CASE NO. 24-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

B.A., mother of minors D.A. and X.A.;
D.A., a minor, by and through his mother, B.A.;
X.A., a minor, by and through his mother, B.A.,
Plaintiffs-Appellants,

v.

TRI COUNTY AREA SCHOOLS;
ANDREW BUIKEMA, in his individual capacity;
WENDY BRADFORD, in her individual capacity,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District Of Michigan
Case No. 1:23-Cv-00423

BRIEF OF DHILLON LAW GROUP, INC., YOUNG AMERICA'S FOUNDATION, AND HAMILTON LINCOLN LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS – DHILLON LAW GROUP, INC.

Sixth Circuit

Case Number: 24-1769

Case Name: *B.A. et al. v. Tri County Area Schools, et al.*

Name of counsel: Anthony J. Fusaro, Jr.; Krista L. Baughman

Pursuant to 6th Cir. R. 26.1, Dhillon Law Group, Inc., as *amicus curiae*, makes the following disclosure:

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

   No.

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

   No.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS – YOUNG AMERICA'S FOUNDATION

Sixth Circuit

Case Number: 24-1769

Case Name: *B.A. et al. v. Tri County Area Schools, et al.*

Name of counsel: Madison Hahn; Victor Bernson

Pursuant to 6th Cir. R. 26.1, Young America's Foundation, as *amicus curiae*, makes the following disclosure:

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   No.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS – HAMILTON LINCOLN LAW INSTITUTE

Sixth Circuit

Case Number: 24-1769

Case Name: *B.A. et al. v. Tri County Area Schools, et al.*

Name of counsel: Adam E. Schulman; John M. Andren

Pursuant to 6th Cir. R. 26.1, Hamilton Lincoln Law Institute, as *amicus curiae*, makes the following disclosure:

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

   No.

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STATEMENT OF IDENTIFICATION

Dhillon Law Group, Inc., is a national litigation boutique with a focus on First Amendment law, including free speech matters pertaining to student speech in private and public schools across the country. The firm's attorneys routinely represent individuals, students, and businesses who engage in constitutionally protected expression. As such, the firm has a substantial interest in ensuring that courts apply the correct legal standards in cases involving the rights of free speech and free expression, particularly in cases that implicate government censorship of student speech, which is at issue in this appeal.

Young America's Foundation (YAF) is a nonprofit organization whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF fulfills its mission through student-led campus chapters and individual membership. YAF members engage in campus activism and host guest speakers, often facing penalties and bans by school officials who label their speech as political, hateful, or otherwise problematic. YAF has a strong interest in the outcome of this case because it provides an opportunity to check viewpoint-based censorship by school officials, which stifles meaningful classroom discussions, forces students to self-censor, and undermines belief in the American experiment by stripping fundamental freedoms during formative years.

Hamilton Lincoln Law Institute is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers against regulatory abuse and rent-seeking. *See, e.g.*, *Stock v. Gray*, 2023 WL 2601218, 2023 U.S. Dist. LEXIS 48300 (W.D. Mo. Mar. 22, 2023) (preliminarily enjoining enforcement of law that restricts pharmacist speech based on viewpoint); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020) (same; attorney speech). HLLI is concerned by the district court's application of the incorrect legal standard while analyzing the protected student speech at issue. HLLI often encounters such legal errors and has a strong interest in ensuring courts, and government entities generally, evaluate speech under the proper First Amendment rubric, solicitous to the fundamental constitutional rights of all Americans.

This brief is filed pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and upon the accompanying Motion for Leave to File.

No attorney for any party authored any portion of this brief, nor did any attorney or party contribute any money to the preparation or submission of the brief. The brief was prepared pro bono by the undersigned counsel who have received no compensation, and no other individuals or organizations, apart from the signatories to this brief, covered any costs or expenses pertaining to this brief.

SUMMARY OF ARGUMENT

This amicus brief addresses the district court's erroneous application of the First Amendment standard governing political expression in public schools. The First Amendment affords heightened protection to political speech, requiring schools to demonstrate that such expression materially and substantially disrupts school operations before imposing restrictions. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Courts have consistently distinguished political speech from other forms of expression, such as lewd or vulgar language, which may be regulated under less stringent standards. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 319-20 (3d Cir. 2013) (*en banc*).

Here, the district court improperly analyzed Appellants' "Let's Go Brandon" apparel under the standard for lewd or offensive speech established in *Fraser*, rather than the *Tinker* standard for political expression. In doing so, the court incorrectly concluded that "Let's Go Brandon" is not political speech, ignoring its widely recognized political meaning as a criticism of President Biden's performance.[1] By failing to apply the correct legal standard, the district court effectively pretermitted

[1] *See* Record Entry ("RE") 39-15 (CBS News Sacramento video clip), 39-16 (Noticias Telemundo video clip); 39-17 (Fox 5 D.C. video clip); 39-18 (ABC 10 News video clip); 39-19 (Mark Blazor Show audio clip)' 39-20 (WABC Brian Kilmeade audio clip); 39-21 (CNN Tonight video clip); 39-22 (FOX News video clip); 39-23 (NBC News video clip).

the proper analysis of whether the speech caused substantial disruption—the critical element under *Tinker*.

This Court should reverse the district court's decision and remand for further proceedings to ensure Appellants' political expression receives the First Amendment protections to which it is entitled.

ARGUMENT

I. The First Amendment protects Appellants' speech because it constitutes political expression that did not substantially disrupt the school.

It has long been the tradition of this country to treat political expression differently from other forms of speech. Political expression demands the highest level of protection from government censorship because it is "at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion)). "[F]ew [First Amendment rights] are more central than the right to express opinions on electoral questions and the qualifications of political candidates." *Boone Cnty. Republican Party Exec. Comm. v. Wallace,* 116 F.4th 586, 596 (6th Cir. 2024). This bedrock principle holds equally true for the political expression of students. Indeed, each time the Supreme Court has considered the extent of First Amendment protections for student speech, it has emphasized the heightened degree of protection afforded to forms of political expression. *See Morse*, 551 U.S. at 403; *Bethel Sch.*

Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Mahanoy Area Sch. Dist. v. B.L.,* 594 U.S. 180, 190 (2021) (Alito, J., concurring).

As explained below, *Tinker* provides the proper standard for evaluating the First Amendment protections afforded to political speech in schools and requires a showing of material and substantial disruption before such expression can be restricted. By contrast, the more deferential standard for evaluating student speech set forth in *Fraser* should be confined to cases involving speech devoid of political content. *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 319-20 (3d Cir. 2013) (*en banc*). The district court erred in disregarding the political nature of Appellants' "Let's Go Brandon" apparel and failing to apply the Tinker framework. The improper analysis warrants reversal and remand for further proceedings under the correct legal standard. Affirming would create a circuit split and put this Court on the wrong side of the divide.

A. *Tinker* and its progeny have consistently held that political expression in schools—unlike other forms of profane or vulgar speech—cannot be prohibited unless it is shown to materially and substantially disrupt the work and discipline of the school.

In *Tinker*, the Court considered an implicit political statement by students—armbands worn to protest the highly contentious Vietnam War—and held that a public school may not prohibit the political expressions of students unless the school

can show that the targeted expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)) (internal quotations omitted). None of the cases subsequently decided by the Court under *Tinker* deviate from this standard in the context of core *political* expression; instead, they address low-value expression such as sexually explicit speech and drug-related speech. *See Morse*, 551 U.S. at 403; *Fraser*, 478 U.S. at 685.

In *Fraser*, for example, the expression at issue concerned a student's speech laced with "elaborate, graphic, and explicit sexual metaphor(s)" to humorously praise a peer's qualifications for student office. *Fraser*, 478 U.S. at 678. In applying a more deferential standard to this "vulgar and lewd" speech, the Court distinguished *Tinker* on the grounds that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were **unrelated to any political viewpoint**." *See id.* at 680, 685 (emphasis added) (criticizing the Ninth Circuit for giving "little weight" to "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case").

In *Morse*—where students viewing the Olympic Torch Relay were disciplined for holding up a sign that read, "BONG HiTS 4 JESUS"—the Court went to great lengths to distinguish between the sign's promotion of drug use, on the one hand,

and the political expression at issue in *Tinker,* on the other. *See Morse*, 551 U.S. at 397, 403-09. Out of respect for this material distinction, the Court reached the narrow holding that schools may "restrict student expression that they reasonably regard as **promoting illegal drug use**," given the "special characteristics of the school environment," [quoting *Tinker*, 393 U.S. at 506], and "the governmental interest in stopping student drug abuse." *See id.* at 408 (emphasis added). Again, the Court distinguished *Tinker* based on the type of speech at issue, holding that "[t]he essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. . . . Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" *See id.* at 403 (quoting *Virginia v. Black*, 538 U.S. at 365). Moreover, the Court explicitly rejected the petitioners' invitation to adopt a broad holding that would allow school officials to forbid whatever student speech they consider "offensive" or that "might be perceived as offensive to some" regardless of the nature of the speech. *See id.* at 409.

Circuit courts hew to the same line. In *B.H.*, the Third Circuit, sitting *en banc*, held that "I ♥ Boobies" bracelets could not be banned as *Fraser* vulgarity because "plainly lewd speech" is "by definition" distinct from "political or social commentary," and "*Fraser* does not permit a school to categorically restrict ambiguous[ly lewd] speech . . . a reasonable observer . . . could plausibly interpret as commenting on a social or political issue." 725 F.3d 293, 319-320 (3rd Cir. 2013).

Likewise, the Ninth Circuit determined that *Fraser* does not grant schools the authority to restrict "Do scabs bleed" buttons even though acknowledging that the word "scab" itself "is most often used as insult or epithet" *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (internal quotation omitted). *Tinker* provides the rule of decision for political speech or social commentary.

Accordingly, while the law has built upon *Tinker* to address speech *unrelated* to political expression, it has not deviated from the rule that a school may not restrict *political expression* unless it shows that the expression materially and substantially disrupted the work and discipline of the school.

B. A determinative factor in cases permitting schools to ban nondisruptive speech is the absence of political expression.

As *Fraser* and *Morse* make clear, the precedent directing courts to depart from *Tinker* and begin their analysis by determining "whether the school's interpretation of the expression is reasonable"[2] is only intended to apply where the speech at issue does not concern political expression. In such cases, courts often underscore that the absence of political expression justifies their departure from *Tinker*. *Cf. Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 386 (6th Cir. 2005) (declining to apply First

[2] *See D.A. by & through B.A. v. Tri Cnty. Area Sch.*, No. 1:23-CV-423, 2024 WL 3924723, at *7 (W.D. Mich. Aug. 23, 2024) (citing *Morse*, 551 U.S. at 401).

Amendment scrutiny when petitioner acknowledged that there was "no particular message" she wished to convey through her clothing).

Although decided before *Morse*, this Court's decision in *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), is illustrative. *Boroff* addressed whether a school could prohibit a student from wearing a Marilyn Manson T-shirt on campus based on the school's determination that the band "promotes destructive conduct and demoralizing values that [were] contrary to the educational mission of the school." *Id.* at 469. Citing *Fraser*, this Court held that because the 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." *See id.* at 470.

In reaching this holding, *Boroff* first recognized that *Fraser* was premised on the "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech." *See Boroff*, 220 F.3d at 468 (citing *Fraser*, 478 U.S. at 680). It thus concluded that *Fraser* "distinguished *Tinker*" on the grounds that "the vulgar and offensive speech at issue was '**unrelated to any political viewpoint**.'" *See id.* (quoting *Fraser*, 478 U.S. at 685) (emphasis added). Only *after* finding that "[t]he record is devoid of any evidence that the T-shirts . . . were perceived to express any particular political or religious viewpoint," did this Court conclude that "[u]nder *these circumstances*"—

i.e., in the absence of a political or religious viewpoint expression—was the application of *Fraser*'s deferential standard justified. *See Boroff*, 220 F.3d at 470 (emphasis added). And in response to a dissent from Judge Gilman, the majority acknowledged that when T-shirts are prohibited because of a particular political or religious viewpoint, then the more rigorous *Tinker* standard would apply, such that "then the [s]chool must show that it reasonably predicted that allowing the T-shirts would have caused a substantial disruption of, or material interference with, school activities." *See id.* at 470-71 (citing *Tinker*, 393 U.S. at 509).

Thus, *Boroff* demonstrates that while "the suppression of vulgar or plainly offensive speech is governed by *Fraser*," *see Boroff*, 220 F.3d at 469, speech related to a political viewpoint should be analyzed under the traditional *Tinker* standard. *See Boroff*, 220 F.3d at 468. And in post-*Boroff* decisions, this Court has consistently reaffirmed that the *Tinker* standard—not *Fraser*—governs political speech in schools:

> *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. . . . Thus, the inquiry in this case focuses on whether the record demonstrates "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."

Defoe ex rel. Defoe v. Spiva, 625 F.3d 324, 332 (6th Cir. 2010) (quoting *Tinker*, 393 U.S. at 514)) (citation omitted).

C. The district court erred by analyzing Appellants' speech under *Fraser*'s standard for "lewd, indecent, or offensive speech," rather than *Tinker*'s standard for speech related to political expression.

The foregoing authorities confirm that the district court's analysis makes two fundamental errors. First, the court finds that Appellants' "Let's Go Brandon" apparel did not constitute "speech on public issues." *See D.A.*, 2024 WL 3924723, at *12. Then, based on this faulty determination, the court applies the mode of analysis set forth in *Fraser* for vulgar or plainly offensive speech, rather than the traditional *Tinker* analysis for speech related to a political viewpoint. *See id.* at *7-12. This analysis requires reversal.

The district court provides a token acknowledgment of the principle that "political expression, the exchange of ideas about the governance of our country, deserves the highest protection under the First Amendment," yet the court contradicts this principle by holding that "[Appellants] did not engage in speech on public issues" by wearing "Let's Go Brandon" apparel. *See D.A.*, 2024 WL 3924723, at *12. An individual who finds the phrase "Let's Go Brandon" to be offensive is one who interprets it to mean 'fuck Joe Biden'—and it cannot reasonably be disputed that this sentiment *relates* to a political viewpoint: disapproval of President Biden's performance. *See Fraser*, 478 U.S. at 678 (distinguishing *Tinker* on the grounds that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint"). "Let's Go

Brandon" constitutes a political expression, as evident by its frequent invocation by politicians, scholars, and public figures debating politics.[3] As such, schools lack the same *Fraser* authority to ban it as narrow instances of sexual innuendos, promotion of drug use, or promotion of disruptive and demoralizing values. *See Morse*, 551 U.S. at 397, 403-09; *Fraser*, 478 U.S. at 678-85; *Boroff*, 220 F.3d at 468.

At the outset of its decision, and before the district court had even determined whether *Tinker* or *Fraser* should govern the analysis, the court cites the deferential *Fraser* standard that "[i]n school speech cases where a school limits or restricts a student's expression, courts must determine whether the school's interpretation of the expression is reasonable." *See id.* at 7 (citing *Morse*, 551 U.S. at 401). By allowing the *Fraser* standard to shape the threshold question—whether the speech pertains to political expression—the court begs the question, effectively predetermining that *Fraser* will apply. This puts the cart before the horse.

As *Defoe* and *B.H.* demonstrate, the court should have first determined whether the *Tinker* or *Fraser* standards apply based on the character of the speech, then applied the proper analysis. *See Defoe*, 625 F.3d at 332 (holding *Tinker* "governs" case involving clothing with Confederate Flag because it is pure First Amendment speech); *B.H.*, 725 F.3d at 309 (instructing courts to determine whether

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[3] *See supra* note 1, at 3.

the speech "could also plausibly be interpreted as expressing a view on a political or social issue").

After the district court applies the *Fraser* line of reasoning circuitously to determine that, lo and behold, *Fraser* applies, it then dismisses Appellants' arguments for why the *Tinker* standard should apply by conflating the implied meaning of "Let's Go Brandon" with the phrase itself and ignoring the phrase's clear political meaning entirely. *See D.A.*, 2024 WL 3924723, at *10-11.

In the district court's few pages of analysis, it does not even directly answer its initial issue statement of whether *Fraser* or *Tinker* governs. *See id.* at *7-12. Then, in the third to last paragraph, the court erroneously concludes that "Let's Go Brandon" is not a form of political expression, without qualification. *See id.* at *12. As the court explains, "Defendants reasonably interpreted Let's Go Brandon to F*** Joe Biden, the combination [of] [*sic.*] a politician's name and a swear word—nothing else." *See id.* Under this flawed reasoning, politics cannot be implicated if someone uses a bad word when criticizing a politician (even when that word is only implied through a phrase's double meaning). Simply put, it is hard to discern any reasonable basis for the district court's conclusion that criticism of the President of the United States does not relate to politics. *See Contra Boone Cnty. Republican Party Exec. Comm.,* 116 F.4th at 596.

In sum, the district court failed to apply the correct standard to assess political expression in schools, *Tinker*. Instead, it presupposes that *Fraser* applies and reasons backwards. Had the court followed the proper order of analysis and correctly applied the *Tinker* standard, it should have addressed whether the record demonstrated that Appellants' "Let's Go Brandon" apparel "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" *See Defoe*, 625 F.3d at 332 (quoting *Tinker*, 393 U.S. at 514)). With the issue and analysis properly framed, the court would have been compelled to conclude that the record established Appellants' political message did not meet *Tinker*'s "demanding standard." *See Mahanoy*, 594 U.S. at 193.[4] Rather, at best, the record supports that only two individuals—teacher Wendy Bradford and assistant principal Andrew Buikema—were offended by Appellants' political expression, or merely assumed that other students would be. *See D.A.*, 2024 WL 3924723, at *2-3.

But as the Supreme Court has made clear, the "offensive" nature of political speech in schools is not grounds for its suppression. *See Morse*, 551 U.S. at 409 (rejecting the petitioners' invitation to adopt a broad holding that would allow school

[4] *See also* RE 39-8, Buikema Deposition Transcripts Excerpts, Page ID # 607-08; RE 39-13, Williams Deposition Transcript Excerpts, Page ID # 667-72; RE 39-14, Goheen Deposition Transcript Excerpts, Page ID # 677-78; RE 39-27, Bradford Deposition Transcript Excerpts, Page ID # 707; RE 39-30, Williams' Notes, Page ID # 720; 39-31, April 26, 2023 Email to All Staff, Page ID # 722.

officials to forbid whatever student speech they consider "offensive" or that "might be perceived as offensive to some" on the basis that such a rule could be used to unconstitutionally suppress political speech). Neither would the school's "'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,' or '[] urgent wish to avoid the controversy which might result from the expression,'" provide an adequate justification for its suppression of Appellants' political expression. *See id.* (quoting *Tinker,* 393 U.S., at 509, 510). Thus, a proper application of *Tinker* would have compelled the conclusion that Appellants' political expression was protected under the First Amendment.

In short, the district court failed to address and apply the correct legal standard. Consequently, its holding is erroneous and should be reversed and remanded for further proceedings under the correct standard.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment for Appellee and remand this case for further proceedings under the correct legal standard.

Dated: December 10, 2024
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 3,084 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman font.

Dated: December 10, 2024
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on December 10, 2024.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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