice's views are "the least common denominator" necessary to maintain a majority opinion. *Id.*; *see generally* Sonja R. West, *Concurring in Part and Concurring in the Confusion*, 104 Mich. L. Rev. 1951 (2006) (advocating the same approach and explaining that it is consistent with determining precedent from the traditional Supreme Court's seriatim opinions).

Indeed, this is not the first time that we have been compelled to limit a majority opinion by a linchpin justice's narrower concurrence. In *Horn v. Thoratec*, we considered whether the federal regulation of medical devices preempts only state-law "requirement[s]" specific to medical devices or also preempts general common-law claims not specific to medical devices (such as negligence). *See* 376 F.3d 163, 173-74 (3d Cir. 2004). That, in turn, required us to analyze the Supreme Court's decision in *Medtronic v. Lohr*, 518 U.S. 470 (1996). We read Part V of the *Lohr* majority opinion—which Justice Breyer formally joined as the fifth vote—as saying that only device-specific state-law requirements, not general common-law claims, are preempted. *See Horn*, 376 F.3d at 174 (noting that the majority in Part V conclud[ed] that common-law claims "escape[]" preemption because "their generality leaves them outside" of the preempted category of device-specific requirements (quoting *Lohr*, 518 U.S. at 502)); *id.* at 175 (explaining that "Justice Breyer joined in some parts of Justice Stevens' plurality opinion (thus making it a majority opinion at times)," including "in Part V"). But we also read Justice Breyer's concurrence as reaching the

opposite conclusion, despite his having joined that portion of the majority opinion. *See id.* Faced with an apparent conflict between Part V of the majority opinion and Justice Breyer's concurrence, we followed the latter because it was narrower, just as the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits had done. *Id.* at 175-76; *see also Martin v. Medtronic*, 254 F.3d 573, 581-83 (5th Cir. 2001); *Kemp v. Medtronic*, 231 F.3d 216, 230 (6th Cir. 2000); *Mitchell v. Collagen Corp.*, 126 F.3d 902, 911-12 (7th Cir. 1997); *Papike v. Tambrands, Inc.*, 107 F.3d 737, 742 (9th Cir. 1997). In doing so, we rejected our dissenting colleague's argument that the narrowest-grounds approach was "simply inapplicable" because Justice Breyer joined Part V of the majority opinion and that the "correct course of action" in the event of a conflict "would be to follow Part V as the majority opinion." *Horn*, 376 F.3d at 184 & n.30 (Fuentes, J., dissenting); *see id.* at 183 (explaining that the *Horn* majority and the Seventh and Ninth Circuits "also perceived a contradiction and chose to ignore Justice Breyer's vote for Part V, instead crediting the apparently contrary reasoning in his concurrence").

Likewise, in *United States v. Bishop*, 66 F.3d 569, 576-77 (3d Cir. 1995), we relied on the narrower concurring views of Justices Kennedy and O'Connor to limit the majority's opinion in *United States v. Lopez*, 514 U.S. 549 (1995), which they formally joined as the fourth and fifth votes. We declined to read the majority opinion so broadly as to upend judicial deference to Congress's judgment about whether an activity substantially implicates interstate commerce, instead following the concurrence's view that the majority had reached a "necessary though limited

holding" that still "counseled great restraint" before finding that Congress had transgressed its Commerce Clause power. *Bishop*, 66 F.3d at 590 (quoting *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring)). As in *Horn*, we took that approach notwithstanding our dissenting colleague's argument that we should follow the breadth of the majority opinion and ignore the narrower concurrence because "Justices O'Connor and Kennedy *joined* in the [majority] opinion." *Id*. at 591 (Becker, J., concurring in part and dissenting in part). As even our dissenting colleague explained, we followed the narrower views of Justices O'Connor and Kennedy because they "form[ed] an intermediate bloc [of the majority] which would view *Lopez* as case-specific." *Id*. And *Horn* and *Bishop* are not the only examples. *See, e.g., United States v. Monclavo-Cruz*, 662 F.2d 1285, 1288 (9th Cir. 1981) (relying on the narrowing construction given to the majority opinion by Justice Powell, who was also a necessary member of the majority, to limit the majority's holding in *South Dakota v. Opperman*, 428 U.S. 364 (1976)); *United States v. Wilson*, 636 F.2d 1161, 1164 (8th Cir. 1980) (similar).

To be sure, the Supreme Court once said—in a case not involving a linchpin concurrence—that federal courts should not give "much precedential weight" to a concurring opinion, even if it coheres with the majority opinion. *Alexander v. Sandoval*, 532 U.S. 275, 285 n.5 (2001); *see also Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 622 n.4 (1986) (describing the *Marks* rule as "inapplicable" to an opinion "to which five Justices expressly subscribed"). Yet we have already decided that this principle from *Alexander* is inapplicable to a concurrence that

(1) "cast the so-called 'swing vote,' which was crucial to the outcome of the case and without which there could be no majority," and (2) took a narrower approach than the majority opinion. *Horn*, 376 F.3d at 174-75 (distinguishing *Alexander* on this basis).

Which brings us back to Justice Alito's concurrence in *Morse*. The linchpin justices in *Morse*—Justices Alito and Kennedy—expressly conditioned their joining the majority opinion on a narrower interpretation of the opinion—namely, that it did not permit the restriction of speech that could plausibly be interpreted as political or social speech. Had they known that lower courts would ignore their narrower understanding of the majority opinion—or had the majority opinion expressly gone farther than their limitations—then, by their own admission, they would not have joined the majority opinion. That would have transformed the five-justice majority opinion into a three-justice plurality opinion, with their concurring views becoming the controlling narrowest grounds under an uncontroversial application of the *Marks* doctrine. Why, then, should it matter whether they formally joined the majority opinion or not?

It should not. Ignoring limitations placed on the majority opinion by a necessary member of the majority would mean that four justices could "fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his own more narrow understanding." *McKoy*, 494 U.S. at 462 n.3 (Scalia, J., dissenting). That produces inexplicable anomalies. If a four-justice plurality holds X and Y, and a

fifth justice "concurs in the judgment" to hold only X and rejects Y, the fifth member's more limited views become binding under a straightforward application of *Marks*. The same interpretation is true if the fifth justice joins the majority opinion and "concurs in part." Yet if the same concurring justice joins the majority opinion while "concurring," then the majority opinion holding X and Y becomes binding and the fifth member's narrower views evaporate. Such an approach places all of its weight on the distinction between a justice's choice to follow his name with "concurring" instead of "concurring in part" or "concurring in the judgment." *Cf.* West, *Concurring in Part and Concurring in the Confusion*, 104 Mich. L. Rev. at 1953-54 (explaining why these "after the comma" phrases cannot bear such weight); Tristan C. Pelham-Webb, Note, *Powelling for Precedent: "Binding" Concurrences*, 64 N.Y.U. Ann. Surv. Am. L. 693, 737 (2009) (same). That elevates formalism over substance at the expense of ignoring the very conditions on which a necessary member of the majority expressly chose to join the majority.

In short, because Justice Alito's concurrence provides "a single legal standard . . . [that] when properly applied, produce[s] results with which a majority of the Justices in the case articulating the standard would agree," *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (alterations in original) (internal quotation marks and citations omitted), his opinion in *Morse* forms the "narrowest grounds necessary to secure a majority," *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 694 n.7 (3d Cir. 1991), *aff'd in part and rev'd in part on*

other grounds, 505 U.S. 833 (1992). As a result, we agree with the *en banc* Fifth Circuit that the limitations placed on the majority opinion by Justice Alito's concurrence are binding on us.[17] *See Morgan v. Swanson*, 659 F.3d 359, 403 (5th Cir. 2011) (*en banc*) (majority opinion of Elrod, J.) (describing Justice Alito's *Morse* concurrence as "controlling"); *see also Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 746 n.25 (5th Cir. 2009) ("We have held Justice Alito's concurrence to be the controlling opinion in Morse." (citing *Ponce*, 508 F.3d at 768)).

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

17. We have had this same intuition previously. *See J.S.*, 650 F.3d at 927 ("Notably, Justice Alito's concurrence in *Morse* further emphasizes the narrowness of the Court's holding."). And every court of appeals to address this question (other than the Seventh Circuit) has shared our intuition. *See Morgan*, 589 F.3d at 746 n.25; *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (treating Justice Alito's concurrence as the basis for *Morse's* "narrow holding"); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) (same). The Seventh Circuit concluded, without citation or support, that the narrowest-grounds approach does not apply where there is a majority opinion, as in *Morse. Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 673 (7th Cir. 2008). But as we explain, we have already rejected the Seventh Circuit's formalist approach when it was urged by dissenting colleagues in *Horn* and *Bishop*.

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. One need not be a philosopher of Mill or Feinberg's stature[18] to recognize that harmful speech posing an "immediately obvious" threat to the "physical safety

18. John Stuart Mill and Joel Feinberg are both known for, among other things, their groundbreaking work on the relationship between harm and offense and how conduct of each type might be subject to criminalization. *See generally* Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (1984); Joel Feinberg, *Offense to Others: The Moral Limits of the Criminal Law* (1985); John Stuart Mill, *On Liberty* (1859).

of students," *id.* at 425, presents a far graver threat to the educational mission of schools—thereby warranting less protection—than ambiguously lewd speech that might undercut teaching "the appropriate form of civil discourse" to students, *Fraser*, 478 U.S. at 683. 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*.

Those limits are persuasive on their own terms, even if we disregard the controlling limitations of Justice Alito's *Morse* concurrence. *Fraser* reflects the longstanding notions that "not all speech is of equal First Amendment importance" and that "speech on matters of public concern . . . is at the heart of the First Amendment's protection." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quotation marks and citations omitted); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (internal quotation marks and citations omitted)). And it is only a limited exception to the otherwise "bedrock principle" of the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."). The Supreme Court has never held that schools may bore willy-nilly through that bedrock principle. But it has made clear that "minors are entitled to a significant measure of First Amendment

protection" and the government does not "have a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2736 (2011). To be sure, *Fraser* rejected the idea that "simply because 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. As we have explained, though, *Fraser* was limited to plainly lewd speech, and that refusal to protect a student's plainly lewd speech where the same speech by an adult would be protected does not extend to political speech that is not plainly lewd. On that score, our conclusion puts us in good company with five justices in *Morse*[19] who were expressly unwilling to permit a categorical exception to *Tinker* that would intrude on political or social speech and two justices[20] who all but said as much.

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19. In addition to Justices Alito and Kennedy, three dissenting justices (Justices Stevens, Souter, and Ginsburg) would not have extended the *Morse* exception to political or social speech. These five justices instead split over whether Morse's speech could reasonably be interpreted as advocating illegal drug use. *Morse*, 551 U.S. at 444, 448 (Stevens, J., dissenting) (concluding that Morse's banner is constitutionally protected because it could not reasonably be interpreted as advocating illegal drug use and was at most a "minority[] viewpoint" in "the national debate about a serious issue" deserving First Amendment protection).

20. In the majority opinion, Chief Justice Roberts and Justice Scalia refused to "stretch[] *Fraser*" so far as to "encompass any speech that could fit under some definition of 'offensive'" specifically to protect "political and religious speech [that] might be perceived as offensive to some." *Morse*, 551 U.S. at 409; *see also id.* at 403 (majority opinion) ("But not even Frederick argues that the banner conveys any sort of political or religious

What's more, this limitation is consistent with our previous intuitions as well as those of the Sixth and Second Circuits. *See Saxe*, 240 F.3d at 213 (Alito, J.) (noting that the "dichotomy" between *Fraser* and *Tinker* is "neatly illustrated by the comparison between Cohen's ["Fuck the Draft"] jacket and Tinker's armband"); *Defoe*, 625 F.3d at 335 n.6 (rejecting the Eleventh Circuit's extension of *Fraser* to displays of the Confederate flag and instead holding that such displays "by students [are] protected political speech that school officials may only regulate by satisfying the *Tinker* standard" (citing *Barr v. Lafon*, 538 F.3d 554, 569 n.7 (6th Cir. 2008))); *Guiles*, 461 F.3d at 325 (holding *Fraser* inapplicable because the T-shirt was not "as plainly offensive as the sexually charged speech considered in *Fraser* . . . [,] especially when considering that [it was] part of an anti-drug political message").

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.

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message. Contrary to the dissent's suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession."); *id.* at 406 n.2 ("[T]here is no serious argument that Frederick's banner is political speech . . . ."). Although Justice Thomas joined that portion of the majority opinion, he would have concluded that "the First Amendment, as originally understood, does not protect student speech in public schools" and overruled *Tinker*. *Id.* at 410-11 (Thomas, J., concurring). Justice Breyer would have avoided the "difficult First Amendment issue" and concluded that "qualified immunity bars [Morse's] claim for monetary damages." *Id.* at 425 (Breyer, J., concurring in the judgment in part and dissenting in part).

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 response, the School District recites a mantra that has *Fraser* providing schools the ultimate discretion to define what is lewd and vulgar. It relies on the Supreme Court's sentiment that schools may define their "basic educational mission" and prohibit student speech that is inconsistent with that mission. *Kuhlmeier*, 484 U.S. at 266-67.[21] Indeed, before *Morse*, some courts of appeals adopted that broad interpretation of the Supreme Court's student-speech cases. *See, e.g., LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001) ("[A] school need not tolerate student speech that is inconsistent with its basic educational mission."); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) ("[W]here Boroff's T-shirts contain symbols and words that promote values that are so patently contrary to the school's educational mission, the School has the authority, under the circumstances of this case, to prohibit those T-shirts [under *Fraser*].").

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21. *See also Fraser*, 478 U.S. at 683 ("[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Pico*, 457 U.S. at 864 ("[F]ederal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems.'" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *see also Kuhlmeier*, 484 U.S. at 273 ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.").

Whatever the face value of those sentiments, such sweeping and total deference to school officials is incompatible with the Supreme Court's teachings. 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).

Instead, *Morse* settled on a narrower view of deference, deferring to a school administrator's "reasonable judgment

that Frederick's sign qualified as drug advocacy" only if the speech could not plausibly be interpreted as commenting on a political or social issue. *Morse*, 551 U.S. at 441 (Stevens, J., dissenting); *see also id.* at 408 (majority opinion) ("[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use."); *id.* at 422 (Alito, J., concurring) ("[A] public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use . . . ."). Our approach to lewd speech provides the same degree of deference to schools as the Court did in *Morse*. We defer to a school's reasonable judgment that an observer could interpret ambiguous speech as lewd, vulgar, profane, or offensive only if the speech could not plausibly be interpreted as commenting on a political or social issue.

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. *See* Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 381 (1985) ("[I]n virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim."). The ease of turning a slippery-slope argument on its head explains why the persuasiveness of such a contention does not depend on its logical validity. *Id.* Instead, the correctness of a slippery-slope argument depends on an empirical prediction that a proposed rule will increase the likelihood of some other undesired outcome occurring. *Id.* ("To some people, one argument will seem more persuasive than the other because the underlying empirical reality . . . makes one equally logical possibility seem substantially more likely to occur than the other."); *see also* Eugene Volokh, *The Mechanism of the Slippery Slope*, 116 Harv. L. Rev. 1026, 1066-71 (2003) (making a similar point in the context of extending precedent). Because courts usually lack the data necessary for such a prediction, "fear of . . . what's at the bottom of a long, slippery slope is not a good reason for today's decision." *Marozsan v. United States*, 852 F.2d 1469, 1499 (7th Cir. 1988) (*en banc*) (Easterbrook, J., dissenting). "The terror of extreme hypotheticals produces much bad law," and so our answer to the School District's "extreme hypothetical[s]" is that we will "cross that bridge when we come to it." *Id.*

To make matters worse, the School District has greased the supposedly slippery slope by omitting any empirical evidence. 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. *See Pacifica Found.*, 438 U.S. at 745-46 (plurality opinion) (explaining that the comedian George Carlin's seven "dirty" words, which includes "tits," "offend for the same reasons that obscenity offends"); *see also LaVine*, 257 F.3d at 989 (concluding that a poem "filled with imagery of violent death and suicide" 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"); *cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 517-18 (2009) (concluding it was not arbitrary or capricious for the FCC to regulate even "isolated uses of sexual and excretory words," including Carlin's seven "dirty" words, because "[e]ven isolated utterances can be made in pander[ing], . . . vulgar and shocking manners" and can thus "constitute harmful first blow[s] to children" (alterations in original)). The same is true of a student's drawings of stick figures in sexual positions, even if used to promote contraceptive use. *Cf. R.O. ex rel. Ochshorn City Sch. Dist.*, 645 F.3d 533, 543 (2d Cir. 2011). And even if students engage in more questionable speech, the school

retains the government's normal sovereign authority to regulate speech as well as its additional powers as educator to restrict speech under *Tinker*, *Kuhlmeier*, and *Morse*. *See, e.g.*, *Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013) (holding that a school's prohibition on wearing T-shirts depicting the Confederate battle flag was permissible under *Tinker* because of a history of racial tension and disruptions related to the Confederate flag).

By contrast, there is empirical support for the opposite worry. Some schools, if empowered to do so, might eliminate all student speech touching on sex or merely having the potential to offend. Indeed, the Middle School's administrators seemed inclined to do just that. They initially testified that they could ban the word "breast," even if used in the context of a breast-cancer-awareness campaign, because the word, by itself, "can be construed as [having] a sexual connotation." App. 490, 497. If anything, the fear of a slippery slope cuts against the School District.

In a similar vein, we need not speculate on context-dependent hypotheticals to give guidance to schools and district courts. The fault lines of our framework are adequately mapped out in the rest of First Amendment jurisprudence. The Supreme Court's obscenity-to-minors case law marks the contours of plainly lewd speech. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (refusing to extend the categorical nonprotection for obscenity to minors to speech that is violent from a minor's perspective); *Ginsberg*, 390 U.S. at 638 (approving a state prohibition on selling minors sexual material that

would be obscene from the minor's perspective). Those contours necessarily admit of some flexibility and can be "adjust[ed] . . . 'to social realities by permitting the [sexual] appeal of this type of material to be assessed" from the minors' perspective. *Id.; see also Fox Television Stations, Inc.*, 556 U.S. at 520 (explaining that based on the obscenity-to-minors case law, the FCC properly "dr[aws] distinctions between the offensiveness of particular words based upon the context in which they appeared" on case-by-case basis without having to rely on empirical evidence as to the degree of offensiveness). And the government is not a stranger to determining whether speech plausibly comments on a political or social issue. For that, we look to case law on whether speech involves a matter of public concern. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is yes, then the possibility of a First Amendment claim arises."). Of course, these rules lack "perfect clarity"—just as every legal rule contains fuzzy borders. *Brown*, 131 S. Ct. at 2764 (Breyer, J., dissenting); *cf. United States v. Williams*, 553 U.S. 285, 304 (2008) ("[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."). Even so, just because a "precise standard" for political speech or plain lewdness (obscenity to minors) "proves elusive," it is still "easy enough to identify instances that fall within a legitimate regulation." *Brown*, 131 S. Ct. at 2764 (Breyer, J., dissenting). Over

time, the fault lines demarcating plainly lewd speech and political or social speech will settle and become more rule-like as precedent accumulates.

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. *See, e.g., Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 626, 626-27 (8th Cir. 2002) (*en banc*) (holding that the government, as K-12 educator, could punish a student for making a true threat); *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 118 (2d Cir. 2012) (Pooler, J., dissenting) ("Indeed, despite the expansion of school-specific exceptions to the First Amendment's general prohibition against government restrictions on speech, certain well-settled rules apply to adults and adolescents alike."). 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.

C. 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*.[22]

IV.

Fraser, of course, is only one of four school-specific avenues for regulating student speech.[23] The parties

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22. Because we conclude that the slogan is not plainly lewd and is plausibly interpreted as commenting on a social issue, the bracelets are protected under *Fraser*. As a result, we need not determine whether a reasonable observer could interpret the bracelets' slogan as lewd.

23. As the Supreme Court has recently reaffirmed, there *might* be other exceptions to *Tinker* that have not yet been identified by the courts. *See Morse*, 551 U.S. at 408-09 (identifying a new exception to the *Tinker* framework for speech that is reasonably interpreted as advocating illegal drug use and that is not plausibly interpreted as commenting on any political or social issue). *Compare id.* at 405 ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute."), *and id.* at 406 ("And, like *Fraser*, [*Kuhlmeier*] confirms that the rule of *Tinker* is not the only basis for restricting student speech."), *with id.*

rightly agree that *Kuhlmeier* and *Morse* do not apply: no one could reasonably believe that the Middle School was somehow involved in the morning fashion decisions of a few students, and no one could reasonably interpret the bracelets as advocating illegal drug use.

That leaves only *Tinker* as possible support for the School District's ban. 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). "[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster." *Id.* at 212; *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 928 (3d Cir. 2011) (*en banc*) ("[T]he School District need not prove with absolute certainty that substantial disruption will occur."). The School District has the burden of showing that the bracelet ban is constitutional under *Tinker. See J.S.*, 650 F.3d at 928. That it cannot do.

Tinker meant what it said: "a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Id.* Tinker's black armbands did not

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at 423 (Alito, J., concurring) ("I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools *necessarily* justify any other speech restrictions." (emphasis added)). Here, however, the School District relies solely on the existing school-speech framework and does not propose any new bases for restricting student speech.

meet this standard, even though the armbands "caused comments, warnings by other students, the poking of fun at them, . . . a warning by an older football player that other, nonprotesting students had better let them alone," and the "wreck[ing]" of a math teacher's lesson period. *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

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.*

Even assuming that disruption arising after a school's speech restriction could satisfy *Tinker*—a question we need not decide today—these two isolated incidents hardly bespeak a substantial disruption caused by the bracelets. "[S]tudent expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to 'a showing of mild curiosity' by other students, 'discussion and comment' among students, or even some 'hostile remarks' or 'discussion outside of the classrooms' by other students." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1271-72 (11th Cir. 2004) (internal quotation marks and citations omitted). 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.

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24. According to B.H. and K.M., *Tinker's* substantial-disruption standard does not permit a school to restrict speech because of the heckler's veto of other students' disruptive reactions. *See* Appellees' Br. at 35 (emphasis added). Because no forecast of substantial disruption would be reasonable on this record under any meaning of that term, we need not determine the precise interplay between the anti-heckler's veto principle present elsewhere in free-speech doctrine and *Tinker's* substantial-disruption standard in public schools. *Compare Zamecnik*, 636 F.3d at 879 (noting that Tinker endorsed both the heckler's veto doctrine and the substantial-disruption test and concluding that other students' harassment of "Zamecnik because of their disapproval of her ["Be Happy, Not Gay" T-shirt] is not a permissible ground for banning it"), *and Holloman*, 370 F.3d at 1275-76 (interpreting *Tinker* as endorsing an anti-heckler's veto principle, concluding that "[w]hile the same constitutional

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).

Undeterred, the School District invokes the other half of *Tinker's* general rule, arguing that the bracelets invade other students' Title IX rights to be free from sexual harassment. *See Tinker*, 393 U.S. at 513. Under Title IX, students may sue federally-funded schools that "act[] with deliberate indifference" to "harassment that is so severe, pervasive, and objectively offensive . . . that the victim students are effectively denied equal access to an institution's resources and opportunities." *Saxe*, 240 F.3d at 205-06 (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999)). 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.

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standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason"), *with Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 38 (10th Cir. Apr. 8, 2013) ("Plaintiffs note that most disruptions occurred only because of wrongful behavior of third parties and that no Plaintiffs participated in these activities. . . . This argument might be effective outside the school context, but it ignores the 'special characteristics of the school environment.'" (quoting *Tinker*, 393 U.S. at 506)).

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. *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) ("We generally refuse to consider issues that the parties have not raised below." (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976))). But there is an even more basic reason why the School District's invocation of Title IX is not the shield it claims to be. 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. *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008) ("[U]nless harassment is qualified with a standard akin to a severe or pervasive

25. As we have repeatedly noted, "the precise scope of *Tinker's* 'interference with the rights of others' language is unclear." *Saxe*, 240 F.3d at 217 (quoting *Tinker*, 393 U.S. at 504); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008). And the Supreme Court has "never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection." *Saxe*, 240 F.3d at 207. We need not address either of these points today. Even if *Tinker* permits school regulation of pure speech that would constitute "harassment" under Title IX, the School District has not offered any explanation or evidence of how passively wearing the "I ♥ boobies! (KEEP A BREAST)" bracelets would create such a severe and pervasive environment in the Middle School. *Cf. Saxe*, 240 F.3d at 204 (Alito, J.) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause."); *Rodriguez v. Maricopa Cnty. Cmty. College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (agreeing with *Saxe's* statement).

requirement, [an anti-]harassment policy may suppress core protected speech."); *Saxe*, 240 F.3d at 217 (rejecting a school district's similar argument that it could ban speech creating a "hostile environment" without showing that the particular speech covered by the policy would create a severe or pervasive environment); *see also Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 676 (7th Cir. 2008) ("[I]t is highly speculative that allowing the plaintiff to wear a T-shirt that says "Be Happy, Not Gay" would have even a slight tendency to provoke such incidents [of student-on-student harassment], or for that matter to poison the educational atmosphere.").

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

V.

Because the School District's ban cannot pass scrutiny under *Fraser* or *Tinker*, B.H. and K.M. are likely to succeed on the merits. In light of that conclusion, the remaining preliminary-injunction factors also favor them. 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)). An after-the-fact money judgment would hardly make up for their lost opportunity to wear the bracelets in school. *See Elrod*, 427 U.S. at 374 n.29 ("The timeliness of political speech is particularly important.").

And the preliminary injunction does not "result in even greater harm to" the School District, the non-moving party. *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). 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. *See, e.g., Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 543 (6th Cir. 2001) ("The foregoing discussion of the three Supreme Court . . . cases demonstrates the importance of the factual circumstances in school speech cases . . . ."). The District Court's injunction against the bracelet ban does not change that.

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.*, 710 F.3d 99, 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.

Appendix A

HARDIMAN, *Circuit Judge*, dissenting with whom CHAGARES, 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.

Appendix A

A

I begin with the Majority's first premise, namely, that Justice Alito's concurrence in *Morse* is the "controlling" opinion in that case, despite the fact that Chief Justice Roberts's majority opinion was joined in full by four other Justices. Maj. Typescript at 36-46. This distinctly minority view is contrary both to the understanding of *Morse* expressed by eight of our sister Courts of Appeals and to what we ourselves have repeatedly articulated to be the Court's holding in *Morse*. By endorsing the Fifth Circuit's mistaken understanding of *Morse*, the Majority applies an incorrect legal standard that leads to the unfortunate result the Court reaches today.

The notion that Justice Alito's concurrence in *Morse* is the controlling opinion flows from a misunderstanding of the Supreme Court's "narrowest grounds" doctrine as established in *Marks v. United States*, 430 U.S. 188 (1977). In *Marks*, the petitioners had been convicted of distributing obscene materials pursuant to jury instructions that were modeled on the definition of obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973). *Marks*, 430 U.S. at 190. Because the petitioners' conduct occurred before the Court had decided *Miller*, they argued that due process entitled them "to jury instructions not under *Miller*, but under the more favorable [obscenity] formulation of *Memoirs v. Massachusetts*." *Id*. That formulation was unclear, however, because the *Memoirs* Court had issued a fractured decision; no more than three of the six Justices who voted for the judgment endorsed any one of three separate opinions, each of

which articulated a different standard for obscenity. *See Memoirs v. Massachusetts*, 383 U.S. 413, 414, 418 (1966) (plurality opinion) (Justice Brennan, joined by Chief Justice Warren and Justice Fortas, stating that obscenity may be proscribed if it is "utterly without redeeming social value"); *id.* at 421, 424 (Black and Douglas, JJ., concurring in judgment) (concurring separately on the grounds that obscenity cannot be proscribed); *id.* at 421 (Stewart, J., concurring in judgment) (concurring on the grounds that only hard-core pornography is proscribable as obscene). The lack of a majority opinion in *Memoirs* led the Sixth Circuit in *Marks* to reject the petitioners' argument that the plurality's "utterly without redeeming social value" standard was the governing rule. It reasoned that because "the *Memoirs* standards never commanded the assent of more than three Justices at any one time . . . *Memoirs* never became the law." *Marks*, 430 U.S. at 192 (describing the lower court's holding).

On appeal, the Supreme Court rejected the Sixth Circuit's reasoning and articulated the following standard: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)). Based on this reasoning, the Court concluded that because three Justices joined the plurality opinion and Justices Black and Douglas "concurred on broader grounds," "[t]he view of the *Memoirs* plurality . . . constituted the holding of the Court and provided the governing standards." *Marks*, 430 U.S. at 193-94.

As *Marks* demonstrates, the narrowest grounds rule is a necessary tool for deciphering the holding of the Court when there is no majority opinion. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (attempting to apply the *Marks* rule to derive a holding in the "fractured decision" *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). Contrary to the Majority's holding today, neither *Marks* nor other Supreme Court decisions support the "unprecedented argument that a statement of legal opinion joined by five Justices of th[e] Court does not carry the force of law," *Vasquez v. Hillery*, 474 U.S. 254, 261 n.4 (1986). Rather, the narrowest grounds rule applies only to "discern a single holding of the Court in cases in which no opinion on the issue in question has garnered the support of a majority." *Id.; cf.* Black's Law Dictionary 1201 (9th ed. 2009) (defining a "majority opinion" as "[a]n opinion joined in by more than half the judges considering a given case").

Unable to find persuasive Supreme Court authority to buttress its novel reading of *Marks*, the Majority argues that our Court has "applied the narrowest-grounds approach in circumstances beyond those posed by *Marks*, including to determine holdings in majority opinions." Maj. Typescript at 37-38 (footnotes, citation, and internal quotation marks omitted). For support, the Majority cites our decisions in *Horn v. Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004), and *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995). Maj. Typescript at 39-42. Neither case counsels the Majority's application of the narrowest-grounds doctrine to interpret *Morse*.

In *Horn*, we looked to Justice Breyer's concurrence in *Medtronic v. Lohr*, 518 U.S. 470 (1996), for guidance on how to address an issue central to our case, but that the *Lohr* Court discussed only in dicta. *See Horn*, 376 F.3d at 175-76 (comparing Justice Breyer's "more narrow" view on preemption with "Justice Stevens' sweeping pronouncement [in his plurality opinion] that [the statute at issue] almost never preempts a state common law claim"). Likewise, in *Bishop*, we cited Justice Kennedy's concurrence in *United States v. Lopez*, 514 U.S. 549 (1995), in order to reinforce the already established principle that courts must exercise "'great restraint' before a court finds Congress to have overstepped its commerce power" despite *Lopez's* revolutionary holding. *Bishop*, 66 F.3d at 590 (quoting *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring)). Critically, in neither of these cases did we indicate a belief that a concurring Justice can create a new rule of law simply by both asking and answering a question left unaddressed by the majority opinion. In fact, we noted that Justice Breyer's concurrence in *Horn* was particularly persuasive because "Justice Breyer did not discuss issues in his concurring opinion that Justice Stevens, writing on behalf of the four-judge plurality, did not reach." *Horn*, 376 F.3d at 175. That is not the case here.

The Majority concedes that a concurring "justice's opinion 'cannot add to what the majority opinion holds' by 'binding the other four [j]ustices to what they have not said.'" Maj. Typescript at 39 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., dissenting)). Yet by holding that Justice Alito's concurrence "controls the majority opinion in *Morse*," Maj. Typescript at 36, the Majority violates this very principle.

The majority in *Morse* noted that "this is plainly not a case about political debate," *Morse*, 551 U.S. at 403, and refused to address what the result of the case would have been had Frederick's banner been "political." 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.*

Notwithstanding the Majority's statement to the contrary, we have never applied the *Marks* rule to hold that a concurrence may co-opt an opinion joined by at least five Justices. Rather, consistent with *Marks*, "we have looked to the votes of dissenting Justices if they, combined with votes from *plurality or concurring opinions*, establish a majority view on the relevant issue." *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (emphasis added); *see also Student Pub. Interest Research Grp. of N.J., Inc. v. AT&T Bell Labs.*, 842 F.2d 1436, 1451 & n.16 (3d Cir. 1988). In *Donovan*, we used *Marks* to analyze the Supreme Court's "fractured" decision in *Rapanos v. United States*, 547 U.S. 715 (2006), a case in which only three other Justices joined Justice Scalia's plurality opinion and four others dissented. *Donovan*, 661 F.3d at

179, 182. Nowhere did we suggest that *Marks* would have been applicable had *Rapanos* featured a single majority opinion. Likewise, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991), *rev'd on other grounds*, 505 U.S. 833 (1992), we held that *Marks* stands for the proposition that "the controlling opinion *in a splintered decision* is that of the Justice or Justices who concur on the 'narrowest grounds.'" *Casey*, 947 F.2d at 693 (emphasis added). We then applied this principle while interpreting the Supreme Court's *plurality* decisions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). *See Casey*, 947 F.3d at 695-96 (noting that in *Webster* "[t]he five Justices in the majority issued three opinions," none of which garnered five votes on the legal issue in dispute, and that "*Hodgson* was decided in a similar manner"). Once again, we gave no indication that *Marks* would have applied had five Justices or more joined the same opinion.

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.[1] Not one of these courts

1. *See Doninger v. Niehoff*, 642 F.3d 334, 345 (2d Cir. 2011) ("[T]he Supreme Court has determined that public schools may 'take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use' because of the special nature of the school environment

indicated that Justice Alito's concurrence controls, or that his dicta regarding "political or social speech" altered or

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and the dangers posed by student drug use." (citations omitted)); *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 435 (4th Cir. 2013) ("[S]chool officials can regulate student speech that can plausibly be interpreted as promoting illegal drugs because of 'the dangers of illegal drug use.'" (citation omitted)); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 332-33 (6th Cir. 2010) ("As this Court has already recognized, however, the *Morse* holding was a narrow one, determining no more than that a public school may prohibit student expression at school or at school-sponsored events during school hours that can be 'reasonably viewed as promoting drug use.'" (citation omitted)); *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011) (noting that promoting "the use of illegal drugs, [is] a form of advocacy in the school setting that can be prohibited without evidence of disruption" (citation omitted)); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 761 (8th Cir. 2011) ("Chief Justice Roberts reviewed the Court's approach in these prior decisions before holding 'that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.'" (citation omitted)); *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071, 1094 (9th Cir. 2008), *rev'd on other grounds*, 557 U.S. 364 (2009) ("[S]chools can 'restrict student expression that they reasonably regard as promoting illegal drug use.'" (citation omitted)); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) ("[A] public school may prohibit student speech at school or at a school-sponsored event during school hours that the school 'reasonably view[s] as promoting illegal drug use.'" (citation omitted)); *Boim v. Fulton Cnty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) ("[T]he special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use." (citation omitted)).

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).[2] This widespread consensus is further proof that Chief Justice Roberts's majority opinion, not Justice Alito's concurrence, is the controlling opinion in *Morse*.

Before today, only the Fifth Circuit had held otherwise. *See Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 746 n.25 (5th Cir. 2009) ("We have held Justice Alito's concurrence to be the controlling opinion in *Morse*." (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007)); *see also Morgan*, 589 F.3d at 745 n.15 (interpreting the holding in *Morse* to be "that schools may regulate speech that a reasonable observer would interpret as advocating illegal drug use and that

2. The Majority cites our opinion in *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), as evidence that we "previously" had the "intuition" that Justice Alito's concurrence controls the Supreme Court's opinion in *Morse*. Maj. Typescript at 45 n.17. But in *J.S.*, as in *K.A.*, we explicitly noted that the Supreme Court "*held* that 'the special characteristics of the school environment and the governmental interest in stopping drug abuse allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.'" 650 F.3d at 927 (emphasis added) (quoting *Morse*, 551 U.S. at 408) (alterations, citation, and internal quotation marks omitted).

could not be interpreted as commenting on any political or social issue" (internal quotation marks omitted)).[3] However, the Fifth Circuit did not cite *Marks* or any other "narrowest grounds" case and provided no justification to support its conclusion that Justice Alito's concurrence is the controlling opinion in *Morse*. As the Seventh Circuit has aptly noted:

> The plaintiff calls Justice Alito's concurrence the "controlling" opinion in *Morse* because Justices Alito and Kennedy were part of a five-Justice majority, so that their votes were crucial to the decision. But *they joined the majority opinion, not just the decision*, and by doing so

3. The Majority claims that both the Sixth Circuit and Tenth Circuit agree with the Fifth Circuit that Justice Alito's concurrence is controlling. *See* Maj. Typescript at 45 n.17 (citing *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008), and *Corder*, 566 F.3d at 1228). I disagree. In *Barr*, the Sixth Circuit recognized Chief Justice Roberts's articulation that "a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school 'reasonably view[s] as promoting illegal drug use'" as the Court's "narrow holding." 538 F.3d at 564 (citation omitted). Although the opinion went on to discuss Justice Alito's concurrence, the Sixth Circuit never opined that the concurrence controls or otherwise modifies what the court had previously described as *Morse's* "narrow holding." *See id.; see also Defoe*, 625 F.3d at 332-33 & n.5 (describing the same "narrow" holding in *Morse* before discussing Justice Alito's concurrence in a footnote). The same can be said for the Tenth Circuit's decision in *Corder*, which essentially parrots *Barr's* description of *Morse's* majority opinion and Justice Alito's concurrence. *See Corder*, 566 F.3d at 1228 (quoting *Barr*, 538 F.3d at 564).

> they made it a majority opinion and not merely, as the plaintiff believes (as does the Fifth Circuit, *Ponce v. Socorro Independent School District*, 508 F.3d 765, 768 (5th Cir. 2007)), a plurality opinion. The concurring Justices wanted to emphasize that in allowing a school to forbid student speech that encourages the use of illegal drugs the Court was not giving schools carte blanche to regulate student speech. And they were expressing *their own* view of the permissible scope of such regulation.

Nuxoll ex rel. Nuxoll v. Indian Prarie Sch. Dist. # 204, 523 F.3d 668, 673 (7th Cir. 2008) (emphasis added) (citation omitted). This interpretation of the relationship between Justice Alito's concurrence and the majority opinion in *Morse* is the correct one because it is faithful to *Marks* and its progeny.

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

If Justice Alito's concurrence is not the "controlling" opinion in Morse, the Majority has committed legal error by engrafting his dicta regarding "social or political" commentary as a limitation upon the ability of schools to regulate speech that runs afoul of *Fraser*. But even assuming, *arguendo*, that Justice Alito's concurrence alters or circumscribes the Court's opinion in *Morse*, it is far from clear that it had anything to say about the realm *Fraser* carved out of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Tinker established the general rule that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse*, 551 U.S. at 403 (quoting Tinker, 393 U.S. at 513); *see also, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001). *Tinker's* "substantial disruption" test does not apply in every case, however. As then-Judge Alito wrote when he was a member of this Court, "the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption." *Id.* at 212; *see also J.S.*, 650 F.3d at 927 (emphasizing that the exceptions to *Tinker* are "narrow"). First came *Fraser*, in which the Supreme Court held that schools may restrict the manner in which a student conveys his message by forbidding and punishing the use of lewd, vulgar, indecent, or plainly offensive speech. *See Fraser*, 478 U.S. at 680-86. Then, in *Hazelwood School District v. Kuhlmeier*,

484 U.S. 260 (1988), the Court held that administrators may regulate speech that is school-sponsored or could reasonably be viewed as the school's own speech. *Id.* at 272-73. Most recently, in *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." *Morse*, 551 U.S. at 397.

As these cases indicate, "[s]ince *Tinker*, every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate." *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 507 (5th Cir. 2009); *cf. Morse*, 551 U.S. at 417 (Thomas, J., concurring) (observing that "the Court has since scaled back *Tinker's* standard, or rather set the standard aside on an ad hoc basis"). In derogation of this consistent trend, the Majority makes us the first United States Court of Appeals to suggest that *Morse* has circumscribed *Fraser*, thereby limiting the ability of teachers and administrators to regulate student speech.

In addition to overriding the careful steps taken to allow schools to regulate student speech since *Tinker*, the Majority errs by placing *Morse* at the center of a case that has nothing whatsoever to do with illegal drug use. That *Morse* is not central to this case is borne out by the way the case was litigated and adjudicated. 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.

Courts have recognized, time and again, that the three exceptions to *Tinker's* general rule are independent "carve-outs." *See, e.g.*, *Saxe*, 240 F.3d at 212-14. The Supreme Court has given no indication—either in *Morse* or any of its subsequent decisions—that it has modified the standard, first articulated in *Fraser* more than 25 years ago, that governs how schools are to regulate speech they may reasonably deem lewd, vulgar, indecent, or plainly offensive. Moreover, although the appellate courts have had dozens of opportunities to do so, no court has suggested that *Morse* qualified *Fraser* in any way. Since *Morse*, we have had occasion to consider *Fraser* and have consistently "interpreted [it] to permit school officials to regulate 'lewd, vulgar, indecent, and plainly offensive speech in school.'" *J.S.*, 650 F.3d at 927 (quoting *Saxe*, 240 F.3d at 213) (emphasis and internal quotation marks omitted); *see also K.A.*, 710 F.3d at 107 ("In [*Fraser*], the Court held that schools may restrict the manner in which a student conveys his message by forbidding and

punishing the use of lewd, vulgar, indecent, and plainly offensive speech." (citation omitted)); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 212-13 (3d Cir. 2011) (same).

In fact, the appellate opinions addressing *Morse, Fraser*, and *Kuhlmeier* treat them as independent analytical constructs that permit schools to regulate certain types of speech that would otherwise be protected under *Tinker*. *See, e.g., Hardwick*, 711 F.3d at 435 n.11 ("[W]e must continue to adhere to the *Tinker* test in cases that do not fall within any exceptions that the Supreme Court has created until the Court directs otherwise."); *Doninger*, 642 F.3d at 353-54 ("[B]ecause the t-shirts were not vulgar, could not reasonably be perceived to bear the School's imprimatur, and did not encourage drug use, they could be subject to regulation different from that permissible for adults in non-school settings only if they threatened substantial disruption to the work and discipline of the School." (citations omitted)). It is especially notable that even the Fifth Circuit, which mistakenly held that Justice Alito's concurrence in *Morse* is "controlling," continues to treat the *Tinker* carve-outs as independent exceptions rather than overlapping categories of proscribable speech. *See Morgan*, 589 F.3d at 745 n.15 (5th Cir. 2009) (characterizing *Fraser* as "holding schools may prohibit lewd, vulgar, obscene or plainly offensive student speech" and, in the same string citation, separately characterizing *Morse* as "holding that schools may regulate speech 'that a reasonable observer would interpret as advocating illegal drug use' and that could not be 'interpreted as commenting on any political or social issue'" (citations omitted)). The Majority's own analysis

demonstrates that threshold questions in a school speech case are whether the speech at issue is governed by one of the three *Tinker* carve-outs and, if not, whether the school acted properly under *Tinker*. *See* Maj. Typescript at 63-64.

In addition, we have emphasized that the carve-outs touch on "several *narrow categories of speech* that a school may restrict even without the threat of substantial disruption." *K.A.*, 710 F.3d at 107 (emphasis added) (internal quotation marks omitted). This does not mean, as the Majority suggests, that the carve-outs narrow one another. *See* Maj. Typescript at 45 n.17 (citing *J.S.*, 650 F.3d at 927). Rather, it is simply a recognition that they are narrow within their separate spheres. Indeed, courts have been especially careful to underscore the narrowness of the Court's holding in *Morse*. *See, e.g.*, *Defoe*, 625 F.3d at 332-33 ("[T]he *Morse* holding was a *narrow* one, determining *no more* than that a public school may prohibit student expression at school or at school-sponsored events during school hours that can be 'reasonably viewed as promoting drug use.'" (emphasis added) (citation omitted)); *Barr*, 538 F.3d at 564 (same); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 741 (8th Cir. 2009) (same).

In *J.S.*, we too recognized the "narrowness of the Court's holding" in Morse. *J.S.*, 650 F.3d at 927.[4] There, we

4. The Majority believes that this clause serves as an indicator that Justice Alito's concurrence narrowed the holding in *Morse* and, in turn, narrowed the speech that schools can proscribe under *Fraser*. *See* Maj. Typescript at 45 n.17. Contrary to the Majority's implication, in *J.S.* we neither addressed Justice Alito's discussion

declared that *Morse* did not apply to a school's punishment of a student for creating a MySpace profile using graphic language and imagery to disparage her teacher, *see J.S.*, 650 F.3d at 932 n.10 ("Indisputably, neither *Kuhlmeier* nor *Morse* governs this case."). Instead, we indicated that "the only way for the punishment to pass constitutional muster is if . . . J.S.'s speech can be prohibited under the *Fraser* exception to *Tinker*." *Id.* at 931-32. If the proper standard under *Fraser* is the Majority's formulation of whether a student's lewd speech may "plausibly be interpreted as commenting on a social or political issue," surely we would have considered whether J.S.'s online profile touched on any such issue. Instead of doing so, we applied the *Fraser* test while disavowing the relevance of *Morse*.

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

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of student speech that touches on matters plausibly related to a social or political issue nor indicated a belief that his concurrence somehow modified the *Morse* Court's majority opinion, which we quoted verbatim as the Court's holding. *See J.S.*, 650 F.3d at 927.

"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, *Morse's* "narrow" holding does not apply unless a school has regulated student speech that it viewed as advocating illegal drug use. Notwithstanding its critical reliance on *Morse*, at one point the Majority seems to agree that *Morse* does not apply to this case when it states that "no one could reasonably interpret the bracelets as advocating illegal drug use." Maj. Typescript at 64. The Majority can't have it both ways. The decision to engraft Justice Alito's *Morse* concurrence onto *Fraser* erodes the analytical distinction between the two lines of cases and turns this appeal into some sort of *Fraser/Morse* hybrid. "The law governing restrictions on student speech can be

difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case." *Doninger*, 642 F.3d at 353. By using *Morse* to modify the distinct carve-out established in *Fraser*, the Majority has muddied the waters and further encumbered the ability of educators to run their schools.

The Majority attempts to make more palatable its decision to engraft *Morse*'s supposed prohibition of "any restriction of speech that can plausibly be interpreted as commenting on any political or social issue" onto *Fraser*. For instance, it claims that "the [Supreme] Court did not believe that Fraser's speech could plausibly be interpreted as political or social commentary." Maj. Typescript at 27. By claiming that such an interpretation of Matthew Fraser's "speech nominating a fellow student for student elective office," *Fraser*, 478 U.S. at 677, is wholly "implausible," the Majority demonstrates the difficulties that arise when it blends together the disparate *Tinker* carve-outs.

As the Majority rightly notes, the *Fraser* Court opined that there was a "marked distinction between the political 'message' of the armbands in *Tinker* and the *sexual* content of Fraser's speech." Maj. Typescript at 28-29 (quoting *Fraser*, 478 U.S. at 680). That does not mean, however, that it was *implausible* to conclude that Fraser's speech was political. If it were truly implausible to "interpret[] [Fraser's speech] as commenting on any political or social issue," one must wonder why the United States Court of Appeals for the Ninth Circuit characterized

Fraser's speech as "student political speech-making" and a "campaign speech[]." *Fraser v. Bethel Sch. Dist. No. 403*, 755 F.2d 1356, 1363 (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986); *id*. at 1368 (Wright, J., dissenting). The three appellate judges who heard Fraser's case were deemed by the Supreme Court to have erred when they likened his speech to *Tinker*'s armband, but that does not mean that it was "implausible" for those three judges to view Fraser's speech as political. It was, after all, a *campaign* speech.

A brief hypothetical further demonstrates the problems posed by the Majority's plausibility-based articulation of the *Fraser* carve-out. Suppose a student makes a speech at a school assembly. Like Matthew Fraser's speech, the content is about supporting a candidate for office, but the sexual references are muted enough such that the Majority would deem them "ambiguously lewd" instead of "plainly lewd." If the student's speech is about a classmate running for school office, the Majority would say that the school may punish the speaker. But if an identical speech is given and the classmate's name is replaced with the name of a candidate for president, mayor, or even school board, the Majority would conclude that the First Amendment insulates the student's speech. In my view, the two speeches are indistinguishable under *Fraser*.

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

As noted, the Majority holds that "*Fraser* . . . permits a school to categorically restrict ambiguous speech that a reasonable observer could interpret as having a lewd, vulgar, or profane meaning," but only "so long as it could not also plausibly be interpreted as commenting on a social or political issue." Maj. Typescript at 61. It is important to emphasize here that, despite my disagreement with the second part of the Majority's formulation, I agree fully with its understanding of the objective-reasonableness inquiry compelled under *Fraser*. *See* Maj. Typescript 32-35 (discussing why "courts should defer to a school's decisions to restrict what a reasonable observer would interpret as lewd, vulgar, profane, or offensive").[5]

5. Though I believe an objective-reasonableness test is the correct interpretation of *Fraser*, its level of generality leaves something to be desired, particularly when one considers that the lower courts will look to our decision for guidance. The Majority states that "[i]t remains the job of judges . . . to determine whether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive." Maj. Typescript at 33-34. But who is this "reasonable observer"? The Majority gives us clues: he "would not adopt an acontextual interpretation" and would

The Majority did not find that the school's interpretation of the bracelets' message as lewd was objectively unreasonable. *See* Maj. Typescript at 63 n.22 ("[W]e need not determine whether a reasonable observer could interpret the bracelets' slogan as lewd."). Thus, had the Majority not engrafted Justice Alito's concurrence in *Morse* onto the *Fraser* standard, my colleagues might agree that the school did not violate the First Amendment when it proscribed the bracelet. Because the Majority chose not to analyze whether the school was reasonable in determining that the bracelet could be proscribed under *Fraser*, however, I will briefly discuss why that is so.

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

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consider "the plausibility of the school's interpretation in light of competing meanings; the context, content, and form of the speech; and the age and maturity of the students." Maj. Typescript at 34. I would add several more considerations. Most importantly, evolving societal norms counsel that what is "objectively" considered "lewd, profane, vulgar, or offensive" one day may not be so the next. *See, e.g., Fraser*, 478 U.S. at 691 (Stevens, J., dissenting) ("'Frankly, my dear, I don't give a damn.' When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then."). Furthermore, given the diversity of opinions and perspectives across our country, the type of speech that may reasonably fall into one of the proscribable categories would vary widely from one community to the next. These considerations highlight the importance of ensuring that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683.

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.

Second, in its substantive conclusion that "I ♥ boobies!" cannot reasonably be regarded as lewd or vulgar, the District Court highlighted the bracelets' social value while disregarding their likely meaning to immature middle-schoolers.[6] As the School District argues, the

6. In fact, we have questioned the applicability of the Supreme Court's student speech jurisprudence in the elementary and middle school settings:

> [A]t a certain point, a school child is so young that it

fact that Plaintiffs' laudable awareness message *could* be discerned from the bracelets does not render the School District's ban unconstitutional. "I ♥ boobies!" not only

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> might reasonably be presumed the First Amendment does not protect the kind of speech at issue here. Where that point falls is subject to reasonable debate.
>
> In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited. Elementary school officials will undoubtedly be able to regulate much—perhaps most—of the speech that is protected in higher grades. When officials have a legitimate educational reason—whether grounded on the need to preserve order, to facilitate learning or social development, or to protect the interests of other students—they may ordinarily regulate public elementary school children's speech.

Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 417-18 (3d Cir. 2003); *see also Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 276 (3d Cir. 2003) (noting that "the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise"). Other appellate courts share our misgivings, noting that "the younger the children, the more latitude the school authorities have in limiting expression." *Zamecnik*, 636 F.3d at 876 (citing *Muller ex rel. Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538-39 (7th Cir. 1996)); *see also Nuxoll*, 523 F.3d at 673 (when a school regulates the speech of children that are "very young . . . the school has a pretty free hand"); *Morgan*, 659 F.3d at 386 ("[I]n public schools, the speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students. Indeed, common sense dictates that a 7-year-old is not a 13-year-old, and neither is an adult." (alterations, citations, and internal quotation marks omitted)).

expresses support for those afflicted with breast cancer, but also conveys a sexual attraction to the female breast.

It is true that certain facts indicate that a sexual interpretation of the "I ♥ boobies!" bracelets may be at the outer edge of how a reasonable observer would interpret speech. Most obviously, the bracelets always modify the "I ♥ boobies!" phrase with "(KEEP A BREAST)" or other breast-cancer-awareness messages. "When one reads the entire phrase, it is clearly a message designed to promote breast cancer awareness." *K.J. v. Sauk Prairie Sch. Dist.*, No. 11-cv-622, slip op. at 14 (W.D. Wis. Feb. 6, 2012). Additionally, school administrators did not immediately recognize the bracelets as vulgar or lewd; students had been wearing the bracelets for two months before they were banned, and teachers had to request guidance on whether and how to deal with the bracelets. Moreover, the school itself was compelled to use the word "boobies" over the public address system and school television station in order to describe the proscribed bracelets, which suggests that the word alone is not patently offensive.

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.

Likewise, the School District administrators' subjective beliefs, expressed at the time of the ban and later during this litigation, do not affect my determination of whether it is objectively reasonable to infer a sexualized meaning from the bracelets. Their failure to use the words "lewd," "vulgar," "indecent," or "plainly offensive" is not fatal to their claim of regulatory authority. Similarly, some principals' inconsistent testimony regarding what other breast-cancer-related phrases they might censor does not make the phrase at issue here more or less vulgar. Therefore, it is not probative that administrators intermittently indicated that they thought the word "breast" by itself has an impermissible sexual connotation.

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)).

Nor is Plaintiffs' position saved by the fact that the "I ♥ boobies!" phrase was "chosen to enhance the effectiveness of the communication to the target audience.. *B.H.*, 827 F. Supp. 2d at 406. The District Court's focus on the strategic purpose of the words and format used in the bracelets was misguided. 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.

* * *

As this case demonstrates, running a school is more complicated now than ever before. Administrators and teachers are not only obliged to teach core subjects, but also find themselves mired in a variety of socio-political causes during school time. And they do so in an era when

they no longer possess plenary control of their charges as they did when they acted *in loco parentis. See, e.g., Morse*, 551 U.S. at 413-16 (Thomas, J., concurring). The decisions school administrators must make regarding the deportment of their students—what they say, what they wear, or what they do—require common sense and good judgment. Many of those decisions will involve matters about which reasonable people can disagree. In the close cases, such as this one, there is virtue in deferring to the reasonable judgments of those responsible for educating our nation's youth. With respect, I dissent.

GREENAWAY, JR., *Circuit Judge*, dissenting, with whom CHAGARES, 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. Reasonable minds may come to varying conclusions on this test, but one thing is not open to debate: a school district faced with the same dilemma in the coming weeks, months, or years is given no greater guidance regarding its ability to determine whether a particular message may be proscribed than before the Majority opinion issued.

The Majority lauds the intent of the two middle schoolers responsible for introducing "I ♥ boobies! (KEEP A BREAST)" bracelets into their school, which encouraged serious discussion regarding a medical issue of increasing social import. Appellees' actions may or may not reflect an admirable maturity, but the intent of Appellees is not at issue. In many cases, when the First Amendment is implicated, the intent of the speakers will be admirable or at worst benign. The Majority concludes that, as long as the ambiguous speech may be interpreted by a reasonable person as plausibly related to a political or social issue, it is protected. Despite its express disavowal of intent as a consideration, the Majority inadvertently re-injects the students' intent into the fray by mandating an analysis of whether a political or social issue is addressed by the speech. This is improper but it is not my sole criticism.

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.

Practical problems with the Majority's test abound. Where and how do school districts line-draw regarding the nouns used to describe the subject matter of the particular awareness campaign? The Majority has established that at opposite ends of the spectrum are "boobies," on the one hand, and "tits," one of the "seven dirty words," on the other hand. What lies between those two extremes and how a school district is to make a principled judgment going forward remain open questions. No doubt, there are some words and phrases that all would agree should be afforded no protection in the middle school context, despite their use in promoting an important social issue. My recalcitrance to extend First Amendment protection to the slogan at hand is simple — why is this word, "boobies," different? Why does it deserve protection? Is "boobies" a term that is inherently innocuous or sophomoric, as the Majority asserts? As noted in the Majority, "ta tas" is used as the descriptive term in some breast cancer awareness campaigns. The ambiguity of "ta tas" in this context is beyond question. What also seems beyond question is

that the school district, according to the Majority, must lay dormant to a student's use of "ta tas" or any synonym of "breast" (other than "tits") as long as the student is commenting on a political or social issue, here, breast cancer awareness. The lack of certitude or a workable parameter unnecessarily handcuffs school districts.

What of the circumstance when an anatomically correct term is used in an awareness campaign? Applying the Majority's test, "I ♥ penises," "I ♥ vaginas," "I ♥ testicles," or "I ♥ breasts" would apparently be phrases or slogans that school districts would be powerless to address. Would the invocation of any of these slogans in a cancer awareness effort fail to garner protection under the Majority's test? It would appear not. What of the other slogans that the Majority mentions in its opinion that are sufficiently ambiguous? The Majority blithely states that "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.'" (Maj. Op. 71.) This is exactly my concern. What may a school district do? These phrases are both ambiguous and speak to political and social issues. How is a school district now better able to discern when it may exercise its discretion to impede the use of a particular slogan, as it relates to an awareness program, than before the issuance of this opinion?

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.

APPENDIX B — ORDER AND MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, FILED APRIL 12, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 10-6283

B. H., *et al.*

v.

EASTON AREA SCHOOL DISTRICT

ORDER

AND NOW, this 12th day of April, 2011, upon consideration of the plaintiffs' Motion for Preliminary Injunction (Docket No. 2), the opposition, and reply thereto, and following an evidentiary hearing on December 21, 2010, and oral argument held on February 18, 2011, and for the reasons stated in a memorandum of today's date, IT IS HEREBY ORDERED that the plaintiffs' motion is GRANTED. The defendant is hereby ENJOINED from suspending, threatening to suspend, or otherwise punishing or disciplining the plaintiffs for wearing the bracelets presented to the Court in this case. The Court waives the Rule 65(c) security bond requirement.

BY THE COURT:

/s_____
MARY A. McLAUGHLIN, J.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 10-6283

B. H., *et al.*

v.

EASTON AREA SCHOOL DISTRICT

MEMORANDUM

McLaughlin, J. April 12, 2011

This case involves a middle school's ban on breast cancer awareness bracelets that bear the slogan "I ♥ Boobies! (Keep A Breast)" and similar statements. These bracelets are distributed by the Keep A Breast Foundation, which operates breast cancer education programs and campaigns that are oriented toward young women. On the school's designated breast cancer awareness day, two female students defied the school's bracelet prohibition and both were suspended for a day and a half and prohibited from attending an upcoming school dance. The students, by and through their parents, filed this lawsuit seeking, among other things, a preliminary injunction to enjoin the school district from enforcing the ban.

The plaintiffs argue that the school has violated their First Amendment right to freedom of speech. The two Supreme Court cases examining student speech that are most relevant to this case are *Fraser* and *Tinker*. *See Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159,

92 L. Ed. 2d 549 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). *Fraser* allows schools to ban speech that is lewd or vulgar. If the speech does not meet the standard of *Fraser*, *Tinker* applies. *Tinker* forbids the suppression of student expression unless that expression is reasonably foreseen as a material and substantial disruption of the work and discipline of the school. The school district contends that the bracelets are lewd and vulgar under *Fraser* and if not, that they caused a substantial disruption of school operations under *Tinker* or the School District had a reasonable expectation of such disruption.

The Court concludes that these bracelets cannot reasonably be considered lewd or vulgar under the standard of *Fraser*. The bracelets are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce stigma associated with openly discussing breast health. Nor has the school district presented evidence of a well-founded expectation of material and substantial disruption from wearing these bracelets under *Tinker*. The Court will therefore grant the plaintiffs' motion for preliminary injunction.

I. *Procedural History*

On November 15, 2010, the plaintiffs filed this lawsuit and a motion for a temporary restraining order and preliminary injunction. The plaintiffs' motion sought a temporary restraining order allowing the plaintiffs to attend the upcoming "Snow Ball" middle school dance,

which the school had prohibited the plaintiffs from attending as punishment for wearing their breast cancer awareness bracelets, along with one and a half days of in-school suspension.

The Court held a telephone conference with counsel for the parties and urged the school to allow the students to attend the school dance with the option of imposing comparable punishment if the Court held that the ban was constitutional. The school agreed to the Court's proposal. The Court then denied the motion for a temporary restraining order without prejudice.

On December 16, 2010, the Court held a day-long evidentiary hearing. At the hearing, the Court heard testimony from the two minor plaintiffs, B.H. and K.M.; Kimberly McAtee, a representative from the Keep A Breast Foundation; Stephen Furst, the Director of Teaching and Learning for the Easton Area School District; Anthony Viglianti, the Seventh Grade Assistant Principal; Amy Braxmeier, the Eighth Grade Assistant Principal; and Angela DiVietro, the Head Principal of Easton Area Middle School for grades seven and eight. On February 18, 2011, the Court held oral argument on the plaintiffs' motion.

II. *Findings of Fact*

This case involves two students, B.H. and K.M., who are currently enrolled in the Easton Area Middle School. B.H. is a thirteen-year-old, eighth grade student at Easton Area Middle School. K.M. is a twelve-year-old,

seventh grade student at Easton Area Middle School. The defendant Easton Area School District (the "School District") is a political subdivision of the Commonwealth of Pennsylvania. (Notes of Testimony, Evidentiary Hearing, Dec. 16, 2010 ("N.T.") at 22:4-5[1]; Compl. ¶¶ 6-7; Answer ¶¶ 6-7.)

Easton Area Middle School (the "Middle School") is a large complex that holds two separate schools: a fifth and sixth grade school and a seventh and eighth grade school. The fifth and sixth grade school has a separate entrance, separate classrooms, separate lunchrooms, and is administered separately from the 7-8 building. The plaintiffs attend classes in the Middle School's 7-8 building. (N.T. 153:2-154:5.)

The bracelets at issue in this case include several colored rubber bracelets that contain various slogans including "I ♥ boobies! (KEEP A BREAST)," "check y♥ur self!! (KEEP A BREAST)," and a bracelet with an amalgam of similar slogans.[2] The web address for the

1. The page citations are to the page numbers in the paper version of the hearing transcript. The page numbering of the electronic version differs by one.

2. Pictures of these bracelets may be found online. *See, e.g.*, The Keep A Breast Foundation, *Zumiez*, http://www.keep-a-breast.org/blog/zumiez/ (last visited Feb. 22, 2011). The bracelet with the amalgam of slogans is co-branded with the clothing line "Glamour Kills." The bracelet includes the slogans "♥ boobies!," "KAB," "Glamour Kills," and "KEEP A BREAST." The co-branded bracelet also includes the web address glamourkills.com on the inside of the bracelet. In exchange for a donation, the Keep

Keep A Breast Foundation, keep-a-breast.org, is contained on the inside of all of the bracelets. (*See* Pls.' Ex. 39, 40.)

A. *Keep A Breast Foundation*

The Keep A Breast Foundation (the "Foundation"), a 501(c)(3) nonprofit organization, distributes these bracelets. The Keep A Breast Foundation operates breast cancer education programs and campaigns that are oriented towards young women. The "I ♥ Boobies! (Keep A Breast)" bracelets serve as an awareness and fund-raising tool for the Foundation. The Foundation targets its awareness efforts to young women under 30. One of the goals of the Foundation is to educate young women about breast cancer and to help young women discuss breast health openly with their doctors. The Foundation encourages young women to establish a baseline

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A Breast Foundation allows other businesses to market their products using the Keep A Breast name and slogans, including "I ♥ Boobies!." (N.T. 110:12-113:4.) This is termed "co-branding" or "cause marketing." In addition to Glamour Kills, the Keep A Breast Foundation co-brands with the following businesses: Kleen Canteen, Etnies shoes, and SJC Snare Drum brand apparel. (K. McAtee Dep. 43:24-47:10; Transcript of oral argument, Feb. 18, 2011 ("Tr.") at 19:19-21:11.) The School District argues that these bracelets are commercial speech and are therefore afforded less constitutional protection. The presence of co-branding on one of the several bracelets at issue here, however, does not transform these bracelets into commercial speech. The bracelets are not the type of speech that "does no more than propose a commercial transaction." *See Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 66-68, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) (citation omitted).

knowledge of how their breasts feel in order to improve their ability to detect changes in their breasts. Breast cancer prevention and health information is available by clicking on the health page of the Foundation's website. (N.T. 105:21-24, 120:19-121:2, 121:3-6.)

The Keep A Breast Foundation believes that a barrier to achieving their goals is negative body images among young women. Young women may feel that a stigma is associated with touching, looking at, or talking about their breasts. The Foundation's "I ♥ Boobies!" campaign seeks to reduce this stigma and to help women talk openly and without embarrassment about their breasts. The bracelets are intended to be and may be reasonably viewed as conversation starters to facilitate discussion of breast cancer, and to help overcome fear and taboo associated with discussing breast health.[3] (N.T. 98:9-20.)

The Foundation controls the distribution of the bracelets to ensure that the purchaser will have access to the Keep A Breast Foundation's educational materials. Truck stops, convenience stores, vending machine companies, and even "porn stars" have expressed interest in selling or being associated with the bracelets and

3. There was evidence that a teacher at the Middle School felt that these bracelets offer "cutesy" or insufficiently serious treatment of breast cancer awareness. The Court takes no view as to whether these bracelets are an effective breast cancer awareness tool or whether the bracelets may be viewed as making light of a very serious disease. The Court finds, however, that the bracelets are intended to be, and may be reasonably viewed as, speech designed to raise awareness of breast cancer and reduce stigma associated with openly discussing breast health.

the Foundation, but the Keep A Breast Foundation has rejected these requests. (N.T. 101:18-102:13.)

B. *The Plaintiffs' Purchase of the Bracelets*

The plaintiffs purchased their "I ♥ Boobies! (Keep A Breast)" bracelets with their mothers prior to the start of the 2010-11 school year. B.H. learned about the bracelets and their purpose from her friends. B.H. and her mother Jennifer Hawk sought out the bracelets together, making multiple attempts to find them in stores. After purchasing the bracelets, B.H. wore them every day, up until her suspension. By purchasing and wearing the bracelets, B.H. wanted to show her support for breast cancer prevention, raise awareness and initiate dialogue about breast cancer, and support the Keep A Breast Foundation's breast cancer prevention programs. B.H. also wanted to honor a close friend of the family who survived the disease after undergoing a double mastectomy. (N.T. 22:6-21, 56:12-15, 22:13-15, 22:15-21, 23:4-17, 26:1-5, 27:20-22, 23:18-24:23, 24:1-20, 43:1-10.)

K.M. first learned about the "I ♥ Boobies! (Keep A Breast)" bracelets over the summer of 2010 from her friend B.H. Before the school year started, K.M. and her mother Amy McDonald-Martinez traveled together to the mall to purchase "I ♥ Boobies! (Keep A Breast)" bracelets. After purchasing the bracelets, K.M. wore them every day, up until her suspension. K.M.'s mother, Amy McDonald-Martinez, also wore a Keep a Breast Foundation bracelet that contained the phrase "check y♥ur self!! (Keep A Breast)." (N.T. 55:25-56:8, 56:14-57:9, 59:5-24, Pls.' Ex. 41.)

Both young women researched and learned more about breast cancer after purchasing these bracelets. B.H. learned about the Keep A Breast Foundation through in-store displays and the Foundation's website. After purchasing the bracelets, K.M. sought out more information about breast cancer, and learned that the youngest girl diagnosed with breast cancer was ten years old. She also learned about breast cancer risk factors, the effects of breast cancer, and how to check one's self for lumps. She learned about her great aunt who had breast cancer and that breast cancer "can run in the family." Both B.H. and K.M. believe that the bracelets more effectively raise awareness for breast cancer than the color pink. B.H. explained that "no one really notices [the color pink]." (N.T. 42:12-25, 60:11-23, 74:3-10, 56:25-58:12, 91:22-92:6, 24:12-23, 64:24-66:4, 24:12-23.)

C. *The School's Bracelet Ban*

The "I ♥ Boobies! (Keep A Breast)" bracelets became popular with students at the Easton Area Middle School during the beginning of the 2010-2011 school year, which began on August 30, 2010. In mid-to-late September, approximately four or five of the 120 teachers in the Middle School's 7-8 building spoke to or electronically contacted Ms. Braxmeier about the "I ♥ Boobies! (Keep A Breast)" bracelets. The teachers sought instruction regarding how the school would choose to handle the bracelets. The three principals, Mr. Viglianti, Ms. Braxmeier, and Ms. DiVietro, conferred and agreed that the bracelets should be banned. (N.T. 190:10-16, 210:16-211:5.)

Appendix B

On September 23, 2010, Mr. Viglianti sent an email instructing faculty and staff to ask students to remove "wristbands that have the word 'boobie' written on them." Mr. Viglianti stated that students instead may wear pink on October 28th in honor of Breast Cancer Awareness Month. This initial ban was not communicated directly to the students. On October 27, 2010, a day before the School District's designated breast cancer awareness day, Ms. DiVietro recirculated the email that Mr. Viglianti sent on September 23, 2010. In response, a teacher requested that the ban be communicated to the students directly by the administration.[4] On the afternoon of October 27, 2010, approximately two months into the school year, Mr. Viglianti read a prepared statement over the public address system describing the ban. The next morning, October 28, 2010, a student delivered a statement prepared by the School administration on the School's TV station that reiterated the ban. The School's TV announcement contained the word "boobies." (Pls.' Ex. 1.; Pls.' Ex. 2.; N.T. 64:3-5.)

At the time that the ban initially went into effect, September 23, 2010, none of the three principals had heard any reports of disruption or student misbehavior

4. The email stated, "Can this please be announced either via the morning TV announcements or by someone in the main office? We were issued a similar email in the past but the students have not been told by administration that these bracelets are a violation of dress code and if they wear them they will be written up for defiance. . . . We need a direct statement from administration." Email from Carrie A. Sanal to Angela DiVietro, October 27, 2010 (Pls.' Ex. 3).

linked to the bracelets. Nor had any of the principals heard reports of inappropriate comments about "boobies." The three principals offered various reasons for their decision to ban the bracelets.

Mr. Viglianti testified at his deposition that the administrators' decision was based on the term "boobies," which was "not appropriate." He thought that some of the students were not mature enough "to understand and see that [as] appropriate," and he was concerned that the use of the word "boobies" in the bracelets would cause students "to start using the word just in communication with other students, talking with other students." He testified at the evidentiary hearing that the word "boobies" was "vulgar," based on his understanding that "vulgar is slang." At his deposition, Mr. Viglianti also testified that it would be similarly inappropriate for either the word "breast" or the phrases "keep-a-breast.org" or "breast cancer awareness" to be displayed on clothing in the middle school. During the evidentiary hearing, he changed his position and concluded that a bracelet bearing only "keep-a-breast.org" would be permissible. (Viglianti Dep. 50:1-10, 18:3-19:1, 20:12-23, 24:14-21; N.T. 128:16-19, 124:18-125:21.)

Ms. DiVietro also clarified her position at the evidentiary hearing. At her deposition, Ms. DiVietro testified that the words "keep-a-breast.org" are "not acceptable" for middle schoolers because the word "breast" "can be construed as a sexual connotation." At the evidentiary hearing, she concluded that the words "breast cancer awareness" or a bracelet that only said "keep-a-breast.org" would not be vulgar in a middle

school. (DiVietro Dep. 23:4-25, 51:24-52:2; N.T. 229:3-230:23, 242:18-243:3.)

At the evidentiary hearing, the School's principals testified that the bracelets violate the Middle School's dress code because the phrase "I ♥ Boobies!" is an impermissible double entendre about sexual attraction to breasts. (N.T. 179:18-22, 211:16-22.)

Ms. DiVietro testified that allowing students to wear the Keep A Breast Foundation's "I ♥ Boobies! (Keep A Breast)" bracelets would diminish her authority to prevent students from wearing clothing with other statements that the administrators deemed "inappropriate." She explained that banning the "I ♥ Boobies! (Keep A Breast)" bracelets "makes a statement that we as a school district have the right to have discretionary decisions on what types of things are appropriate and inappropriate for our school children." (N.T. 211:23-212:1, 224:14-226:19, 228:5-10.)[5]

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5. The justification for the ban as explained by the three administrators during their testimony differs from the justification first articulated by the School District in its November 9, 2010 letter to the plaintiffs' counsel. In that letter, the School District claimed that it banned the bracelets because some Middle School students are uncomfortable with discussion of the human body; some male Middle School students had made "embarrassing" comments to female students about their breasts; the students who defied the ban were then observed "high-fiving" each other in the cafeteria; and some Middle School teachers believe that the bracelets trivialize the subject of breast cancer and they are personally offended by the bracelets' "cutesy" treatment of the disease. (Compl. ¶ 29; Answer ¶ 29.)

Appendix B

On October 27, 2010, B.H. wore her bracelets to school. During lunch, a cafeteria monitor noticed her bracelets and summoned the security guard, John Border.[6] B.H. admitted to Mr. Border that she was wearing the bracelets but refused to remove them, so Mr. Border escorted her to Ms. Braxmeier's office. After speaking with Ms. Braxmeier, B.H. agreed to remove the bracelets, and was then allowed to return to the cafeteria without punishment. The bracelets had not caused any disruption in the cafeteria. (N.T. 175:2-8 (Border testifying).)

Later that day after school, October 27, 2010, B.H. told her mother that the "I ♥ Boobies! (Keep A Breast)" bracelets had been banned and asked permission to wear her bracelets despite the ban. Her mother agreed. K.M. also told her mother of the ban on the "I ♥ Boobies! (Keep A Breast)" bracelets. K.M. was also given permission by her mother to wear her bracelets on the following day, the School's Breast Cancer Awareness Day. (N.T. 31:11-32:6; J. Hawk Dep. 8:2-9; N.T. 66:5-15; A. McDonald-Martinez Dep. 21:3-22:14.)

On October 28, 2010, the School District observed Breast Cancer Awareness Day. For the district-wide Breast Cancer Awareness Day, faculty and students were encouraged to wear pink to demonstrate support for breast cancer awareness. On October 28, 2010, Mr. Border was again notified that B.H. was wearing the "I ♥ Boobies!

6. Prior to taking the position of security for the District, John Border was a police officer for the Easton Police Department. He also served as Chief of the Easton Police Department for five years. (N.T. 168:16-169:2.)

(Keep A Breast)" bracelets during lunch period in defiance of the ban. Mr. Border approached B.H. and asked her to remove the bracelet. B.H. informed Mr. Border that she would not remove her bracelet. At that time, K.M. stated that she was wearing an "I ♥ Boobies! (Keep A Breast)" bracelet and was also not going to take it off. (N.T. 158:12-19; 218:25-219:19, 75:25-76:22; 172:9-174:18).

After B.H. and K.M stated that they would not remove their bracelets, a third girl, R.T., stood up and said that she also had a bracelet on and was not going to take it off. Mr. Border allowed the girls to finish eating their lunches, then escorted them to Ms. Braxmeier's office. On their way to Ms. Braxmeier's office, B.H. and K.M. gave each other a "low-five" because they were proud of themselves for standing up for what they believe in. This did not create a disruption and Mr. Border testified that he did not notice it. (N.T. 33:15-21; 45:10-17; 174:6-10.)

Ms. Braxmeier first spoke with R.T. R.T. agreed to remove her bracelet. In the course of her discussion with Ms. Braxmeier, R.T. explained that she understood why students were not allowed to wear the "I ♥ Boobies! (Keep A Breast)" bracelets. Specifically, R.T. stated that some boys or some boy was "immature" and had been approaching girls and commenting "I love your boobies" or "I love boobies." When the School elicited a written statement from R.T. on November 15, 2010 (after receiving the plaintiffs' November 4, 2010 demand letter), R.T. equivocated as to whether the incident involved multiple boys or just one boy, and stated that she did not know the student's name. (N.T. 185:2-5; A. Braxmeier Dep. 20:23-

21:1, 26:25-27:4, 67:13-16; Def.'s Ex. 14 (R.T.'s written statement), N.T. 194:18-20.)

Ms. Braxmeier then spoke with K.M individually. K.M. stated that she was unwilling to remove her bracelets. After discussing the bracelets with K.M., Ms. Braxmeier spoke with B.H. individually about her "I ♥ Boobies! (Keep A Breast)" bracelets. B.H. explained to Ms. Braxmeier that the bracelet was "for breast cancer and people in [her] family have been affected by breast cancer" and she felt that it was her freedom of speech to wear the bracelets. Ms. Braxmeier then conferred with Mr. Viglianti and Ms. DiVietro, and they agreed that B.H. and K.M. would be punished with an in-school suspension for the remainder of that day and for all of the following day and could not attend the upcoming "Winter Ball" school dance. (N.T. 185:6-187:16; 187:18-24; 37:1-7.)

The Court was presented with evidence of two incidents in late October and mid-November where the school administrators received reports of boys making inappropriate remarks about "boobies" in reference to the "I ♥ Boobies! (Keep A Breast)" bracelets. First, during Ms. Braxmeier's October 28, 2010 conversation with R.T. about her "I ♥ Boobies! (Keep A Breast)" bracelets, R.T. stated that she believed some boy(s) had made remarks to girls about their "boobies." The specific details surrounding this incident were never confirmed. Second, on or about November 16, 2010, the Middle School administrators received a report that two female students were discussing the "I ♥ Boobies! (Keep A Breast)" bracelets when a boy sitting with them at

lunch interrupted them and made statements such as "I want boobies" and made inappropriate gestures with two fireball candies. The administrators spoke with the boy, who admitted to the incident and was suspended for one day. (Braxmeier Dep. 14:24-15:3, 16:9-17:5.)

There were also two unrelated incidents of inappropriate touching by middle school boys of eighth grade girls in October. There is no evidence that either incident was caused by the plaintiffs' "I ♥ Boobies! (Keep A Breast)" bracelets. (Braxmeier Dep. 22:19-23:9; Def.'s Ex. 11; N.T. 143:1-18.)

III. *Analysis*

The plaintiffs have filed a motion for a preliminary injunction to enjoin the Middle School from enforcing its ban of the "I ♥ Boobies! (Keep A Breast)" bracelets. A party seeking a preliminary injunction must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.,* 369 F.3d 700, 708 (3d Cir. 2004). *See also ACLU v. Black Horse Pike Reg'l Bd. of Educ.,* 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (*en banc*).

A. *Likelihood of Success on the Merits*

The plaintiffs claim that the School's ban on the "I ♥ Boobies! (Keep A Breast)" bracelets violates their First

Amendment right to freedom of speech. There are four Supreme Court cases analyzing the First Amendment free speech rights of students in public schools: (1) *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); (2) *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986); (3) *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988); and (4) *Morse v. Frederick,* 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007).[7]

In *Tinker*, several students were suspended from school for wearing black arm bands to protest the Vietnam War. The Supreme Court noted that the wearing of armbands was "closely akin to 'pure speech'" which the Court has held is entitled to comprehensive protection under the First Amendment. *Tinker,* 393 U.S. at 505 (citation omitted). The Court first observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. But the Court also recognized the authority of school officials to control conduct in schools "consistent with fundamental constitutional safeguards[.]" *Id*. at 507. In balancing these competing interests, the Court focused on whether the speech "intrudes upon the work of the schools or the rights of other students." *Id.* at 508. The Supreme Court held that student expression may not be suppressed unless school officials reasonably forecast that it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513-14.

7. Only *Tinker* and *Fraser* are directly relevant here, but the Court will discuss all four cases for completeness.

Appendix B

In *Bethel v. Fraser*, Matthew Fraser delivered a speech before a high school assembly to nominate a fellow student for student elective office. Fraser's speech employed what the Court described as "an elaborate, graphic, and explicit sexual metaphor." *Fraser,* 478 U.S. at 678. The Court held that schools may prohibit speech that is lewd, vulgar, indecent, or plainly offensive even in the absence of a substantial disruption under *Tinker. Id.* at 684-86; *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 213-14 (3d Cir. 2001) (Alito, J.).

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court addressed the publication of a school-sponsored high school newspaper that contained articles addressing students' experience with pregnancy and the impact of divorce on students at the school. *Kuhlmeier,* 484 U.S. at 263. The Court held that the school could exercise editorial control over school-sponsored speech provided that the school's actions are "reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Most recently, *Morse v. Frederick* addressed speech that advocates illegal drug use. In *Morse*, a student unfurled a banner that contained the phrase "Bong Hits 4 Jesus" at a school-sanctioned and school-supervised event. *Morse,* 551 U.S. at 396-97. The Supreme Court held that schools may prohibit speech that can "reasonably be regarded as encouraging illegal drug use." *Id.* at 397.

In summary, a school may categorically prohibit speech that is (1) lewd, vulgar, or profane; (2) school-sponsored speech on the basis of a legitimate pedagogical concern; and (3) speech that advocates illegal drug use. If

school speech does not fit within one of these exceptions, it may be prohibited only if it would substantially disrupt school operations. *See Saxe,* 240 F.3d at 214.

The plaintiffs argue that *Tinker* applies and that the School acted impermissibly because the School had no reasonable expectation of a substantial disruption of school operations. The defendant argues that the standard of *Fraser* is met and the School acted within its discretion to ban lewd and vulgar speech. Alternatively, the School District argues that the bracelets may be banned because there was a reasonable expectation that they would cause or did cause a substantial disruption to the School.

In deciding whether the plaintiffs are likely to succeed on the merits, the Court first discusses the substantive standard of *Fraser*, and then addresses the standard of review of a school district's determination that certain conduct fits within the *Fraser* standard. The Court then applies that legal framework to the facts of this case. Finding that the *Fraser* standard is not met, the Court then examines whether the standard of *Tinker* is met.

1. *Fraser Analysis*

a. *Substantive Standard of Fraser*

In *Bethel v. Fraser*, Matthew Fraser delivered a speech to a school assembly that endorsed a fellow student for elective office by means of "an elaborate, graphic, and

explicit sexual metaphor." *Fraser,* 478 U.S. at 678.[8] The school suspended Fraser for three days and removed his name from the list of candidates for graduation speaker at the school's commencement exercises. The Court held that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.* at 685. The Court did not conduct a *Tinker* disruption analysis.

The lewd nature of Fraser's speech was apparent to all those who had heard it. During the speech, some students "hooted and yelled," others made gestures simulating the sexual allusions in the speech, while other students appeared to be "bewildered and embarrassed by the speech." *Id.* at 678. One teacher found it necessary to forgo a portion of the next day's scheduled class lesson to discuss the speech with the class.

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8. The text of Fraser's speech is:

> 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.

Fraser, 478 U.S. at 687 (Brennan, J. concurring).

Appendix B

The Court of Appeals for the Third Circuit interpreted *Fraser* in *Saxe v. State College Area School District,* 240 F.3d 200, 213-14 (3d Cir. 2001). In *Saxe*, the Court of Appeals addressed a school district's anti-harassment policy. The Court observed that "*Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends' - a dichotomy neatly illustrated by the comparison between Cohen's jacket and Tinker's armband." *Saxe,* 240 F.3d at 213.[9] After reviewing *Fraser*, the Court concluded that there is no First Amendment protection for "lewd," "vulgar," "indecent," and "plainly offensive" speech in school. *Id.* This standard is "relatively more permissive" than *Tinker* because schools may prohibit speech that falls in the category of lewd or vulgar speech even in the absence of a substantial disruption. *Id.* at 214, 216.[10]

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9. "Cohen's jacket" here refers to Paul Robert Cohen, an adult who wore a coat to the Los Angeles County Courthouse that bore the words "Fuck the Draft." *See Cohen v. California,* 403 U.S. 15, 16, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

10. The supporting cases cited by *Fraser* likewise all concern vulgarity, obscenity, and profanity. *See Fraser*, 478 U.S. at 684-85 (citing *Ginsberg v. New York,* 390 U.S. 629, 639-41, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (upholding ban on sale of sexually oriented material to minors); *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 871-72, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (school may remove "pervasively vulgar" books from library); *FCC v. Pacifica Found.,* 438 U.S. 726, 745-48, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (upholding FCC's ability to censor "obscene, indecent, or profane" speech).

Appendix B

In *Sypniewski v. Warren Hills Regional Board of Education,* 307 F.3d 243, 255-58 (3d Cir. 2002), the Court of Appeals considered the constitutionality of prohibiting a T-shirt that contained a slang word for a female's breasts, although this word was not a primary focus for the Court and the parties agreed that the case should be analyzed under *Tinker*. Thomas Sypniewski was suspended for wearing a Jeff Foxworthy T-shirt. *Id.* at 246. The T-shirt listed 10 reasons one might be a "redneck sports fan."[11] The 10 reasons included references to gambling, the "Bud Bowl,"[12] and the restaurant chain "Hooters." *Id.* at 249-50. The Court of Appeals noted that the defendants did not contend that the Foxworthy shirt contained "indecent

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11. The T-shirt contained the following 10 reasons one may be a "redneck sports fan."

> 10. You've ever been shirtless at a freezing football game.
> 9. Your carpet used to be part of a football field.
> 8. Your basketball hoop used to be a fishing net.
> 7. There's a roll of duct tape in your golf bag.
> 6. You know the Hooter's [sic] menu by heart.
> 5. Your mama is banned from the front row at wrestling matches.
> 4. Your bowling team has it's [sic] own fight song.
> 3. You think the "Bud Bowl" is real.
> 2. You wear a baseball cap to bed.
> 1. You've ever told your bookie "I was just kidding."

Sypniewski, 307 F.3d at 249-50.

12. "The Bud Bowl is a fictional football game between bottles of beer used in a beer advertising campaign." *Sypniewski,* 307 F.3d at 251 n.7.

language," nor was the shirt school-sponsored. *Id.* at 254. Accordingly, under *Saxe*, the Court of Appeals analyzed the T-shirt under *Tinker*'s general rule of substantial disruption. *Id*. The Court concluded that the school could not prohibit the T-shirt under *Tinker* despite a history of racial incidents in the school district. *Id.* at 258.

In *Morse*, the Supreme Court distilled from *Fraser* two basic principles. First, constitutional rights of students are not automatically coextensive with the rights of adults in other settings. If the speech had been delivered in a public forum outside of the school, it would have been protected. *Morse,* 551 U.S. at 404-05. Second, when speech fits within the *Fraser* standard, a court need not do a "substantial disruption" analysis. "Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*." *Id.* at 405.

The Supreme Court in *Morse* also cautioned against over extending *Fraser*. Chief Justice Roberts explained that *Fraser* should not be read to encompass any speech that could fit under some definition of "offensive."

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some.

Morse v. Frederick, 551 U.S. 393, 409, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (citations omitted).

The School District relies on the rule articulated by *Boroff v. Van Wert City Board of Education,* 220 F.3d 465 (6th Cir. 2000). In *Boroff*, the United States Court of Appeals for the Sixth Circuit upheld a school ban of "Marilyn Manson" band T-shirts that the school deemed were "contrary to the educational mission of the school." *Id.* at 469-71. The *Boroff* standard, however, is inconsistent the Third Circuit's decision in *Saxe* and with Justice Alito's criticism of such a standard in *Morse*:

> 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." 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.

Morse v. Frederick, 551 U.S. 393, 423, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (Alito, J. concurring)(citations omitted). *See also Morse,* 551 U.S. at 409 (cautioning

against an expansive understanding of the term "offensive" as used in Fraser).[13]

The heart of *Fraser*'s holding was that a school may prohibit speech that is lewd or vulgar. As the United States Court of Appeals for the Third Circuit succinctly put it, "*Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends[.]'" *Saxe,* 240 F.3d at 213 (quoting *Fraser,* 478 U.S. at 685) (additional quotation omitted). The Court concludes that a proper Fraser analysis involves the narrow inquiry as to whether the speech at issue is lewd, vulgar, or otherwise offends for the same reason that obscenity offends. *Id.*

13. Examples of courts' decisions on what does and does not satisfy the standard of *Fraser* are the following. *Doninger v. Niehoff,* 527 F.3d 41, 49 (2d Cir. 2008) (calling school administrators "douchebags" and encouraging others "to piss [the principal] off more" satisfy the standard of *Fraser*); *Guiles v. Marineau,* 461 F.3d 320, 329 (2d Cir. 2006) (*Fraser* standard not met for a T-shirt that criticized President George W. Bush); *Bragg v. Swanson,* 371 F. Supp. 2d 814, 823 (W.D. W. Va. 2005) (*Fraser* standard not met for a Confederate flag T-shirt); *Smith v. Mt. Pleasant Pub. Schs.,* 285 F. Supp. 2d 987, 989 (E.D. Mich. 2003) (a student calling a teacher "skank," "tramp," discussing two principals having an affair, and questioning the sexuality of an assistant principal satisfy the standard of *Fraser*); *Broussard v. Sch. Bd. of Norfolk,* 801 F. Supp. 1526, 1534-36 (D. Va. 1992) (*Fraser* standard met by T-shirt containing the word "suck").

b. *Standard of Review of a School District's Decision*

The determination of what deference, if any, should be given to a school district's determination under *Fraser* goes to the heart of the tension in First Amendment cases involving public schools. As the Supreme Court has observed, students do not shed their constitutional rights to freedom of speech at the schoolhouse gate. *Fraser,* 478 U.S. at 680. On the other hand, schools must play a role in protecting children from exposure to "sexually explicit, indecent, or lewd speech." *Id.* at 684. But school officials do not act *in loco parentis* for First Amendment purposes. When public schools regulate student speech, they regulate speech as the government, not as parents.[14]

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14. As Justice Alito explained,

> The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing *in loco parentis*.

Morse, 551 U.S. at 424 (Alito, J. concurring).

Although *Fraser* does not directly address the issue of review, the Supreme Court has appeared to apply a reasonableness standard in its decisions in *Kuhlmeier*, *Morse*, and *Tinker*. In *Kuhlmeier*, the Court held that the school district did not violate the First Amendment by exercising editorial control over the content of student speech in a school-sponsored publication "so long as [the school's] actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. Likewise, in *Morse*, the Supreme Court concluded that a school may restrict student speech at a school event "when that speech is reasonably viewed as promoting illegal drug use." *Morse*, 551 U.S. at 403. In *Tinker*, the Court observed that the record did not demonstrate facts which may "reasonably have led school authorities to forecast substantial disruption . . . ." *Tinker*, 393 U.S. at 514.

The Court concludes that a reasonableness standard properly applies to a school's *Fraser* determination. A rule of review that would provide no deference to a school's vulgarity determination would maximize the protection of students' First Amendment freedoms, but at the cost of unduly interfering with a school's responsibility to protect students from lewd or vulgar speech. Courts must balance the competing tensions of constitutional freedoms with the role that schools perform in maintaining safe and effective learning environments. This standard is consistent with public school First Amendment case law, and balances the competing interests of school management with the protection of students' constitutional rights. A public school's decision to censor lewd or vulgar speech under *Fraser* is permissible if the school's determination is an objectively reasonable application of *Fraser*. A school

may not censor speech under *Fraser* if the speech cannot reasonably be considered lewd or vulgar or if does not "offend for the same reasons that obscenity offends." *Saxe,* 240 F.3d at 213.[15]

c. *Application of Fraser to these Facts*

The next question is whether the ban of the "I ♥ Boobies! (Keep A Breast)" bracelets constitutes an objectively reasonable exercise of a public school's authority to ban lewd or vulgar speech under *Fraser*. The Court concludes that it does not.

The justification asserted by the School District in this litigation is that the word "boobies" is vulgar and therefore meets the standard of *Fraser*. Alternatively, the District argues that the phrase "I ♥ Boobies!" is vulgar because it can be viewed as a double entendre.

First, the Court cannot conclude that any use of the word "boobies" is vulgar and can be banned, no matter what the context. The word "boobies" in the context of

15. The plaintiffs' status as middle school students may also be a factor to consider in evaluating the reasonableness of a school's vulgarity determination. *Cf. Fraser,* 478 U.S. at 683 (noting that some members of the audience were only 14 years old); *Kuhlmeier,* 484 U.S. at 274-75 (noting that the school newspaper would presumably be read by some high school students' younger brothers and sisters). The Court notes, however, that the bracelets have been banned at both the middle school and the high school levels. (N.T. 161:11-13.) This fact undercuts the School District's argument that the ban was enacted in response to special concerns regarding the maturity of middle school students.

breast cancer awareness does refer to a female's breast. However, the words boob, booby, and bubby have a number of possible meanings, and thus context matters in interpreting the word. According to the Oxford English Dictionary, the word booby or boobie may refer to "a dull, heavy, stupid fellow: a lubber," a clown, or a nincompoop. It may also refer to the last boy in a school class, the dunce. A booby is also a type of seabird. The word "boob" is defined as a slang word for breasts, but may also be a foolish mistake or blunder. (*See* Ex. A to Pls.' Reply.)

These bracelets have also been reported and widely discussed in the media. Many of these articles contain the phrase "I ♥ Boobies!" *See, e.g.*, Peggy Orenstein, *Think About Pink*, The New York Times Magazine, Nov. 12, 2010, available at http://www.nytimes.com/2010/11/14/magazine/14FOB-wwln-t.html (last visited Mar. 29, 2011) (criticizing "sexy cancer" awareness campaigns but noting that "I get that the irreverence is meant to combat crisis fatigue, the complacency brought on by the annual onslaught of pink . . . ."). The media also uses the word boobies in other contexts, either to refer to female breasts, birds, or nincompoops.[16]

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16. *Compare* David Bouchier, *Out of Order; A Day for the Marginalized Dad*, The New York Times, June 15, 2003, available at http://www.nytimes.com/2003/06/15/nyregion/out-of-order-a-day-for-the-marginalized-dad.html (last visited March 29, 2011) (describing television sitcoms as portraying fathers as "incompetent boobies") *with* Marci Alboher, *New Ventures Help Fight the Frustrations of Fighting Breast Cancer*, The New York Times, Oct. 25, 2007, available at http://www.nytimes.com/2007/10/25/business/smallbusiness/25sbiz.html (last visited March 29, 2011) (describing efforts to encourage women to conduct breast self-examination).

Second, the phrase "I ♥ Boobies!" in the context of these bracelets cannot reasonably be deemed to be vulgar. "I ♥ Boobies!" is presented in the context of a national breast cancer awareness campaign. The phrase "I ♥ Boobies!" is always accompanied by the Foundation's name "Keep A Breast." If the phrase "I ♥ Boobies!" appeared in isolation and not within the context of a legitimate, national breast cancer awareness campaign, the School District would have a much stronger argument that the bracelets fall within *Fraser*. This is not the case here. One of the bracelets worn by B.H. did not even contain the word "boobies," but rather said "check y♥ur self!! (KEEP A BREAST)." The other bracelets all contained the phrase "Keep A Breast" and all bore the web address of the Keep A Breast Foundation, which provides information on breast cancer prevention and detection.

Nor is the use of the phrase "I ♥ Boobies!" gratuitous. The words were chosen to enhance the effectiveness of the communication to the target audience. There is, of course, no inherent sexual association with the phrase "I ♥ [something]." For example, T-shirts that bear the slogan "I ♥ NY" suggest affinity, not sexual attraction, to New York. The use of the word "boobies" is directed to the target audience of teenage girls. The students testified that "boobies" is the word that they use to refer to their breasts. The phrase is a shorthand way of communicating the importance of breast cancer awareness and of keeping one's breasts healthy.[17]

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17. The School District has also argued that the bracelet ban is permissible because the School District did not engage in viewpoint discrimination because it recognized Breast Cancer Awareness Day and encouraged its students to wear pink. For this

The School District's argument in this litigation that the bracelets are lewd and vulgar also is undermined by the School District's offering several differing reasons to justify its ban of the bracelets. The School District's initial justification was that the bracelets had been banned because of student discomfort discussing the human body, inappropriate comments by students, and because some Middle School teachers were personally offended by the bracelets' "cutesy" treatment of breast cancer awareness. The School's principals testified at their depositions that the word boobies, and even the web address keep-a-breast.org, would be "inappropriate." The School and its counsel later focused their attention on the double entendre of the

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proposition, the School District cites *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). *Perry* addressed whether the First Amendment had been violated when one union with exclusive bargaining power was granted access to a school's internal mail system, while a rival union was denied access. The Court concluded that the mail system was not a public forum, and the state may draw such distinctions among unions. *Id.* at 55. At least one court in this Circuit has concluded that the Third Circuit has not limited *Tinker* to viewpoint discrimination or analyzed student speech under a forum analysis. *See C.H. v. Bridgeton Bd. of Educ.,* No. 09-5815, 2010 U.S. Dist. LEXIS 40038, at *20 (D.N.J. Apr. 22, 2010).

But even if a separate category was carved out for viewpoint neutral regulation of student speech, it would not be met here. The bracelets are part of a campaign to effect a particular healthcare response to the dangers of breast cancer. Young girls are encouraged to perform self examination and to talk openly and without embarrassment about their breasts. These bracelets represent a much more particularized effort to raise awareness for early detection than wearing pink on a certain day.

phrase "I ♥ Boobies!," although Ms. DiVietro continued to emphasize that the bracelet ban reinforces the School's purported discretionary authority to determine what is appropriate and inappropriate for student dress. (Compl. ¶ 29; Answer ¶ 29; N.T. 211:23-212:1, 224:14-226:19, 228:5-10.)

The School itself used the word "boobies" in a prepared statement delivered by a student announcing the bracelet ban. A school would not have been willing to use lewd or vulgar language in a broadcast to its entire student body.[18] This supports a conclusion that the School did not actually consider the word "boobies" to be vulgar. It appears to the Court that the Middle School has used lewdness and vulgarity as a post-hoc justification for its decision to ban the bracelets. Ms. Braxmeier testified that banning these bracelets "makes a statement that we as a school district have the right to have discretionary decisions on what types of things are appropriate and inappropriate for our school children." (N.T. 228:5-10.)

A court may also take into consideration that a school's decision to ban speech was based on an erroneous understanding of the law. *See Guiles,* 461 F.3d at 327 (faulting lower court for accepting the school district's judgment that a T-shirt was inappropriate and misjudging

18. The Court notes that in her testimony, Ms. DiVietro freely referred to the word "boobies," but was noticeably unwilling to discuss other hypothetical in open court. In reference to a hypothetical bracelet addressing testicular cancer, Ms. DiVietro became uncomfortable and explained "I don't know if I can say the word that, you know . . . ." (N.T. 225:2-24.)

the scope of *Fraser*). Public schools do not have the broad authority to make "discretionary decisions on what types of things are appropriate and inappropriate . . . ." (N.T. 228:5-10.) If this were the case, public schools would have the authority to ban both Tinker's arm band as well as Cohen's jacket.

The delay in both enacting the ban and announcing the ban also undermines the School District's argument that the bracelets are lewd and vulgar. The record shows that the bracelets became popular among students at the beginning of the 2010-2011 school year, which began August 30, 2010. After the two plaintiffs wore the bracelets every day until mid-to-late September, the School took no action. The ban was never communicated directly from the administration to the students until October 27, 2010, which is approximately two months after students began wearing the bracelets to school. In contrast, after Matthew Fraser delivered his speech, "students appeared to be bewildered and embarrassed by the speech" and the next day one teacher "found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class." *Fraser,* 478 U.S. at 678.

For all of these reasons, the Court concludes that it would have been unreasonable for these school officials to conclude that these breast cancer awareness bracelets are lewd or vulgar under the *Fraser* standard. Even in a middle school, these bracelets do not "offend for the same reasons that obscenity offends." *Saxe*, 240 F.3d at 213.

2. *Tinker Analysis*

Having concluded that the bracelets cannot be banned under *Fraser*, the Court must consider whether this speech is proscribable under the *Tinker* "substantial disruption" analysis. "[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster." *Saxe,* 240 F.3d at 212. "As subsequent federal cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Id.* at 211.

Cases that have applied *Tinker* have consistently noted that a general fear of disruption does not constitute the type of necessary disruption. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 255-58 (3d Cir. 2002) (concluding that the district's ban on the Jeff Foxworthy T-shirt was unconstitutional because there was no substantial disruption); *C.H. v. Bridgeton Bd. of Educ.,* No. 09-5815, 2010 U.S. Dist. LEXIS 40038, at *26 (D.N.J. Apr. 22, 2010) (finding no substantial disruption where school district only articulated "a general fear of disruption" where student wore an anti-abortion armband); *DePinto v. Bayonne Bd. of Educ.,* 514 F. Supp. 2d 633, 646 (D.N.J. 2007*)* (finding no "specific and significant fear" of disruption where fifth grade students wore buttons to school depicting the Hitler youth to protest the school's dress code); *Killion v. Franklin Reg'l Sch. Dist.,* 136 F. Supp. 2d 446, 456 (W.D. Pa. 2001) (concluding that evidence of upset school employees did not constitute a substantial disruption); *Nuxoll v. India Prairie Sch. Dist. #204,* 523

F.3d 668, 674 (7th Cir. 2008) (noting that symptoms of substantial disruption are akin to symptoms of a "sick school").

There is no evidence before the Court of any incidents that caused the type of disruption required by *Tinker*. Notably, there were no incidents presented to the Court of any disruption prior to the School's bracelet ban. In mid- to late-September, a handful of teachers of the 120 teachers approached the administration to seek guidance regarding the School's policy towards the bracelets. At this point, the bracelets had been on campus for at least two weeks without any evidence of disruption. Despite any incidents that would suggest a problem, the School banned the bracelets without any official announcement. At the time of the ban, the School had at most a general fear of disruption.

After the ban was enacted, two incidents took place that are related to the bracelets. During Ms. Braxmeier's October 28, 2010 conversation with a student about her "I ♥ Boobies! (Keep A Breast)" bracelets, the student stated that she believed one or possibly more boys had made remarks to girls about their "boobies" in relation to the bracelets. Second, on or about November 16, 2010, the Middle School administrators received a report that two female students were discussing the bracelets at lunch. A boy sitting with them interrupted and made statements such as "I want boobies" while making inappropriate gestures with two spherical candies. The boy admitted to the incident, and he was suspended for a day. (Braxmeier Dep. 14:24-15:3, 16:9-17:5.)

Even ignoring the lack of justification for the initial ban under *Tinker*, the two events in October and November fail to create a "substantial disruption." Such isolated incidents are well within a school's ability to maintain discipline and order and they did not cause a disruption to the School's learning environment. Accordingly, the Court concludes that the School's ban of these bracelets was not justified under *Tinker*.

The Court, therefore, concludes that the plaintiffs have demonstrated a reasonable likelihood of success on the merits that the School District violated their First Amendment rights.

B. *Irreparable Harm*

The second requirement for a preliminary injunction is a showing that the plaintiff will suffer irreparable harm if an injunction is not issued. It is well-established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). In this case, the plaintiffs have been directly penalized by the suspensions as well as by the ongoing restraint of the freedom to wear these breast cancer awareness bracelets.

C. *Balance of Harm and Public Interest*

The remaining two factors, balance of harm and public interest, also favor the plaintiffs. The Court first considers "whether granting preliminary relief will result in even

greater harm to the nonmoving party." *Allegheny Inc. v. DQE, Inc.,* 171 F.3d 153, 158 (3d Cir. 1999). The Court is satisfied that the continued denial of the plaintiffs' First Amendment rights outweighs any harm the School District may suffer by suspending this ban pending the final outcome of this litigation. The School has expressed concern that if the ban is lifted, then students will try to test the permissible boundaries with other clothing. Nothing in this decision prevents a school from making a case by case determination that some speech is lewd and vulgar while other speech is not. It should be clear, however, that a school must consider the contours of the First Amendment before it decides to censor student speech.

Likewise, the public's interest favors the protection of constitutional rights in the absence of legitimate countervailing concerns. *See Council of Alternative Political Parties v. Hooks,* 121 F.3d 876, 884 (3d Cir. 1997).

IV. *Conclusion*

The Court concludes that the plaintiffs have satisfied their burden and are entitled to a preliminary injunction to enjoin the Middle School from enforcing its prohibition of the breast cancer awareness bracelets at issue in this case. As this is a non-commercial case involving a relatively small amount of money, and the balance of hardships favors the plaintiffs, the Court waives the Rule 65(c) security bond requirement. *Elliott v. Kiesewetter,* 98 F.3d 47, 59-60 (3d Cir. 1996).

An appropriate Order shall issue separately.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED AUGUST 5, 2013

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Appendix C

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RE: *B.H., et al. v. Easton Area School Dist*

Case Number: 11-2067

District Case Number: 5-10-cv-06283

ENTRY OF JUDGMENT

Today, **August 05, 2013** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Page Limits:
15 pages
Attachments:
A copy of the panel's opinion and judgment only. No other attachments are permitted without first obtaining leave from the Court.

Appendix C

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and *en banc* rehearing. If separate petitions for panel rehearing and rehearing *en banc* are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing *en banc* in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed. R. App. P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari. Very truly yours,

/s/_____
Marcia M. Waldron, Clerk

By: /s/_____
Timothy McIntyre, Case Manager
267-299-4953

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11-2067

B.H., A MINOR, BY AND THROUGH HER MOTHER; JENNIFER HAWK; K.M., A MINOR BY AND THROUGH HER MOTHER; AMY MCDONALD-MARTINEZ

v.

EASTON AREA SCHOOL DISTRICT,

Appellant

On Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 5-10-cv-06283)
District Judge: Honorable Mary A. McLaughlin

Argued on April 10, 2012
Rehearing *En Banc* Ordered on August 16, 2012
Argued *En Banc* February 20, 2013

Before: McKEE, *Chief Judge*, SLOVITER, SCIRICA, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE and GREENBERG, *Circuit Judges*

JUDGMENT

Appendix C

This cause came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued *en banc* on February 20, 2013.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated April 12, 2011, is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs taxed against Appellant.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: August 5, 2013

APPENDIX D—POLICIES OF THE BOARD OF EDUCATION, EASTON AREA SCHOOL DISTRICT, REGARDING STUDENT DRESS

No. 221-AR

EASTON AREA SCHOOL DISTRICT

ADMINISTRATIVE REGULATION

ADOPTED: July 20, 2006

REVISED: August 17, 2006

DRESS CODE

The purpose of education exists on two levels. The more basic of the two consists of imparting practical skills that will assist the individual in supporting the material aspects of his/her life.

On a higher level, the purpose of education is to transmit the values of civilization from generation to generation. These values are both academic and social. They consist of habits, attitudes, and ethical perspectives, as well as the general cultural heritage.

The school, in general, is a place of serious endeavor, and the classroom, in particular, should reflect an appropriate business-like atmosphere.

The dress, speech, and work habits of the students should, in every way possible, support the seriousness of the educational enterprise. The following examples are

considered to be in poor taste and will merit disciplinary action:

1. No clothing imprinted with nudity, vulgarity, obscenity, profanity, and double entendre pictures or slogans, including those relating to alcohol, tobacco, drugs, weapons and violent acts.

2. No flip-flops/thongs, bedroom-like and soft-sole slippers and other hazardous footwear deemed to be inappropriate by the principal.

3. No clothing that has been intentionally torn, cut, or ripped in a fashion that displays the anatomy (including sweatpants, jeans or jean skirts).

4. No spandex, leggings, stirrup pants, or bike shorts may be worn unless worn under an article of clothing that complies with the dress code.

5. No see-through garments without appropriate undergarments. See-through garments must be worn over items of clothing that comply with the dress code.

6. No clothing intended as undergarments may be worn as outer garments. No displaying of undergarments at any time with the exception of neckline t-shirts.

7. No street coats, hats, and other head coverings (including baseball caps, bandanas, etc.). These items should be placed in lockers, closets, or other designated areas, and may not be worn in the building. Exceptions

for medical or religious reasons must be referred to the building principal. Hoodies are permitted, however, the hood may not be worn.

8. For boys and girls, no midriff-baring clothing, tube tops, or low-cut scoop neck tops, tank tops, halter-style tops, spaghetti strap, open backs, or sleeveless shirts (sleeveless shirts may be worn in grades K-4). No off the shoulder garments.

9. All button-down shirts must be buttoned with the exception of the top two buttons.

10. No oversized clothing that may be unsafe for the student to wear (no more than one regular size larger than the student actually measures).

11. No spike haircuts in which the hair is sectioned and brought to a point or Mohawk-type haircuts.

12. No unnatural hair colors (red, blue, yellow, green, orange, purple, etc.).

13. No shorts/skorts above mid-thigh, no skirts that are more than three (3) inches above the back of the knee. No mini/micro skirts.

14. No pajama tops and/or bottoms as well as boxer-type (underwear) shorts are permitted as outerwear.

15. No exposed body-piercing jewelry other than in ears, including tongue rings/spikes. All jewelry is subject to administrative review.

16. No chains, dog collars, wallet chains, or spike bracelets/necklaces.

17. No apparel or usage of apparel characteristically associated with gang affiliation, *e.g.* one pant leg up.

18. No medical-type scrubs.

19. Any article of clothing or personal effect not specifically listed is subject to administrative review.

The principal has the right to enforce all of the above restrictions.

Parents should understand that they may be asked to bring a change of clothing to school for students who are in violation of this policy.

School officials may impose limitations on student participation in the regular instructional program where there is evidence that inappropriate dress causes disruption in the classroom, and the lack of cleanliness constitutes a health hazard or disruption of the educational program.

Students have the responsibility to dress appropriately and to keep themselves, their clothes, and their hair clean.

Students should at all times conduct themselves in a manner appropriate to these serious purposes. Most importantly, they should, at all times, be obedient, cooperative, respectful, and responsible to the teacher who is the supervisor of their educational program.

Appendix D

Students who are disrespectful or defiantly disrupt their own education and that of others will be held accountable for such actions.

	221. DRESS AND GROOMING
1. Purpose	The Board recognizes that each student's mode of dress and grooming is a manifestation of personal style and individual preference.
2. Authority SC 1317.3 Title 22 Sec. 12.11	The Board has the authority to impose limitations on students' dress in school. The Board will not interfere with the right of students and their parents/guardians to make decisions regarding their appearance, except when their choices disrupt the educational program of the schools or affect the health and safety of others.
SC 1317.3 Title 22 Sec. 12.11 221 AR	The Board may require students to wear standard dress, which may be required district-wide or by individual schools.
Title 22 Sec. 12.11	Students may be required to wear certain types of clothing while participating in physical education classes, technical education, extracurricular activities, or other situations where special attire may be required to ensure the health or safety of the student.

Appendix D

3. Delegation of responsibility	The building principal or designee shall be responsible to monitor student dress and grooming, and to enforce Board policy and school rules governing student dress and grooming.
Title 22 Sec. 12.11	The Superintendent or designee shall ensure that all rules implementing this policy impose only the minimum necessary restrictions on the exercise of the student's taste and individuality.
Pol. 325, 425, 525	Staff members shall be instructed to demonstrate by example positive attitudes toward neatness, cleanliness, propriety, modesty, and good sense in attire and appearance.
4. Guidelines 221 AR	The dress code established for the schools of the district shall be disseminated in student handbooks. References: School Code - 24 P.S. Sec. 1317.3 State Board of Education Regulations - 22 PA Code Sec. 12.11 Board Policy - 325, 425, 525

APPENDIX E — MEMORANDUM ISSUED BY DIRECTOR OF TEACHING AND LEARNING (K-12), STEPHEN FURST

Easton Area School District
Education Center – 1801 Bushkill Drive
Easton, PA 18040
610-250-2400, ext. 35036

MEMO

To: All Principals
Date: November 9th, 2010
Re: **Clarification on "I Love Boobies" Bracelets**
CC: S. McGinley, M. Roberts, J. Castrovinci & Atty. McFall

***** CONFIDENTIAL & PRIVILEGED INFORMATION – DO NOT DISSIMINATE FOR ANY REASON *****

As you know, the district has been threatened with legal action from the ACLU for refusing to allow students to wear the infamous "I Love Boobies" bracelets in our middle schools. The actions of the middle school principals concerning this matter have been reviewed and supported by the district as the bracelets are considered to be inappropriate for students to wear within the school setting.

The being the case, I have been directed to inform all the principals to be consistent in enforcing this ruling, since it has been determined that "I Love Boobies" bracelets are inappropriate for a school setting and not to be work by students on school property or conveyances. If a student is seen wearing a bracelet, they should be asked to remove it.

If a student refuses to comply with the request, consider them to be insubordinate, and they should be disciplined accordingly. I would also suggest that administrators, rather than staff members, handle this aspect of student discipline as much as possible.

It is my hope that this issue will be resolved soon through our legal counsel; however, in the meantime, I do caution you on making blanket announcements to students about "banning" the bracelets, as this could backfire and incite a collective protest from students that could disrupt the school day. Instead, you may wish to call an AM faculty meeting to discuss the district's position on this matter with all staff members and advise them on how you would like them to handle this issue with students to insure the least impact on student learning and the school day. However the building administration decides to handle this situation, building principals are charged with making the final determination as to how to proceed in complying with the spirit of this memo.

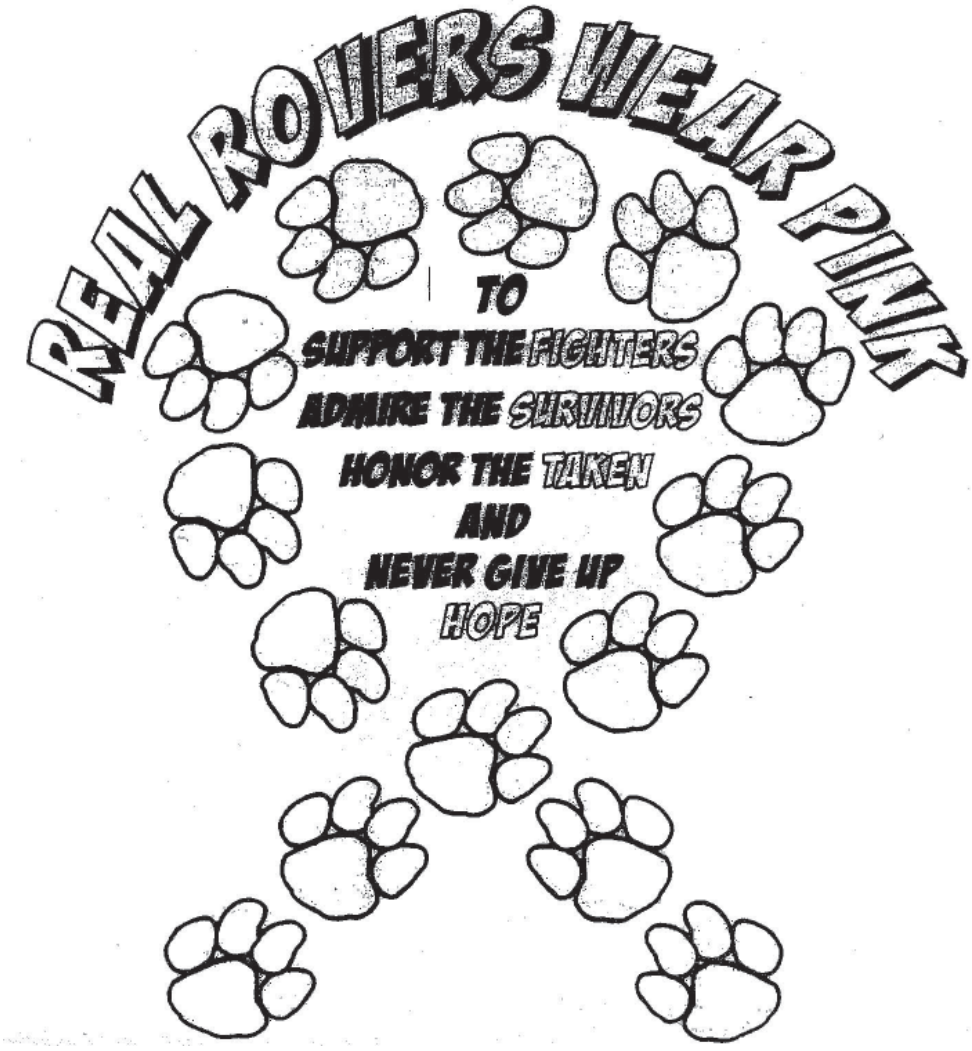
Finally, if you notice any staff members wearing these bracelets, please immediately contact me and John Castrovinci for direction. I can be reached at (484) 239.9705.

Thank you in advance for your cooperation with this situation. Should you have questions about any aspect of this memo, please contact me ASAP.

APPENDIX F — PHOTOCOPY OF B.H. AND K.M.'S "I ♥ BOOBIES!" BRACELETS

Appendix F

APPENDIX G — PHOTOCOPY OF T-SHIRTS WORN BY EASTON AREA SCHOOL DISTRICT ADMINISTRATORS ON THE SCHOOL DISTRICT'S BREAST CANCER AWARENESS DAY



Appendix G

APPENDIX H — UNPUBLISHED OPINION IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, FILED FEBRUARY 6, 2012

11-CV-622-BBC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

K.J., A MINOR, BY AND THROUGH HER MOTHER CARAN BRAUN,

Plaintiff,

v.

SAUK PRAIRIE SCHOOL DISTRICT AND TED HARTER, IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF SAUK PRAIRIE MIDDLE SCHOOL,

Defendants.

JUDGES: BARBARA B. CRABB, District Judge.

OPINION BY: BARBARA B. CRABB

OPINION AND ORDER

This case raises questions about the rights of middle school students to express themselves and the authority of middle school administrators to ban expression they view as inappropriate for middle school students. Plaintiff K.J.

attends the Sauk Prairie Middle School. She has moved for a preliminary injunction preventing defendants Sauk Prairie School District and Ted Harter from prohibiting middle school students from wearing bracelets and other clothing containing the statement "I ♥ Boobies! (Keep A Breast)." Plaintiff contends that the ban violates her right to free speech under the First Amendment. Defendants contend that *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), authorizes them to ban this phrase because it is "lewd," "vulgar," "indecent" and "offensive." Both sides have plausible positions on the issue. However, when I take into consideration the ages of middle school students and the nature of the challenged expression, which can reasonably be interpreted as vulgar, I conclude that plaintiff has not demonstrated that she is likely to succeed on the merits. Therefore, I will deny her motion for preliminary injunction.

From the parties' affidavits submitted in support of this motion, I find the following facts.

FACTS

Plaintiff K.J. is a thirteen-year-old female. She attended Sauk Prairie Middle School as a seventh grade student during the 2010-2011 school year and is now in the eighth grade. Plaintiffs mother, Caran Braun, brought this lawsuit on plaintiff's behalf. Defendant Sauk Prairie School District is a municipal school district, governed and operated by a municipal school board. Defendant Ted Harter is the principal of the Sauk Prairie Middle School, a school within the Sauk Prairie School District.

Appendix H

In early fall 2010, plaintiff purchased a bracelet bearing the phrase "I ♥ Boobies! (Keep a Breast)" with her mother's permission. These bracelets are developed and distributed by Keep A Breast Foundation, a breast cancer-awareness foundation whose mission is "to help to eradicate breast cancer by exposing young people to methods of prevention, early detection and support." The foundation seeks to increase breast cancer awareness among young people, so they are "better equipped to make choices and develop habits that will benefit their long-term health and well-being." The "I ♥ Boobies! (Keep a Breast)" bracelets are part of the foundation's larger "I Love Boobies! Campaign" which "relates to young people in their own voice about a subject that is often scary and taboo and turns it into something positive and upbeat." The campaign encourages people to use the bracelets as an opportunity to start a conversation about breast cancer prevention, body image, early detection and living a healthy lifestyle.

Plaintiff wants to wear the bracelet at school to show her concern about breast cancer and help raise awareness of breast cancer and prevention. For most of the first semester of the 2010-2011 school year, plaintiff and many other students wore the "I ♥ Boobies! (Keep a Breast)" bracelets at Sauk Prairie Middle School. The bracelets caused no disruption to school operations or classes or any disruptions outside school. By wearing her bracelet, plaintiff sparked conversations about breast cancer that have raised awareness in others about breast cancer and prevention and made her more aware of the disease and how it has affected others in her community.

Appendix H

Near the start of the second semester of the 2010-2011 school year, defendant Harter announced in his role as principal that students at Sauk Prairie Middle School would no longer be allowed to wear the "I ♥ Boobies! (Keep a Breast)" bracelets. He told plaintiff that if she continued to wear her bracelet to school, she would be punished with detentions and then suspensions. Several days after the ban was announced, the restriction was altered to permit students to wear the bracelets inside out so that the message was not visually displayed. This restriction remains in place. Sometime after banning the bracelets, the middle school began selling their own bracelets for students to wear at school which state, "Sauk Prairie Eagles support breast cancer awareness." Sauk Prairie High School has not adopted a similar ban.

Defendant Harter concluded that "I ♥ Boobies! (Keep a Breast)" was sexual innuendo in violation of the dress code. He believes the bracelets elicit attention by sexualizing the cause of breast cancer awareness. After the middle school banned the bracelets, he told students and parents that the bracelets were a "distraction, that it was inappropriate slang, and that other people, including some teachers, were offended." In a newspaper article, he was quoted as saying "Our school dress code refers to any kind of dress that might be distracting or inappropriate for middle school." He also said that parents and teachers told him that they believed the slogan was inappropriate and "trivialized the disease."

Appendix H

OPINION

The analysis of a motion for preliminary injunction has two phases. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1085-86 (7th Cir. 2008). First, in the threshold phase, plaintiff must establish that (1) she has a likelihood of success on the merits; (2) denial of relief would result in irreparable harm to her in the interim prior to the resolution of her claims; and (3) traditional legal remedies are inadequate to remedy the harm. *Id.* Although plaintiff must show some likelihood of success on the merits, the threshold is low. *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 2011 WL 3836457 at 15-16 (7th Cir. 2011) ("likelihood of success" is not same thing as "success"); *Brunswick Corp. v. Jones*, 784 F.2d 271, 274-75 (7th Cir. 1986). As for irreparable harm, "[t]he Supreme Court believes that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Nuxoll v. Indian Prairie School District # 204*, 523 F.3d 668, 669-70 (7th Cir. 2008) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)).

If plaintiff makes this showing, then the court proceeds to the balancing phase, in which it weighs the gravity of the harm to plaintiff against any irreparable harm to defendant and considers the effects of granting or denying the injunction on the public interest. *Girl Scouts of Manitou Council*, 549 F.3d at 1086. In an attempt to minimize the harm from potential error, the court employs a "sliding-scale approach," which means that the higher

the probability that plaintiff will win, the less heavily the balance of harms must weigh in favor of granting the injunction. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

A. Speech in Schools

Students retain their constitutional right to freedom of speech while at school, but those rights must be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). Determining the contours of these rights is not a simple matter despite the Supreme Court's identification of several legitimate reasons for schools to restrict student speech. *Id.* at 514 (speech that school officials reasonably conclude is likely to cause substantial disruption); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (speech that "the public might reasonably perceive to bear the imprimatur of the school"); *Morse v. Frederick*, 551 U.S. 393, 396, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007) (speech that school officials reasonably interpret as advocacy of illegal drug use). For the purpose of this motion, defendants have argued only that the language on the bracelets falls within the Supreme Court's ruling in *Bethel School District No. 43 v. Fraser*, 478 U.S. 675, 680, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), that school officials may prohibit students from using certain lewd, vulgar or offensive terms at school regardless whether the speech causes a substantial disruption.

Appendix H

Fraser involved a speech given by a high school student in connection with student body elections that consisted entirely of "an elaborate, graphic, and explicit sexual metaphor." *Id.* at 678. Without using any obscene or profane terms, the student described an erection, sexual intercourse and ejaculation. *Id.* at 687 (Brennan, J., concurring) (quoting the text of the speech). The lewd nature of the speech was apparent to its listeners and it induced other students to simulate its sexual allusions with lewd gestures. *Id.* at 678. The Court concluded that the speech glorified male sexuality, was "acutely insulting" to teenage female students and could have been "seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality." *Id.* at 683. The Court reasoned that "schools must teach by example the shared values of a civilized social order" and, "as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy." *Id.* at 683. The Court concluded that "petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.* at 685.

As the Supreme Court later noted, "the mode of analysis employed in *Fraser* is not entirely clear." *Morse v. Frederick*, 551 U.S. 393, 404-05, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007). In particular, *Fraser* is unclear about (1) the scope of its exception and (2) the standard of review. In the course of the opinion in *Fraser*, the Court used a

variety of adjectives to identify the category of speech that a school may prohibit, describing it variously as "sexually explicit," "vulgar," "lewd," "offensively lewd," "indecent," "highly offensive," "plainly offensive," "offensive" and "inappropriate." *Fraser*, 478 U.S. at 683-85. It is fair to say that the Court's concern was the sexual innuendo and its setting. The student's speech was vulgar, offensive and inappropriate because of its lewd sexual content and lack of meaningful expression and because the student spoke at a school assembly. *Morse*, 551 U.S. at 404 (stating that in *Fraser*, "Court was plainly attuned to the content of [the student's] speech").

Lewd and indecent sexual innuendo is one way that speech may be vulgar, offensive or inappropriate, but not the only one. The word "vulgar" is ambiguous, with senses ranging from "common" and "plebeian," to "lacking in cultivation" and "morally crude" to "offensive in language" and "lewdly or profanely indecent." *Merriam Webster's Collegiate Dictionary* 1326 (10th ed. 1997). Speech may be offensive or inappropriate for any number of reasons. Presumably, the majority in *Fraser* was aware of these differences, especially in light of Justice Brennan's concurrence in the judgment, pointing out the variety of adjectives used in the majority opinion. *Fraser*, 478 U.S. at 687-90 (Brennan, J., concurring in judgment). It remains unclear just how far schools may go to regulate speech that is not sexually explicit, lewd or indecent but is nevertheless vulgar, offensive or inappropriate.

In its latest school speech case, *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007),

the Supreme Court cautioned against a broad reading of a school's right to punish offensive speech, while acknowledging that "[s]tudent First Amendment rights 'are applied in light of the special characteristics of the school environment.'" *Id.* at 406 n.2 (citing *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 688 (Brennan, J. concurring); *Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)). School officials had punished a high school student for displaying a banner at a school event with the slogan "Bong Hits 4 Jesus," words that some might find offensive. The Court held that schools may prohibit advocacy of illegal drug use but it declined expressly to adopt the broader rule that schools may punish any speech that "is plainly 'offensive' as that term is used in *Fraser*." *Morse*, 551 U.S. at 409. Such a rule "stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some." *Id.* In a concurring opinion, Justice Alito criticized the government for arguing that officials may "censor any student speech that interferes with a school's 'educational mission'" because schools officials may define "their educational mission as including the inculcation of whatever political and social views are held by these groups." *Id.* at 423 (citations omitted). *Contra Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 470 (6th Cir. 2000) (upholding school's decision to punish student for wearing Marilyn Manson t-shirt, because it was not "manifestly unreasonable" for officials to conclude that Manson "promotes values patently contrary to the school's educational mission").

Appendix H

The Court of Appeals for the Seventh Circuit has not considered the meaning of "lewd," "vulgar" or "offensive" language under *Fraser*. However, before *Morse* was decided in 2007, several other circuit courts had tried to determine whether depictions of drug use qualified as "vulgar," "offensive" or "plainly offensive" speech under *Fraser*. *E.g. Guiles v. Marineau*, 461 F.3d 320, 327-29 (2d Cir. 2006). In *Guiles*, the issue was whether a student could be forbidden from participating in a school field trip while wearing a t-shirt depicting President George W. Bush, a martini glass, a razor blade and lines of cocaine, among other things. The court of appeals held that the plaintiff had a right to wear the shirt because the shirt was not school-sponsored, the language used was neither vulgar, lewd, indecent nor plainly offensive under *Fraser* and the school had not shown that the shirt's language would materially and substantially disrupt class work and discipline in the school. The court was not persuaded that the images of drugs and alcohol justified a ban on the shirt.

After *Morse*, it is unlikely that this conclusion about a t-shirt picturing cocaine would stand up, but the discussion of "offensive" speech in *Guiles* is persuasive. The court found that "[l]ewdness, vulgarity, and indecency normally connote sexual innuendo or profanity," *id.* at 327 (citations omitted), and that *Fraser*'s reference to "plainly offensive" speech meant "speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity." *Id.* at 328. *See also Saxe v. State College Area School District*, 240 F.3d 200, 213 (3d Cir. 2001) ("*Fraser* permits a school to prohibit words that 'offend for the same reasons that obscenity offends.'"). In

support of its restrictive interpretation of "offensive," the court of appeals noted that the precedents cited in *Fraser* all concerned vulgarity, obscenity or profanity. *Fraser*, 478 U.S. at 684-85, citing *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-48, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978) (obscenity and profanity in public broadcasting); *Ginsberg v. New York*, 390 U.S. 629, 639-41, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968) (selling sexually explicit material to children). In addition, in *Fraser*, the Court used the word "offensive" only in conjunction with "lewd," "vulgar" or "indecent," so it should be understood as "part and parcel of speech that is lewd, vulgar, and indecent." *Guiles*, 461 F.3d at 328.

I conclude that *Fraser* permits schools to prohibit vulgar or offensive speech that is related to, but falls just short of being, profane, obscene or indecent. It remains to be determined what standard of review courts should apply when reviewing a school district's determination that language is lewd or vulgar.

In *Fraser*, the Court stated that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. That statement cannot be literally true. If it were, school officials would have been acting within their discretion when they decided that Tinker's anti-war armband or Morse's "Bong Hits 4 Jesus" banner was offensive or inappropriate. Nevertheless, the Supreme Court has taken the position that courts should show deference to judgments by school administrators about the propriety of putatively lewd or vulgar speech. The

Court expressed a similar need for deference to school administrators' determinations that speech constituted advocacy of drug use and applied that deference when it adopted a rule in *Morse* that permits school officials to restrict speech that is "reasonably viewed as promoting illegal drug use." *Morse*, 551 U.S. at 403.

Although the Court of Appeals for the Seventh Circuit has not addressed the issue of the standard of review for cases involving vulgar or offensive speech in school, its student speech opinions reveal a guarded deference for the decisions of school officials that accommodates the difficulty of their educational task. For example, when considering the scope of primary school students' free speech rights, the court wrote:

> An education in manners and morals cannot be reduced to a simple formula, nor can all that is uncivil be precisely defined . . . If the schools are to perform their traditional function of "inculcat[ing] the habits and manners of civility," *Fraser*, 478 U.S. at 681, they must be allowed the space and discretion to deal with the nuances. The touchtone is reasonableness . . . .

Muller v. Muller by Jefferson Lighthouse School, 98 F.3d 1530, 1542 (7th Cir. 1996) (holding that school may screen non-school related handouts for potentially offensive messages). The court of appeals encourages deference to reasonable decisions of school administrators but it does not treat those decisions as immune from judicial scrutiny. For example, in *Nuxoll v. Indian Prairie School District*

 # 204, 523 F.3d 668 (7th Cir. 2008), a high school used a rule against "demeaning" or "derogatory" statements to prohibit students from wearing t-shirts with the phrase "Be Happy, Not Gay." The district court denied the plaintiff's motion for a preliminary injunction; the court of appeals reversed the lower court on the ground that the school had not offered sufficient evidence that the shirts would substantially disrupt the learning environment. *Id.* at 676. Although the court of appeals expressed support for a "judicial policy of hands off (within reason) school regulation of student speech," it adopted a standard of review that required defendants to "present[] facts which might reasonably lead school officials to forecast substantial disruption." *Id*. at 673. The court upheld the school district's authority to prohibit derogatory or demeaning comments but rejected its determination that the phrase "Be Happy, Not Gay" was demeaning of homosexuals. It found it "highly speculative" that the shirts would provoke harassment of homosexuals or "poison the educational atmosphere," as the school district had asserted. *Id.* at 676.

Because reasonableness standards have been applied to the other school speech exceptions, I conclude that school officials violate the First Amendment by prohibiting expression that they determine is lewd or vulgar only if their determination is unreasonable. A reasonableness standard permits judicial scrutiny to protect students' First Amendment rights while preventing courts from interfering with the ability of administrators to manage their schools to promote a civil and mature discourse.

B. "I ♥ Boobies! (Keep A Breast)"

The statement "I ♥ Boobies! (Keep A Breast)" straddles the line between vulgar and mildly inappropriate. "Boobies" is a morally immature and crude term for breasts. *Merriam Webster's Collegiate Dictionary* 1326 (10th ed. 1997) defines "booby" as "BREAST – sometimes considered vulgar." *Id.* at 131. Although it is a far cry from the extended metaphor for sexual intercourse in *Fraser*, the phrase "I ♥ Boobies!" is sexual innuendo that is vulgar, at least in the context of a middle school. If the bracelets included only this phrase, this would be an easy case.

However, as plaintiffs argue, the phrase "I ♥ Boobies!" is always accompanied by the phrase "(Keep A Breast)." When one reads the entire phrase, it is clearly a message designed to promote breast cancer awareness. Unlike the students in *Fraser* or *Morse*, plaintiff is expressing a meaningful idea in a provocative manner. The effectiveness of her bracelet at provoking attention is evident when it is contrasted with the official sanitized version: "Sauk Prairie Eagles support breast cancer awareness." Plaintiff maintains that the bracelets express a positive social message using "contemporary language that [middle school] students can identify with" and that "appeal[s] to young women's sense of fun." Plt.s' Br., dkt. #6, at 13.

In support of her argument that the "I ♥ Boobies (Keep A Breast)" bracelets cannot reasonably be interpreted as vulgar, plaintiff cites *H. v. Easton Area School District*, 827 F. Supp. 2d 392, 2011 WL 1376141

(E.D. Pa. 2011). In *Easton*, the district court granted the plaintiff a preliminary injunction prohibiting the school district from enforcing a ban against the same "I ♥ Boobies (Keep A Breast)" bracelets in its middle school. After explaining its understanding of *Fraser*, the court found that the "bracelets cannot reasonably be considered lewd or vulgar" because they "are intended to be and they can reasonably be viewed as speech designed to raise awareness of breast cancer and to reduce stigma associated with openly discussing breast health." 827 F. Supp. 2d 392, *Id*. at *1. In rejecting the school district's argument that the bracelets use vulgar language and a double entendre, the court reasoned that the phrase "I ♥ [something]" has no inherent sexual connotations, and the phrase "I ♥ Boobies!" is not "gratuitous" but "chosen to enhance the effectiveness of the communication to the target audience." 827 F. Supp. 2d 392, *Id.* at *11.

With respect, I disagree with the court's conclusion in *Easton*. The connotation of the expression "I ♥ Boobies!" cannot be determined by analyzing the explicit meaning of its constituent parts. The phrase "I ♥ [something]" or the word "boobies" may not have inherent sexual connotations, but the phrase "I ♥ Boobies!" does, especially in the middle school context. The campaign uses these hints of vulgarity and sexuality to attract attention and provoke conversation, a ploy that is effective for its target audience of immature middle students.

Although the bracelets promote a worthy cause, that does not make their slogan innocuous. Lewd and vulgar language can be an effective means to attract attention.

Appendix H

When a person is speaking in a public forum, the First Amendment protects her freedom to choose words that convey the cognitive and its emotive content of her message, even if the words are vulgar or offensive. *Cohen v. California*, 403 U.S. 15, 26, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). However, a student's freedom to select her preferred "mode of expression" within the school is more limited. *Fraser*, 478 U.S. at 684. School officials have a responsibility to "demonstrate the appropriate form of civil discourse and political expression" and to impart the "essential lessons of civil, mature conduct." *Id.* at 683. Although the defendants in *Cohen* and *Tinker* were both expressing anti-war messages, "[t]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* (quoting *Thomas v. Granville Central School District*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

Several district courts have held, after bench trials, that school officials did not violate a student's free speech rights by punishing her for making positive social statements in terms that could be reasonably interpreted as vulgar. In *Broussard v. School Board of Norfolk*, 801 F. Supp. 1526, 1537 (E. D. Va. 1992), the district court found that school officials did not violate the rights of a seventh grade student by punishing her for wearing a t-shirt with the slogan "Drugs Suck." The court found that school officials concluded reasonably that the term "suck" had sexual connotations that were vulgar and offensive, despite the shirt's anti-drug message and despite arguments by plaintiff's etymology expert that young people would understand the shirt as a generic

message that "drugs are bad." *Id.* at 1533-34. Similarly, in *Pyle v. South Hadley School Community*, 861 F. Supp. 157 (D. Mass. 1993), the court found that school officials determined reasonably that the word "dick" is vulgar when used on a t-shirt that said "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick." Although the plaintiff argued that the message against drunk driving should be protected, the court concluded that "[a]t least in high school, a political message does not justify a vulgar medium." *Id.* at 169.

Plaintiff's bracelet uses a vulgar and sexually provocative statement to draw attention to a worthy social cause. The degree of vulgarity and innuendo in these bracelets is relatively innocuous, compared to the other influences that 11, 12 and 13-year-olds confront in school hallways and beyond the school walls. However, this case is not about whether I would adopt the same policy as defendants if I were a principal or a school board member. It is reasonable for school officials to conclude that this phrase is vulgar and inconsistent with their goal of fostering respectful discourse by encouraging students to use "correct anatomical terminology" for human body parts.

A question remains, however, whether this is the actual reason for defendants' ban on the bracelets. In the abstract, a practice prohibiting mildly vulgar language may be an appropriate way to teach middle school students the "fundamental values of public discourse" and to "inculcate the habits and manners of civility." *Fraser*, 478 U.S. at 683, 681. However, defendants' assertion that they

follow such a practice relies entirely on unsubstantiated statements by defendant Harter. The principal is an authority on school practices, but he identified no other instances in which the school banned similarly vulgar slang or disciplined a student for similar using a similar type of vulgar slang. Defendant Harter also told a local newspaper that parents and teachers had complained because they thought the phrase was inappropriate or trivialized breast cancer. Public school officials do not have broad discretion to ban any language they deem inappropriate or trivializing. The most damaging evidence for the middle school's putative "practice" is that defendants permitted students to wear the bracelets for an entire semester. The language was equally vulgar when students first began wearing the bracelets.

However, this is not a case in which the defendants' putative reasons might mask viewpoint discrimination. The reason that the bracelets are potentially offensive, trivializing or inappropriate is that they use vulgar language and sexual innuendo. Defendants did not restrict plaintiff's message and, in fact, made efforts to provide alternative means for her and her fellow students to express their message of breast cancer awareness. They made efforts to tailor their speech regulations to the age and maturity level of their students by not banning the bracelets in the high school. *Zamecnik v. Indian Prairie School District*, 636 F.3d 874, 876 (7th Cir. 2011) ("[T] he younger the children, the more latitude the school authorities have in limiting expression."). Concern about the age-appropriateness of speech is particularly relevant in matters of human sexuality, especially in a middle

school atmosphere. It is likely that defendants determined reasonably that the phrase "I ♥ Boobies! (Keep A Breast)" involved sexual innuendo that was vulgar within the meaning of *Fraser*.

As District Judge Ponsor wrote when denying the preliminary injunction in *Pyle*, the "See Dick Drink" case:

> If a school committee and administration decide to limit clothing with sexually provocative slogans, and diffuse somewhat an already highly charged atmosphere, in order to protect students and enhance the educational environment—even where the specific items banned may be relatively innocuous in today's world—the court is unlikely to conclude that this action violates the First Amendment.

Pyle v. South Hadley School Committee, 824 F. Supp. 7, 11 (D. Mass. 1993). I conclude that it is unlikely that plaintiff can show that it was unreasonable for defendants to determine that the phrase "I ♥ Boobies! (Keep A Breast)" is vulgar. Because she has not made the threshold showing that she is likely to succeed on the merits, it is unnecessary to discuss the other factors that must be present before a preliminary injunction may issue. *Girl Scouts of Manitou Council*, 549 F.3d at 1086.

Appendix H

ORDER

IT IS ORDERED that plaintiff K.J.'s motion for preliminary injunction, dkt. #5, is DENIED.

Entered this 6th day of February 2012.
BY THE COURT:
/s/ BARBARA B. CRABB
District Judge