Suprem Court of the United States

EASTON AREA SCHOOL DISTRICT Petitioner,

٧.

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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	School officials must be able to teach students appropriate boundaries in public expression	
	2. School officials must be able to protect the sensibilities and rights of other students through reasonable regulation of student speech	
Ш.	THE THIRD CIRCUIT'S NEW STANDARD ENCOURAGES LITIGATION AGAINST PUBLIC SCHOOLS	20
CON	CLUSION	21

TABLE OF AUTHORITIES

Page Cases:
Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986)passim
B.H. v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013) (en banc)
Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988)6
J.A. v. Ft. Wayne Cmty. Sch., 2013 WL 447929 (N.D. Ind. Aug. 20, 2013)
Kowalski v. Berkeley, 652 F.3d 565 (4th Cir. 2011)22
Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011)7
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)
Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765 (5th Cir. 2007)7

U.S. DEP'T OF EDUC., KEY COMPONENTS IN STATE ANTI-BULLYING LAWS, available at http://www.stopbullying.gov/laws/key

"Let's Play Army (Army Insignia) I'll lie down and
you can blow the hell out of me," available at
http://www.teeshirtpalace.com/let-s-play-army-i-ll-
lay-down-and-you-can-blow-the-hell-out-of-me-mens-
s-tank-tophtml15

AMICI CURIAE¹

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 Nati

District v. Fraser4 to decide the case before it. For nearly 30 years,

"plainly lewd." The Third Circuits 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 administrators role under Fraser encompasses the authority to determine whether messages like "I Boobies" are lewd and inappropriate in the educational environment.

FRASER 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

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. No Justice suggested or adopted the approach of the Third Circuit here that the degree of

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 Circuits invocation of Alitos concurrence in Morse as limiting Fraser is misplaced. 17

¹⁶ /d. at 423-24 (Alito, J., concurring).

The disagreement between the circuits provides a further reason for the Court to grant *certiorari*. Only the Fifth Circuit has interpreted Justice Alitos 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 Circuits conclusion that Alitos 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. The Third Circuit's new standard, requiring sub-categorization and

(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/AIICOSAdocuments/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/St udent-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**.

REGULATION OF "AMBIGUOUSLY LEWD" STUDENT SPEECH THAT IS

The Third Circuits new standard will require school administrators to analyze every instance of

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 administrators finding that the "ambiguously lewd" speech is detrimental to the captive audience of young students under the schools care is irrelevant. Concern for the wellbeing 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

comment"—it will be nearly impossible to apply it to the vast array of inappropriate expressions easily available to adolescents. A cornucopia of breast T-shirts commercially cancer awareness are available on websites, each prominently bearing a pink ribbon, the universal breast cancer awareness like, symbol, with slogans "Save along 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

new test, educational appropriateness is now irrelevant.

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

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." 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.

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

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

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 Circuits 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. In fact, character education programs, which are often a part of school climate and antibullying initiatives, are now very common and even required in some states. An integral part of this important work is to teach students that their

³¹ See Dear Colleague Letter, Office for

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.

THE THIRD CIRCUIT'S NEW

Even if school administrators were trained to "fully understand the intricacies of [this Courts] First Amendment jurisprudence," 36 it would do little to quell the inevitable litigation that will come as a result of the Third Circuits 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

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 principals 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.

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 Circuits misguided attempt to graft a concurrence in *Morse* onto *Fraser*,

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