No. 13-672

IN THE
Supreme Court of the United States

EASTON AREA SCHOOL DISTRICT
Petitioner,

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, AASA THE SCHOOL SUPERINTENDENTS ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AND PENNSYLVANIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association is a nonprofit organization representing through its state associations of school boards, the school board members governing over 13,800 local school districts serving approximately 50 million public school students.

AASA, The School Superintendents Association represents over 13,000 professional educational leaders throughout the United States and the world. These school system leaders help shape and implement education policy.

The National Association of Secondary School Principals is the preeminent organization of middle level and high school leaders throughout the United States and the world. NASSP promotes excellence in school leadership.

The Pennsylvania School Boards Association is a nonprofit statewide association of public school boards, pledged to the highest ideals of local lay leadership for public schools.

Amici share a commitment to encouraging safe and effective learning environments that reinforce the academic lessons and civic values that schools impart. *Amici* strongly believe that local school officials and school staff are best situated to

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief and have consented. Letters of consent are on file with this Court. No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to this brief's preparation or submission.

make and enforce reasonable and appropriate policy decisions to fulfill this duty. The Third Circuit's decision substantially impairs the ability of school leaders to prepare students for responsible participation in a democratic society and demands correction by this Court.

SUMMARY OF THE ARGUMENT

The Third Circuit has determined that public school officials must allow middle school students to don bracelets bearing the phrase "I ❤ Boobies," because the phrase, though "ambiguously lewd," "plausibly" touches on a political or social issue. If left undisturbed, this new standard for analyzing regulation of student speech will leave school officials powerless when students push the envelope by including a sliver of political speech in an otherwise inappropriate image or phrase that school officials have determined has no place in that learning environment. *Amici* urge this Court to review and rebuff the Third Circuit's errant decision, to clarify its student speech precedent, and to provide important guidance to school officials.

The Third Circuit interpreted this Court's student free speech precedent to prohibit officials of a Pennsylvania middle school from banning bracelets containing a sexually suggestive slogan, despite the lack of viewpoint discrimination,[2] and in the face of a clear dress code policy prohibiting attire containing "double entendres."[3] It failed to recognize the sufficiency of this Court's ruling in *Bethel School*

[2] Pet'r's Br. 31.
[3] *Id*. at 2.

District v. Fraser[4] to decide the case before it. For nearly 30 years, *Fraser* has provided school officials wide latitude to restrict language they deem to be lewd, vulgar, inappropriate, offensive, inconsistent with the educational mission, or disruptive to the school environment.[5]

Instead, the Third Circuit fashioned a new, elaborate and highly legalistic test that not only disregards this Court's precedent deferring to school officials' judgments regarding speech inappropriate for the school environment, but also creates a standard impossible for school officials to apply consistently and effectively. As they attempt to apply this complex test, school officials will be forced to ignore a crucial part of their mission that this Court has repeatedly affirmed—to inculcate the values of democratic citizenship and foster a civil and secure learning environment in our nation's public schools.

The Third Circuit relies on "a linchpin justice's narrower concurrence" in *Morse v. Frederick*[6] to justify limiting *Fraser*, thereby creating a new standard that protects student speech that is "ambiguously lewd" but "plausibly" can be interpreted to touch on a political or social issue.[7] While this Court frequently has alluded to protection for student political speech, its only direct ruling on

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[4] 478 U.S. 675 (1986).

[5] *Id*. at 685.

[6] *Morse v. Frederick*, 551 U.S. 393 (2007).

[7] *B.H. v. Easton Area Sch. Dist*., 725 F.3d 293, 310-11 (3d Cir. 2013) (en banc). Absent another basis for regulation, such as reasonable forecast of disruption under *Tinker*, school officials in the Third Circuit may no longer regulate such student speech.

this topic is its landmark decision in *Tinker v. Des Moines Independent Community School District*.[8] In *Tinker*, known throughout the school law community as the high-water mark of student free speech rights, this Court held that schools may not restrict silent, political expressive conduct that is neither disruptive nor intrusive upon the rights of others—expression "closely akin to 'pure speech.'"[9]

This case is not *Tinker*. "I ♥ Boobies" is far from the silent political protest at issue there.[10] The expression here is one example of a type of student speech that school officials encounter daily—sexual double-entendre intended to push boundaries, sometimes touching on a political or social concern. Educators in schools full of impressionable students at various stages of physical, cognitive, psychological, sexual, emotional and social development are authorized under *Fraser* to make reasonable determinations about the appropriateness of these messages in their own school environments. But school officials in the Third Circuit must now attempt to apply a new complex test to lewd student expression on endless "plausible" political and social issues—testicular cancer, colo-rectal cancer, immigration, education, politics, the U.S. military and its role in foreign affairs—none of which will be subject to regulation unless they meet some legally defined notion of

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[8] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1968).

[9] *Id.* at 506.

[10] *Id.* at 504 (students wore black armbands at school "to publicize their objections to the hostilities in Vietnam and their support for a truce").

"plainly lewd." The Third Circuit's test misreads *Fraser* and imposes a standard that is completely unworkable in the day-to-day atmosphere of public schools. *Amici* urge the Court to grant *certiorari* and clarify that a school administrator's role under *Fraser* encompasses the authority to determine whether messages like "I ♥ Boobies" are lewd and inappropriate in the educational environment.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT MISINTERPRETED *FRASER* AND ERRONEOUSLY APPLIED *MORSE*.

Fraser provides guidance for school officials in cases such as this, where the student speech or expressive conduct at issue is arguably lewd or offensive. Citing the responsibility of schools to inculcate the values of a democratic society that disfavor the use of offensive terms in public discourse, the *Fraser* Court stated unequivocally that school officials must be able to determine what is appropriate speech in the classroom or the school assembly.[11] The concurring and dissenting Justices all agreed with this declaration.[12]

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[11] *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.").

[12] *Id.* at 687-88 (Brennan, J., concurring) ("[I]n light of the discretion school officials have to teach high school students ... civil and effective public discourse ... it was not unconstitutional for school officials to conclude, ... that ... [the] remarks exceeded permissible limits."); *id.* at 690 (Marshall, J., dissenting) ("I recognize that the school administration must be

Tellingly, in *Fraser*, the Justices disagreed as to whether Matthew Fraser's nomination speech for a classmate—given as a prolonged sexual metaphor loaded with double entendre—was "vulgar," "lewd," or "offensive," as described by Chief Justice Burger. Nevertheless, recognizing the strong interest in protecting children, a captive audience of high school students, from "sexually explicit, indecent or lewd speech," the Justices unanimously recognized that the judgment about the appropriateness of the speech properly lay within the discretion of school officials.[13] No Justice suggested or adopted the approach of the Third Circuit here that the degree of deference to be afforded to such determinations by school officials depends on the degree of lewdness of the speech or its plausible expression of a political or social message.

In its student speech decisions subsequent to *Fraser,* this Court has reiterated its deference to the judgment of school officials regarding student speech that conflicts with the educational mission.[14] In *Morse v. Frederick*,[15] noting the disagreement between the majority and dissent as to whether the

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given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission ...."); *id.* at 691 (Stevens, J., dissenting) ("... a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission.").

[13] *Id.* at 684-85.

[14] *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (citation omitted) (noting that schools should not be "unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'").

[15] *Mors*e, 551 U.S. at 410.

student expression at issue advocated illegal drug use, this Court deferred to the school principal's reasonable decision to prohibit a banner she interpreted as promoting illegal drug use, in violation of school policy. Because the Court in *Morse* recognized that teaching students the dangers of illegal drug use is an important part of the mission of schools, it held that school officials may restrict student speech at school that contributes to those dangers.

When Justice Alito cautioned in *Morse* that there is a limitation to school officials' discretion to regulate speech at odds with their self-defined mission, his concern was that such discretion not be expanded to permit suppression of student speech based on school officials' disagreement with the political or social viewpoint expressed by the student. Justice Alito did not express concern about school authority to take actions, including the restriction of advocacy speech, when necessary to protect other students.[16] Because there is no suggestion that the school officials in this case engaged in any sort of viewpoint discrimination, the Third Circuit's invocation of Alito's concurrence in *Morse* as limiting *Fraser* is misplaced.[17]

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[16] *Id*. at 423-24 (Alito, J., concurring).

[17] The disagreement between the circuits provides a further reason for the Court to grant *certiorari*. Only the Fifth Circuit has interpreted Justice Alito's concurrence as the controlling opinion in *Morse*. *Morgan v. Swanson*, 659 F.3d 359, 374 n.46 (5th Cir. 2011) (citing *Ponce v. Socorro Indep. Sch. Dist.,* 508 F.3d 765, 768 (5th Cir. 2007)). The Seventh Circuit, on the other hand, has expressly disavowed the Fifth Circuit's conclusion that Alito's concurrence is controlling. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673

This Court surely understood when it decided *Fraser* that a school official's decision in any given case would involve judgment and reflection about the appropriateness of the specific speech at issue, before applying his discretion to regulate it. Indeed, this Court recognized that First Amendment interests are sometimes secondary to the government interest in protecting students from vulgar and offensive speech.[18] The Third Circuit's new standard, requiring sub-categorization and

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(7th Cir. 2008). Given that at least two circuits disagree on whether Justice Alito's concurrence is controlling, it is clear that school administrators require guidance in determining whether they can restrict or must allow the type of student speech at issue here.

NSBA's Council of School Attorneys (COSA) has published numerous articles written by school attorneys who advise public school boards interpreting this Court's student speech decisions. None have advised practitioners to view Justice Alito's concurrence in *Morse* as controlling. *See* Ann Gifford, *Waving the "Bong Hits" Banner: Student Speech Rights After Morse v. Frederick*, paper presented at 2007 School Law Practice Seminar, *available at* http://www.nsba.org/SchoolLaw/COSA/Search/AllCOSAdocuments/WavingtheBongHitsBanner.pdf (noting that Justice Alito's concurring opinion in *Morse* "emphasiz[ed] that the *Morse* exception to the *Tinker* standard is a narrow one," and highlighting Justice Alito's view that the "special features" of the school environment afford school officials the authority to restrict student speech before it leads to violence); Thomas E. Wheeler, II, *Student Press Rights: Fact Or Fiction?*, INQUIRY & ANALYSIS (June 2010), *available at* http://www.nsba.org/SchoolLaw/COSA/InquiryAnalysis/2010/Student-Press-Rights.html (advising that *Morse* stands for the proposition that "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").

[18] *Fraser*, 478 U.S. at 684.

weighing the lewdness and political subject-matter of particular student speech, denies school administrators this discretion, and hampers their ability to pursue their educational mission.

Under *Fraser*, an ambiguously lewd message would be lewd to some people in some contexts; school officials have the discretion to determine whether it is so in the school environment before them. The Third Circuit has misapplied *Fraser* by borrowing *Tinker*'s protection for political speech, something this Court itself declined to do in *Fraser* when it rejected the theory that a political message could protect lewd speech in a public school.[19]

[19] "As cogently expressed by Judge Newman, 'the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.'" *Fraser*, 478 U.S. at 682 (citation omitted).

II. THE THIRD CIRCUIT HAS CREATED A STANDARD FOR PUBLIC SCHOOL REGULATION OF "AMBIGUOUSLY LEWD" STUDENT SPEECH THAT IS IMPOSSIBLE FOR SCHOOL OFFICIALS TO APPLY WITHOUT DISREGARDING THEIR CRUCIAL MISSION TO INCULCATE THE VALUES OF CIVIL DISCOURSE AND TO PROTECT THE RIGHTS OF ALL STUDENTS.

A. The Third Circuit fashioned a new test that is unnecessarily complex and nearly impossible for school officials to apply.

The Third Circuit's new standard will require school administrators to analyze every instance of *possibly* lewd or offensive speech using two imprecise variables: "ambiguously lewd" and "plausibly interpreted as a political or social comment." These inquiries will require expertise more likely found in individuals trained as attorneys, linguists, or sociologists, beginning with the difficult first step of determining whether the speech is "ambiguously lewd."

In step one, a school administrator now must determine the degree of lewdness of the student speech before him. The Third Circuit points to a number of sources that could inform this decision: George Carlin's "7 words," the FCC guidelines, or

Supreme Court precedent.[20] The administrator must classify the speech as "not lewd," "ambiguously lewd," or "plainly lewd," based on the totality of the circumstances which include, at a minimum, the words themselves, traditional definitions, slang usage, the age of the students, and the context. If the speech is plainly lewd, the administrator may restrict it regardless of whether it contains political or social commentary. If the speech is not lewd at all, the administrator may not restrict it unless it falls under another "school specific avenue . . . for regulating student speech."[21] However, if a school administrator determines that the student's speech qualifies as "ambiguously lewd," and believes that the speech is inappropriate or detrimental to the interests of other students or the school's educational responsibilities, he still is not in a position to restrict the speech. Before deciding if the school has the authority to take action, the administrator must navigate step two of the test.

In step two, the school administrator must determine whether the "ambiguously lewd" student speech before him plausibly comments on a political or social issue. To decide that, the Third Circuit states that the administrator may consider the large body of case law applicable to employee speech on matters of public concern.[22] He will need to weigh myriad factors specific to the age, locale, interests, and quantity of discussion provided by the speaker

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[20] *B.H.*, 725 F.3d at 315, 318-19. The Supreme Court precedent cited to help school administrators ascertain the degree of lewdness of student speech involve non-school contexts.

[21] *Id.* at 320-21.

[22] *Id.* at 319-20.

and audience. He will have to discover and assess the topical interests of students, which can be quite ephemeral, as well as larger community issues. If the administrator decides that the speech plausibly comments on a political or social issue, he may not restrict it categorically *unless* it falls under another "school-specific avenue . . . for regulating student speech." The administrator's finding that the "ambiguously lewd" speech is detrimental to the captive audience of young students under the school's care is irrelevant. Concern for the well-being of children who may be confronted with the lewd expression with no adult guidance to help them filter or cope with its impact is of no consequence to the determination of whether the speech may be regulated.[23]

Instead the analysis described above is highly legalistic. It places school personnel with minimal legal training in the unenviable position of reviewing and interpreting years of law and social history and applying that gloss of knowledge to a set of facts that in actuality demands an educational decision. It is too much to ask.[24]

Even assuming *arguendo*, that the Third Circuit's test easily could be applied to the "I ♥ Boobies" bracelet—because the expression fits squarely within the newly-minted but undefined ranges of "ambiguously lewd" and a "plausible social

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[23] *Id.* at 320.

[24] *Morse*, 551 U.S. at 427 (Breyer, J., concurring in judgment in part and dissenting in part) ("Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence.").

comment"—it will be nearly impossible to apply it to the vast array of inappropriate expressions easily available to adolescents. A cornucopia of breast cancer awareness T-shirts are commercially available on websites, each prominently bearing a pink ribbon, the universal breast cancer awareness symbol, along with slogans like, "Save Motorboating," and "Squeeze a boob, save a life."[25] Now, school officials in the Third Circuit faced with such a message on student apparel will not be able to regulate the message under *Fraser* unless it is plainly lewd. Such messages are *not* plainly lewd, of course, because they are specifically crafted that way; they are sexual double entendres mixed with enough ambiguity to fly under the radar of school officials. These messages may be protected speech in the mall, but are often inappropriate in a respectful, civil school environment. Under the Third Circuit's

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[25] "Save Motorboating," *available at* http://www.redbubble.com/people/mralan/works/10914323-mens-breast-cancer-save-motorboating; "Squeeze a boob, save a life," *available at* http://www.mywalkgear.com/squeeze-a-boob-breast-cancer-awareness-black-t-shirt-34126x.aspx; *see also* "I stare because I care," *available at* http://www .zazzle.com/i+stare+because+i+care+tshirts; "Save second base," *available at* http://www .cafepress.com/+breast-cancer-second-base+mens-t-shirts; "I'm a breast man," *available at* http://www.zazzle.com/i'm+a+breast+man; "Fight for second base," *available a*t http://skreened. com/breastcancershirts/fight-for-2nd-base-breast-cancer-shirt; "I'm here for the boobies," *available at* http://www.ebay.com/itm/Im-Here-For-The-Boobs-Mens-Breast-Cancer-Awareness-Pink-Ribbon-TShirt/380466335827; "Squeeze the boobies," *available at* http://www.cafepress.com/+squeeze_the_boobies_sweatshirt, 701704256?utm_medium=cpc&utm_term=701704256&utm_source=google&utm_campaign=sem-cpc-product-ads&utm_content=search-pla.

new test, educational appropriateness is now irrelevant.

Messages such as the one at issue here appeal to adolescents' natural urge to express independence by pressing the boundaries of appropriate discourse. School officials are charged with the responsibility of guiding students to recognize the value in such boundaries. Breast cancer awareness is the tip of the iceberg when it comes to ambiguously lewd, plausibly political/social messaging. If the test fashioned by the Third Circuit is permitted to stand, school officials will be hard-pressed to fulfill their educational mission when faced with a slew of other "ambiguously lewd" but "plausibly" political or social messages. Consider: "Illegals Suck" (immigration); "Feel My Balls" (testicular cancer); and "I support single moms. One dollar at a time" (single parenthood).[26] Because each of these messages

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[26] "Illegals Suck," *available at* http://www.zazzle.com /illegals_suck_tshirt-235327523953826570; "Feel My Balls" (testicular cancer), *available at* http://www.feelmyballs.org/ index2.php; "I support single moms. One dollar at a time," *available at* http://shirtshovel.com/sex-singlemoms.shtml; *see also* "I want YOU to speak English," *available at* http://www.zazzle.com/i_want_you_to_speak_english_t_shirts-235184184535770128; "I Love Balls," *available at* http://www.save-a-testicle.org/; "Immigrants are like sperm, Millions get in, But only one works," *available at* http://www.roadkilltshirts.com/IMMIGRANTS-ARE-LIKE-SPERM-MILLIONS-GET-IN-BUT-ONLY-ONE-WORKS-FUNNY-T-SHIRT-White-ink-P10437.aspx; "Axe me about Ebonics," *available at* http://www.cafepress. com/+axe_me _about_ebonics_dog_tshirt,201946139; "Anthony Weiner AT LEAST HE LIVED UP TO HIS NAME," *available at* http://shirtscope.com/funny-t-shirts/anthony-weiner-photo-tee/; "Fighting for peace is like screwing for virginity," *available at* http://behappy.me/t-shirt/fighting-for-peace-is-like-screwing-

plausibly relates to a political or social issue, under the Third Circuit's decision, a school administrator would be compelled to allow students to display the message unless he can prove that the expression is *plainly* lewd rather than ambiguously so. But, of course, these expressions are ambiguous by design; school officials in the Third Circuit will now be inviting legal challenge whenever they regulate the message no matter how valid their underlying educational judgments might be.

B. The Third Circuit's test negates the crucial duties of school officials to inculcate the values of democratic society by teaching civil discourse and to protect the rights and sensibilities of other students.

Behind this Court's historic deference to educators as the arbiters of appropriate language in schools[27] is the firm recognition of crucial government responsibilities: to teach students the values and manners of civility and to safeguard the

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for-virginity-33150; "Let's Play Army (Army insignia) I'll lie down and you can blow the hell out of me," *available at* http://www.teeshirt palace.com/let-s-play-army-i-ll-lay-down-and-you-can-blow-the-hell-out-of-me-men-s-tank-top-.html.

[27] *See Fraser*, 478 U.S. at 683 ("Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'"); *Morse*, 551 U.S. at 404 (citing *Fraser*, 478 U.S. at 683) ("But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate.").

rights, security and sensibilities of other students.[28] These two fundamental responsibilities of schools weigh heavily whenever a student's free speech rights are at issue. They are critical to the case at bar.

1. School officials must be able to teach students appropriate boundaries in public expression.

Public schools carry the weighty and essential responsibility of preparing students for participation in a democratic society.[29] This preparation must necessarily include "inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[30] Schools guide students into respectful habits through school board policies that reflect community values, such as student codes of conduct, in addition to case-by-case decisions regarding appropriate speech or expression.

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[28] *Fraser*, 478 U.S. at 681 ("The fundamental values of 'habits and manners of civility' ... must also take into account consideration for the sensibilities of others, and in the case of a school, the sensibilities of fellow students."); *Tinker*, 393 U.S. at 508 ("[t]here is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.").

[29] *Fraser*, 478 U.S. at 681 (citing C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)) ("[P]ublic education must prepare pupils for citizenship in the Republic.").

[30] *Id*.

As professional, trained educators, school officials consider a range of pedagogical factors to determine whether student speech is appropriate in the environment in which it occurs, including the intellectual, emotional, and developmental state of students at different ages and grades. Given the different maturity levels and vulnerabilities of children, messages (particularly those with a sexual double entendre) that may seem innocuous when presented in the public sphere could have a deleterious effect in a school. "I ♥ Boobies" and other double entendres designed to appeal to adolescents may diminish efforts to teach acceptable social norms of behavior and expression. In middle and high school, these "ambiguously lewd" expressions might well lead to the kind of adolescent distraction or discomfort that disrupts the learning process. For this reason, in the absence of evidence of viewpoint suppression, judgments about how a specific expression, regardless of its political or social content, will impact the classroom and the learning process are best left to professional educators, who can weigh the significant pedagogical concerns associated with the needs of their students. In one middle school in the midst of breast cancer awareness month, where a school board policy prohibits sexual double entendres on clothing, it was well within school officials' discretion to determine that "I ♥ Boobies" bracelets were demeaning and inappropriate for the school setting. In another middle school under different circumstances, an administrator could reasonably determine that the bracelets need not be regulated.

2. School officials must be able to protect the sensibilities and rights of other students through reasonable regulation of student speech.

As school officials guide impressionable students through the process of learning to express themselves respectfully in a free society, they are fulfilling a companion responsibility to protect the sensibilities and rights of other students. Local school boards and building officials establish rules of dress and behavior that are designed to encourage respect for self and others and sensitivity to differences of opinion. Such officials work to create an environment that is conducive to learning and in which all children feel safe.

The Third Circuit's ruling comes at a time when a school's responsibility to create a safe environment is a particular focus across the country. Schools have been asked to confront and address the problem of harassment and bullying on a scale never before seen.[31] In fact, character education programs, which are often a part of school climate and anti-bullying initiatives, are now very common and even required in some states.[32] An integral part of this important work is to teach students that their

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[31] *See* Dear Colleague Letter, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., p. 3, n.11 (Oct. 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

[32] *See* Character Education Partnership, *Character Education - What States Are Doing*, *available at* http://www.character.org/wp-content/uploads/What-States-Are-Doing.pdf.

respectful participation is indispensible in creating a safe and effective school environment.

Students need the guidance and involvement of school administrators and teachers, which may, at times, come in the form of restrictions. As part of their efforts to reduce or eliminate harassment and bullying, school boards across the country have adopted policies aimed at regulating certain types of expression that are inappropriate in the school environment and harmful to students.[33] The Easton school district had a clear policy prohibiting double entendres in student dress.[34]

In certain contexts, school officials may reasonably determine that a message purportedly supporting breast cancer awareness such as "Check yourself or I will," might contribute to an environment hostile to female students, interfering with the rights of other students to be safe and to be let alone.[35] Requiring schools to permit slogans that

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[33] Indeed, anti-bullying and harassment policies are required by statute in nearly every state. *See, e.g.*, DEL. CODE ANN. tit. 14, § 4112D (2013); N.J. STAT. ANN. § 18A:37-15 (2013); 24 PA. STAT. ANN. § 13-1303 (2013); *see also* U.S. DEP'T OF EDUC., KEY COMPONENTS IN STATE ANTI-BULLYING LAWS, *available at* http://www.stopbullying.gov/laws/key-components/index.html#definitions.

[34] Pet'r's Br. 2. These policies often act as reinforcement at school of lessons parents seek to teach their children at home. For example, dress codes promote decorum by helping to ensure that the school-appropriate clothing parents see their children wearing when they leave home in the morning is the same apparel the children have on during the school day.

[35] *Tinker,* 393 U.S. at 513; *see also J.A. v. Ft. Wayne Cmty. Sch.*, 2013 WL 4479229, *3 (N.D. Ind. Aug. 20, 2013) (upholding a school's decision to ban "I ♥ Boobies" bracelets as "offensive to

are "ambiguously lewd" will subject students to sexual innuendo, notwithstanding that the message may have some connection to a political or social issue. Many students may be very uncomfortable with this type of message and the mores and manners it incites, and may feel intimidated or even harassed, leading school officials to restrict messages of that nature in the interest of creating a safe learning environment. The Third Circuit's decision significantly limits a school's ability to create such an environment.

III. THE THIRD CIRCUIT'S NEW STANDARD ENCOURAGES LITIGATION AGAINST PUBLIC SCHOOLS.

Even if school administrators were trained to "fully understand the intricacies of [this Court's] First Amendment jurisprudence,"[36] it would do little to quell the inevitable litigation that will come as a result of the Third Circuit's ruling. Until school officials in the Third Circuit have internalized its complicated new standard through years of training and application, judges will be called upon to determine which student speech is "ambiguously lewd" and "plausibly" related to political or social issues. As students seek to find the outer limits of "ambiguously lewd" political or social commentary protected by the First Amendment, school officials' disciplinary decisions will be continually challenged. Local school boards will bear the burden of litigation

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women and inappropriate for school wear" after a male student wearing the bracelet harassed a female student).

[36] *Morse*, 551 U.S. at 427.

costs, which will escalate with each expert witness hired to opine on language and politics, and with each hour of discovery and preparation for injunction hearings.

By expanding the range of ostensibly protected student speech, the Third Circuit has increased the likelihood that a student will obtain a temporary restraining order permitting him or her to wear the inappropriate T-shirt for the months leading up to a trial. During this time, fellow students will be exposed to a message which is offensive and inimical to the purposes of schooling. The principal's authority will be undermined, creating leadership challenges in areas beyond student dress. With the principal's loss of significant qualified immunity protection, the real prospect of personal liability may cause administrators, understandably, to refrain from acting, thereby letting inappropriate expressions remain in the school. The result will be a chilling effect on the enforcement of rules intended to protect the rights of others and to create an effective learning environment.

CONCLUSION

Amici urge this Court to grant *certiorari* to address the Third Circuit's misapplication of its student speech jurisprudence, and to clarify the boundaries of public school students' rights to express ambiguously lewd but plausibly political or social messages at school. This case should have been decided under *Fraser*, which recognizes school

officials' authority to determine what student speech is lewd and inappropriate for the school context.

Like many other student speech cases, this matter does not fall neatly into the *Tinker* pure speech analysis. The Third Circuit's misguided attempt to graft a concurrence in *Morse* onto *Fraser*, has resulted in an unworkable standard for school officials. *Amici* implore this Court to articulate a clear standard that incorporates its recognition of school authority to regulate student speech—whether or not that speech pertains to political or social issues—if the restriction is directly related to the school's pedagogical interests and is neither overbroad nor based on viewpoint.[37]

[37] *See also Kowalski v. Berkeley*, 652 F.3d 565, 572-73 (4th Cir. 2011) ("Far from being a situation where school authorities 'suppress speech on political and social issues based on disagreement with the **viewpoint** expressed.' *Morse*, 551 U.S. at 423 (Alito, J., concurring), school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning. . . There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.").

Respectfully submitted,

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