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, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit, sitting en banc, correctly affirm the grant of preliminary relief to female students threatened with discipline for wearing breast cancer awareness bracelets where the bracelets were not plainly lewd, and where the trial court determined that in context they could not reasonably be regarded as lewd and that "the school board used lewdness and vulgarity as a post-hoc justification for its decision to ban the bracelets"?

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INTRODUCTION

Plaintiffs-Respondents B.H. and K.M. were suspended from the Easton Area Middle School for wearing breast cancer awareness bracelets distributed by the Keep A Breast Foundation that bear the slogan "i ♥ boobies! (KEEP A BREAST)." The trial court rejected the arguments by the Easton Area School District (the "School District") that it had authority to ban the bracelets under either *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), or *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The court preliminarily enjoined the School District from forbidding the bracelets, and the Court of Appeals for the Third Circuit, sitting en banc, affirmed. The School District now seeks a writ of certiorari. The Court should decline the writ in this case for several independent reasons:

1. This case is not a good vehicle for addressing the legal standard to be applied to allegedly lewd student speech under *Bethel School District No. 403 v. Fraser* because the factual and legal posture of the case preclude consideration of the School District's legal arguments;

2. The Third Circuit correctly held that *Fraser* did not justify censorship of Plaintiffs' breast cancer awareness bracelets and there is no "conflict" for this Court to resolve; and

3. This case does not present a pressing issue requiring the Court's immediate review, especially in the context of a preliminary injunction that is subject to further proceedings in the lower courts.

COUNTER-STATEMENT OF THE CASE

The case described in the Easton Area School District's Petition for a Writ of Certiorari ("the Petition") is not the case considered by two courts below. Respondents submit this Counter-Statement of the Case to correct misstatements in the Petition for a Writ of Certiorari filed by the School District as required by Rule 15.2.

After a day-long evidentiary hearing, submission of proposed findings and conclusions of law by each party, and additional oral argument, the trial court made several core findings of fact:

1. The trial court found that the bracelets at issue in this case were neither presented nor understood as lewd or vulgar by students or staff at the Easton Area Middle School prior to the decision to ban them;[1]

2. The trial court found that the bracelets caused no sexual harassment and that the ban was not motivated by a concern that the bracelets would cause sexual harassment;[2] and

3. The trial court found that the School District had offered, then abandoned, many different justifications for the bracelet ban, and concluded that the School District "has used lewdness and vulgarity as a post-hoc justification for its decision to ban the bracelets." Pet. App. 125.

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[1] *See* Pet. App. 96, 100 n.3, 123–25; J.A. 76, 90, 99-100, 133, 528 (B.H. Dep. 45:21–23), 535 (B.H. Dep. 75:7–21).

[2] *See* Pet. App. 108–09, 123-26.

These factual findings were not questioned by either the majority or the dissenters in the Court of Appeals. Pet. App. 4–8, 49–50, 52, 54–56; Pet. App. 84 (Hardiman, J., dissenting) ("Notwithstanding the facts supporting Plaintiffs' case, I conclude that 'I ♥ boobies!' can reasonably be interpreted as inappropriate sexual double entendre."). This factual record provides the framework for this Court's review of the Petition for Certiorari.[3]

A. Neither students nor staff at the Easton Area Middle School understood the bracelets to be lewd or vulgar.

In the fall of 2010, Plaintiff B.H. was a thirteen-year-old girl in eighth grade and Plaintiff K.M. a twelve-year-old girl in seventh grade at the Easton Area Middle School. Pet. App. 97–98. After wearing their "i ♥ boobies! (KEEP A BREAST)" bracelets to school for almost two months without incident in order to raise their peers' awareness about breast cancer and to demonstrate their support for survivors of breast cancer,[4] B.H. and K.M. were

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[3] References to the Joint Appendix filed by the parties in the Third Circuit are given as "J.A. __."

[4] After purchasing the bracelets, both B.H. and K.M. acquired more information about breast cancer, including through the Keep A Breast Foundation's in-store displays and website. Pet. App. 101–02; J.A. 92:12–25. K.M. learned that the youngest girl diagnosed with breast cancer was only ten years old. Pet. App. 102. The girls wore the bracelets in order to raise their peers' awareness about breast cancer and to honor members of their family circles who had faced the disease. *See* Pet. App. 101–02; J.A. 72:25–74:1, 106:9–108:9, 127:2–10. Both B.H. and K.M. believe that the "i ♥ boobies! (KEEP A BREAST)" bracelets raise awareness of breast cancer more effectively than

suspended when they wore the bracelets on the School District's Breast Cancer Awareness Day.

The bracelets, like those for other health-related campaigns,[5] are brightly colored bands of rubber. The bracelets in this case bear the slogans "i ♥ boobies! (KEEP A BREAST)," "check y♥ur self!! (KEEP A BREAST)," or an amalgam of slogans ("KEEP A BREAST," "KAB," "boobies!," and "Glamour Kills"). Pet. App. 98 & n.2. The "i ♥ boobies! (KEEP A BREAST)" campaign is designed to resonate with young women by employing familiar language that young people will find natural and non-threatening.[6] The campaign uses a heart graphic because it is commonly employed in popular culture as a symbol for "love," and the theme of loving one's own body is an important part of the Foundation's message. Pet. App. 123; J.A. 148:9–15, 149:16–20.[7]

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wearing the color pink as a symbol of support for breast cancer awareness. Pet. App. 102.

[5] Jaime Herndon, *About Bracelets for Cancer*, Livestrong.com (Aug. 16, 2013), http://www.livestrong.com/article/26357-bracelets-cancer/ ("Since the inception of the yellow LIVESTRONG wristband in 2004, awareness bracelets have become ubiquitous.").

[6] *See* J.A. 150:13–19 ("boobies" is a "commonplace" word); J.A. 166:2 (describing "i ♥ boobies! (KEEP A BREAST)" as a "very young sounding campaign"); J.A. 150:17 (explaining that "boobies" is a word that people are comfortable using to describe breasts to babies); J.A. 166:1–8 (same).

[7] The Keep A Breast Foundation did not intend or expect for the phrase "i ♥ boobies! (KEEP A BREAST)" to be interpreted as a sexual statement. J.A. 150:9–12, 151:15–23, 163:17–164:3. Rather, by associating "boobies" with the concept of love, the exuberant language of the "i ♥ boobies! (KEEP A BREAST)"

As the trial court noted, the word "boobies" is a common informality typically used with young children to refer to breasts. Pet. App. 123; J.A. 75:21–25, 76:19–77:1, 111:2–9; *see also* J.A. 131:14–21. Indeed, B.H. and K.M. and their peers and families—including a friend of B.H.'s grandmother who suffered from breast cancer—do not consider the term "boobies" to be vulgar, and use the term "boobies" to refer to their own and other women's breasts. Pet. App. 123; J.A. 75:21–25, 76:19–77:1, 111:2–9; *see also* J.A. 137:14–21. Nor did B.H. or K.M. interpret the phrase ""i ♥ boobies!" as a sexual double entendre, or believe that the bracelets could be construed to have any sexual meaning.[8] B.H. explained that the text on the bracelets that says "KEEP A BREAST," a reference to breast cancer awareness and to the Keep A Breast Foundation, makes the breast cancer context of the bracelets clear.[9]

The "i ♥ boobies! (KEEP A BREAST)" bracelets were popular among students in the

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campaign takes aim at negative body images and taboos about self-touching and encourages young women to appreciate and actively care for their breasts. J.A. 148:9–149:1, 149:4–22, 170:16–171:2. Other slogans on the bracelets ("KEEP A BREAST" and "check y♥ur self!") encourage the wearer to learn about breast cancer and take charge of their breast health. J.A. 159:21–160:11. The web address printed on every bracelet directs the wearer to a wealth of information about breast cancer, prevention, and detection. J.A. 159:25–160:1; *see also* J.A. 339; J.A. 340; J.A. 341; J.A. 146:24–147:7.

[8] *See* J.A. 90:8–10, 99:25–100:19, 133:16–24, 528 (B.H. Dep. 45:13–23).

[9] *See* J.A. 99:25–100:19, 528 (B.H. Dep. 45:21–23), 535 (B.H. Dep. 75:7–21).

seventh and eighth grade building of the Easton Area Middle School at the beginning of the 2010–2011 school year, which started on August 30, 2010. Pet. App. 102. For the two months during which B.H. and K.M. wore the bracelets to school, the bracelets sparked conversations with their classmates about breast cancer, and did not provoke any sexual comments about "boobies." J.A. 76:11–18, 89:4–90:7, 115:4–24, 527 (B.H. Dep. 44:4–7).

The bracelets came to the attention of the seventh and eighth grade principals several weeks into the school year. As the trial court noted, the middle school administrators' reactions to the bracelets did not suggest that the bracelets were a pressing concern. Pet. App. 126 ("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."). In late September, Mr. Viglianti and Ms. Braxmeier (the seventh and eighth grade assistant principals) and Ms. DiVietro (the head building principal) agreed not to allow students to wear the bracelets, but only told the teachers, and not the students, about this new rule.[10]

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[10] In mid-September, four or five of the 120 teachers in the Easton Area Middle School seventh and eighth grade building spoke to Ms. Braxmeier, the eighth grade assistant principal, about the "i ♥ boobies! (KEEP A BREAST)" bracelets, seeking instruction on how they should be handled. Pet. App. 102. The building principals conferred and agreed that they would instruct teachers to have students remove the bracelets, but would not make an announcement to the students about the bracelets. Pet. App. 103. Mr. Viglianti then emailed building staff to direct them to ask any students wearing "wristbands that have the word 'boobie' written on them" to remove the bands, and to advise students that they could instead "wear

Students continued wearing the bracelets after the announcement of the ban to teachers on September 23, 2010. Then, on October 27, the day before the School District's designated Breast Cancer Awareness Day, the seventh and eighth grade principals decided to announce the ban to students and start disciplining those who did not comply with the ban.[11]

After school on October 27, B.H. and K.M. each discussed the school's newly announced bracelet ban with her mother and obtained her mother's permission to wear the bracelets to school on Breast Cancer Awareness Day in spite of the ban. Pet. App. 106. Neither the girls nor their "i ♥ boobies! (KEEP A BREAST)" bracelets disrupted any school activities that day or any other day. *See* Pet. App. 107; J.A. 189:12–190:1, 223:10–18, 224:6–8, 225:9–13.

B. The bracelets did not spark harassment or lewd comments.

The School District's Petition suggests that the bracelets led to sexual harassment "during the September through November 2010 timeframe[.]"

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pink on October 28 when the entire district will be wearing pink to recogniz[e] Breast Cancer Awareness Month." *Id.*; J.A. 342.

[11] At the request of teachers tired of asking students to remove the bracelets, the principals decided to announce the ban on the bracelets to students in the seventh and eighth grade building on October 27, 2010. *See* Pet. App. 103 n.4; J.A. 351. Mr. Viglianti read a prepared statement over the PA system announcing the ban, which was also announced through a student who delivered a statement written by the administration on the school's TV station. *See* Pet. App. 103; J.A. 268:6–9, 345.

Pet. 4. In fact, despite the popularity of the bracelets, when the administrators met at the end of September, none of them had heard any reports of disruption or student misbehavior linked to the bracelets from either teachers or students. Pet. App. 103–04; J.A. 182:10–14, 260:13–21.[12] Nor had any of the principals then heard reports of inappropriate comments about "boobies." Pet. App. 103–04; J.A. 182:10–17. This was still true when they decided to announce the ban on October 27. *See* Pet. App. 124–26.

It was not until after the administrators announced the ban that they received the only two reports they would ever hear of boys making inappropriate remarks about "boobies." One girl, upon being threatened with discipline for defying the bracelet ban, reportedly told the eighth grade assistant principal that a boy or boys had made "immature" comments about girls' "boobies," but the girl later claimed to be unable to remember any details or identify the boy(s) involved.[13] Then, more than two weeks after the announcement of the ban,

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[12] The District claims that some teachers had reported to the principals that the bracelets were causing distraction in their classrooms. Pet. 4. There is nothing in the record to support this assertion, and the district court rejected it. Pet. App. 103–04; *see also* J.A. 182:10–14, 228:20–229:4, 260:13–21, 450 (Braxmeier Dep. 26:3-27:4, 28:18-29:17), 494 (DiVietro Dep. 39:3-22), 764 (Viglianti Dep. 98:18-25).

[13] Pet. App. 107. On November 15, 2010 (after receiving Plaintiffs' November 4 letter demanding that the school lift the ban), the school elicited a written incident report from this girl in which she alternately described the incident as involving multiple boys and just one boy, and stated that she did not know the name(s) of anyone involved. *Id.*

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 suggestive gestures with two spherical fireball candies. Pet. App. 108–09.

As for the School District's reference to "instances of boys touching girls in an unwanted sexual manner[,]" Pet. 4, the School District officials testified and the trial court found that there was no connection at all between those events and the bracelets.[14]

C. The School District did not view or treat the bracelets as lewd.

As the trial court found, in concluding that the claim of "lewdness" was a post hoc rationalization, "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." Pet. App. 124. Initially, the School District took the position

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[14] Ms. Braxmeier testified regarding two unrelated incidents in October of inappropriate touching by middle school boys of eighth grade girls. Pet. App. 109. There is no evidence that either incident was caused by Plaintiffs' "i ♥ boobies! (KEEP A BREAST)" bracelets. *Id.* Ms. Braxmeier's only reason for identifying these incidents in connection with the bracelets is that they occurred at the same time the bracelets were on campus. *See* J.A. 242:18–243:15, 449 (Braxmeier Dep. 25:1–11). All of the administrators acknowledged, however, that such incidents are common in middle school. *See* J.A. 195:24–196:21, 233:9–11, 243:8–22, 284:11-24, 496 (DiVietro Dep. 46:6–19).

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."[15] But in their deposition and hearing testimony, the three principals articulated different—and shifting—reasons for their decision to ban the bracelets that focused on their discomfort with middle school students discussing breasts.[16]

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[15] Pet. App. 105 n.5. (summarizing a November 9, 2010 letter from the District's counsel to Plaintiffs' counsel explaining the District's reasons for the ban).

[16] The School District's assertion that "it was never the word 'boobies' that was singled out for removal from the middle school[,]" Pet. 31 n.6, is flatly contradicted by the testimony of all three of the building principals and the District's litigation posture in the lower courts. *See*, *e.g.*, Pet. App. 104–05; J.A. 446 (Braxmeier Dep. 11:22–12:10), 497 (DiVietro Dep. 51:6-23). Mr. Viglianti testified that their decision was based on the term "boobies," which was "not appropriate." Pet. App. 104. Mr. Viglianti initially testified that he thought it was 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. *Id.*; *see also* J.A. 174:18–175:7, 748 (Viglianti Dep. 35:2–23), 759 (Viglianti Dep. 81:2–4). The other two building principals agreed with Mr. Viglianti that the word "boobies" is "vulgar" and "inappropriate" for use in the middle school. J.A. 446 (Braxmeier Dep. 11:22–12:10), 497 (DiVietro Dep. 51:10–12); *see also* J.A. 489 (DiVietro Dep. 20:1–12), 490 (DiVietro Dep. 25:1–4). Ms. DiVietro, the head principal, also testified at her deposition that the words "keep-a-breast.org" are offensive, vulgar, and "not acceptable" for middle school students because the word "breast" "can be construed as a sexual connotation." Pet. App. 104; *see also* J.A. 490 (DiVietro Dep. 23:4–25), 497 (DiVietro Dep. 51:24–52:2). During the hearing on Plaintiffs' motion for preliminary injunction, Mr. Viglianti changed his testimony and said that a

After litigation commenced, the School District continued to argue that the word "boobies" is a "vulgar" term for an "inherently sexual" part of the human body, and therefore censorable, while adding an objection that the phrase "i ♥ boobies! (KEEP A BREAST)" is sexual double entendre.[17]

The School District's actions belie its words. "The delay in both enacting the ban and announcing the ban . . . undermines the School District's argument that the bracelets are lewd and vulgar." Pet. App. 126. As the district court found:

> The record shows that the bracelets became popular among students at the beginning of the 2010–2011 school year, which began August 30, 2010. Though the two Plaintiffs wore the bracelets every day, the School took no action until late September. 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.

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bracelet bearing only the phrase "keep-a-breast.org" would be permissible. Pet. App. 104. Ms. DiVietro likewise concluded, after some equivocation, that she would not deem the words "breast cancer awareness" or a bracelet that simply said "keep-a-breast.org" to be vulgar in the middle school context. *Id*.

[17] The School District has argued, in support of the ban, that middle school students are particularly susceptible to being distracted by sexual innuendo, but the bracelets were also banned in the high school. Pet. App. 121 n.15 (citing J.A. 211:11–13).

Id.

The School District also argued in both the trial court and court of appeals that the bracelets could be banned under *Tinker* because of a risk of fostering sexual harassment. *See*, *e.g.*, Pet. App. 96, 127–28. The School District appears to have abandoned that contention in its Petition.

REASONS TO DENY THE PETITION

I. THIS CASE IS NOT A GOOD VEHICLE FOR ADDRESSING THE LEGAL STANDARD TO BE APPLIED TO ALLEGEDLY LEWD STUDENT SPEECH UNDER *BETHEL SCHOOL DISTRICT NO. 403 V. FRASER.*

A. The School District's petition relies on a version of the facts that its own witnesses disavowed at trial, and that two courts have rejected.

As noted in the Counter-Statement of the Case, the case described by the School District's Petition is not the one tried below. The School District officials acknowledged that they made the decision to ban the bracelets—and the decision a month later to announce that they had banned the bracelets—without having heard a single complaint about inappropriate remarks or other misbehavior linked to the bracelets. The trial court made detailed factual findings that the bracelets were neither presented nor received as a sexual message, and, further, that they led to no sexual harassment. Both the majority and the dissenting opinions in the Court

of Appeals accepted these findings. This Court is not the place to relitigate those factual issues.

The School District asserts that since the trial court issued its preliminary injunction, "the students of the 7/8 Building administration have been testing the administration with dress code violations." Pet. 12. If the School District believes that the bracelets are creating substantial and material disruption that allows suppression of speech under *Tinker*, it can augment the record and seek to modify or vacate the preliminary injunction in the trial court.

B. The outcome of this case does not turn upon the Third Circuit's reliance on the concurring opinion in *Morse v. Frederick*.

The School District's argument that the en banc majority inappropriately relied upon Justice Alito's concurring opinion in *Morse v. Frederick,* 551 U.S. 393 (2007), does not justify the grant of certiorari in this case, because application of the legal standard urged by the School District (which the trial court applied) produced the same outcome. The trial court reviewed the claim that the bracelets were subject to prohibition under *Fraser* by analyzing whether, in context, the speech can "reasonably be considered lewd or vulgar" or "offend[s] for the same reasons that obscenity offends." *Compare* Pet. 29 ("The standard that should be applied is one of deference to the objectively reasonable determination of school administrators.") *with* Pet. App. 120–21 ("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.'") (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001)).

Because "*Fraser* does not directly address the issue of review[,]" the trial court looked to this Court's other student speech cases for guidance in applying First Amendment principles to ambiguous student speech. Pet. App. 120. Noting that "the Supreme Court has appeared to apply a reasonableness standard in its decisions in *Kuhlmeier*, *Morse*, and *Tinker*[,]" the trial court concluded that a reasonableness standard also properly applies to a school's determination of lewdness under *Fraser*. *Id.* This was appropriate, the court explained, because "[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." *Id.*

The trial court's analysis is consistent with the majority opinion in *Morse*, which, faced with "cryptic" student speech, considered the form, content, and context of the speech as revealed by the record in holding that that the principal reasonably feared that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use[.]" *Morse*, 551 U.S. at 401; *see also id.* at 401–03. Here, the trial court conducted an exhaustive review of the factual record before rejecting the School District's arguments that the bracelets could reasonably be viewed as lewd or vulgar and thus prohibited under *Fraser*. *See* Pet. App. 123 ("the phrase 'I ♥ Boobies!' in the context of

these bracelets cannot reasonably be deemed to be vulgar"); Pet. App. 126 ("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.'") (citation omitted).

The trial court did not, as the Petitioner argues, "conduct[] 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." *See* Pet. 12. Rather, the trial court considered—and rejected—the two arguments made by the School District: (1) "that the word 'boobies' is vulgar and therefore meets the standard of *Fraser*"; and (2) "that the phrase 'I ♥ Boobies!' is vulgar because it can be viewed as a double entendre." Pet. App. 121; *see also* Pet. App. 123–26 (rejecting District's arguments under *Fraser*).

The trial court rejected the School District's position that the word "boobies"—an informal term for breasts—is inherently vulgar and therefore censorable under *Fraser*.[18] As to the School District's second argument, the trial court exhaustively reviewed the phrase "i ♥ boobies! (KEEP A BREAST)" in the context in which it was presented and found nothing to suggest that the bracelets

[18] "First, the Court cannot conclude that any use of the word 'boobies' is vulgar and can be banned, no matter what the context." Pet. App.121–22.

carried a lewd meaning in the abstract or in the particular context of this middle school:

> [T]he 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.

Pet. App. 123.

There was no evidence that the Plaintiffs presented the bracelets in a sexual manner, and the testimony was that their peers—with one exception—did not understand the bracelets to be lewd or sexy or react to them in a sexualized manner. The trial court found further support for its conclusion that the bracelets could not be understood

as lewd in the behavior of the middle school administrators. The principals "banned" the bracelets in late September, but did not tell the students that they were prohibited. And when they did announce a ban to the students in late October, it was inspired, apparently, by the teachers' frustration with having to enforce a rule that the students didn't know, rather than any new concerns with the bracelets. And, until the commencement of litigation, the School District was describing the bracelets as "inappropriate," potentially "embarrassing" to some, and "offensive" to others because of the bracelets' "cutesy" message, but the School District did not suggest the bracelets were lewd. In light of all of this, the trial court concluded that the School District's *post hoc* characterization of the bracelets as "lewd" was neither reasonable nor credible.

The trial court's determination that the School District's description of the bracelets was neither genuine nor reasonable has nothing to do with the effect of Justice Alito's concurrence in *Morse*. The trial court's fact-specific analysis was guided by the Third Circuit precedent—albeit under a *Tinker*, not a *Fraser*, framework—requiring trial courts to consider school officials' justifications for censorship in light of the facts and circumstances surrounding the speech at issue. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254–57 (3d Cir. 2002) (rejecting school officials' assertion that student's "redneck" T-shirt would be associated with racial harassment by a student group known as "the Hicks" when there was no evidence that students made that connection).

If this Court were to reject the Third Circuit's reading of *Morse*, therefore, the outcome of the case would not change.

C. The School District's post hoc rationalization provides no basis to sustain banning the bracelets and suspending the Respondents.

The School District contends that the trial court should have accepted its administrators' determination about what is "lewd or vulgar" in the middle school context. Perhaps the trial court would have done so if that court had not concluded that the School District officials, in fact, made no such determination. The trial court found that the bracelet ban did not reflect concern about any "sexual" message, but simply discomfort with discussion of female breasts and "an erroneous understanding of the law." Pet. App. 125–26.

The trial court concluded that "the Middle School has used lewdness and vulgarity as a post-hoc justification for its decision to ban the bracelets," Pet. App. 125, and, as this Court has noted, "post hoc rationalizations . . . mak[e] it difficult for courts to determine in any particular case whether the [government] is permitting favorable, and suppressing unfavorable, expression." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988).

The trial court's factual finding that the School District's claim of lewdness was a pretext is an independent reason that this Court should not use these facts to decide whether speech that is not

plainly lewd may be banned from school under *Fraser*.

II. THE THIRD CIRCUIT CORRECTLY HELD THAT *FRASER* DID NOT JUSTIFY CENSORSHIP OF PLAINTIFFS' BREAST CANCER AWARENESS BRACELETS.

The Court of Appeals properly declined to "extend" *Fraser* to allow school officials to ban breast cancer awareness bracelets that are not plainly lewd and that were understood by all to be about breast cancer, not about sex. Pet. App. 22–27. The Third Circuit's analysis does not conflict with this Court's decisions nor those of any other United States Courts of Appeals.

The bracelets in this case are not comparable to Matthew Fraser's speech. As the trial court found:

> 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.

Pet. App. 123.

In *Fraser*, this Court upheld discipline against a student who, at a mandatory school assembly,

delivered a speech that was heavily and deliberately laden with "elaborate, graphic, and explicit sexual metaphor." *Fraser*, 478 U.S. at 678. The speech at issue in *Fraser* was not merely sexual and not age-appropriate for the entire audience—it was "obscene," *id.* at 679, "vulgar," *id.* at 683, 684, "offensively lewd and indecent," *id.* at 685, and "plainly offensive to both teachers and students—indeed to any mature person." *Id.* at 683. Matthew Fraser's speech inspired an immediate response to its lewd content, and immediate disapproval from school authorities. *Id.* at 678. The bracelets worn by B.H. and K.M., on the other hand, were worn throughout the seventh and eighth grade building for weeks without the school administrators hearing a single complaint about "lewdness" or taking action to ban them.

Fraser is not, as the School District contends, a broad grant of authority to punish student speech that falls outside "community values" defined by fiat of school officials. In *Morse*, this Court explicitly rejected the school district's attempt to expand *Fraser* in this manner:

> 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, 551 U.S. at 409 (citation omitted).

The School District struggles to identify a "split" of authority among courts of appeals on some issue relevant to this case, but cannot. First, the School District contends that circuits have differed on whether *Fraser* can justify censorship of political speech by citing two cases that consider whether a ban on Confederate flags could be justified under *Fraser*. Pet. 17 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1248–49 (11th Cir. 2003) (per curiam opinion quoting trial court opinion invoking *Fraser* as an alternative rationale for banning a confederate flag that is predictably disruptive); *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 332, 335 n.6 (6th Cir. 2010) (Clay, J., holding that Confederate flag cannot be censored under *Fraser*)).[19] But whether or not a Confederate flag ban can be upheld under *Fraser*, those rulings shed no light on the application of *Fraser* to speech that is claimed to fall directly under the *Fraser* authority to limit lewd expression.

Second, the School District contends that nine Courts of Appeals have treated Chief Justice Roberts' opinion in *Morse* as the controlling opinion of that case, while the Third and the Fifth Circuits have

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[19] In fact, the District has failed to cite the controlling opinion in *Defoe*. Although Judge Clay announced the judgment of the court in that case, his opinion deferred to the concurrence written by Judge Rogers and joined by the third member of the panel: "To the extent that there are any differences between this opinion and the concurring opinion, the concurring opinion shall govern as stating the panel's majority position." *Defoe*, 625 F.3d at 326 (Clay, J.). Judge Roger's governing concurrence holds that the flag ban can be justified under the principles announced in *Fraser* and this Court's other student speech precedents. *Defoe*, 625 F.3d at 342 (Rogers, J.).

held that Justice Alito's concurrence is controlling. Pet. 22–23, 25–26. Most of the cases in the first category do no more than cite *Morse* for the proposition that schools can censor pro-drug speech. The "conflict" appears between a case from the Fifth Circuit in which the Court of Appeals read Justice Alito's concurrence to support censorship of any student speech that embodies a "threat to the physical safety of students,"[20] and a Seventh Circuit case in which that court disagreed with the Fifth Circuit about the proper reading of Justice Alito's concurrence (but also read *Morse* to endorse censorship of more than pro-drug speech).[21] In these cases the courts of appeals neither agree nor disagree, however, with the analysis used by the Third Circuit—indeed, these cases have nothing at all to do with censorship under *Fraser*.

The School District has failed to identify a single circuit decision that addresses the application of *Fraser* to speech that is not "plainly lewd" but that a school contends is suggestive enough to be censored under *Fraser*. That is because there are none. Indeed, there is only one appellate decision, apart from the one in this case, applying *Fraser* to student

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[20] *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770–72 (5th Cir. 2007). The speech at issue in *Ponce* was a student's notebook that described scenarios in which the author directed violence against other students. *Ponce*, 508 F.3d at 766.

[21] *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 673–74 (7th Cir. 2008). The *Nuxoll* court upheld a school policy barring derogatory comments "that refer to race, ethnicity, religion, gender, sexual orientation, or disability," but held that a T-shirt stating "Be Happy, Not Gay" did not fall under that policy. *Nuxoll*, 523 F.3d at 670–76.

speech that is censored as lewd. And the speech in that case—stick figures that students used to illustrate different sexual positions—was, like the speech in *Fraser* itself, "unquestionably lewd." *See R.O. ex rel. Ochshorn v. Ithaca City Sch. Dist.,* 645 F.3d 533, 541 (2d Cir. 2011). There is no "conflict" among the courts of appeals concerning the applicability of *Fraser* to speech about breast cancer that is not clearly lewd.

III. THIS CASE DOES NOT PRESENT A PRESSING ISSUE REQUIRING THE COURT'S IMMEDIATE REVIEW, ESPECIALLY IN THE CONTEXT OF A PRELIMINARY INJUNCTION THAT IS SUBJECT TO FURTHER PROCEEDINGS IN THE LOWER COURTS.

There are only a handful of court decisions at any level in which students have challenged discipline for purportedly lewd or vulgar speech. Although the School District and its *amici* express concern that cause-related apparel will lead to more students "testing" school rules on lewdness, in reality students have always "tested" these limits and the schools have proven equal to that challenge for more than forty years. The School District's prophecy of doom echoes Justice Black's dissent forty-five years ago in *Tinker*:

> [A]fter the Court's holding today some students . . . will be ready, able, and willing to defy their teachers on practically all orders. . . . Turned loose with lawsuits for damages and injunctions against their teachers as

> they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils.

Tinker, 393 U.S. at 525 (Black, J., dissenting). History has proven otherwise.

The School District complains that the Third Circuit's "distinction between what is 'patently' lewd and what is 'ambiguously' lewd creates an unworkable metaphysical dichotomy of meaning" that will lead school officials into legal error. Pet. 15. The School District overstates both the complexity of the Third Circuit's analysis and the supposed clarity of *Fraser*. As even this Court has acknowledged, "The mode of analysis employed in *Fraser* is not entirely clear." *Morse*, 551 U.S. at 404. Identifying speech that is "patently" or "plainly" lewd cannot be any more difficult than discerning that which is "lewd, indecent or offensive," "obscene, indecent or profane," "vulgar," "offensive to . . . modesty and decency," "offensively lewd and indecent," "sexually explicit," "inappropriate," "plainly offensive," or contrary to the "habits and manners of civility"—and certainly is no more difficult than defining "community standards" of propriety. Yet, *Fraser*'s ambiguity has generated no flood of litigation.

The School District presents the decision below as a dramatic departure from pre-existing law. In fact, the Third Circuit has long required a particularized showing of need to censor student speech. *See Saxe*, 240 F.3d at 211 ("*Tinker* requires a

specific and significant fear of disruption, not just some remote apprehension of disturbance."); *id.* at 212 (noting "*Tinker*'s requirements of specificity and concreteness"); *Sypniewski,* 307 F.3d at 253 ("In sum, 'if 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.'") (quoting *Saxe*, 240 F.3d at 212); *id.* at 257 ("Where a school seeks to suppress a term merely related to an expression that has proven to be disruptive, it must do more than simply point to a general association. It must point to a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations or with the rights of others.").

The standard adopted by the court below is not fundamentally different. *See* Pet. App. 25–26 ("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."). It remains for the courts to decide—in the rare instances in which such cases reach the courts—whether school officials have exercised their authority in a manner that is reasonable and consistent with the First Amendment. Both lower courts concluded that the School District had exceeded the bounds of its authority. That conclusion is amply supported by the record and does not merit a grant of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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