CASE NO. 24-1769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

B.A., mother of minors D.A. and X.A.;

D.A., a minor, by and through his mother, B.A.;
X.A., a minor, by and through his mother, B.A.,

Plaintiffs-Appellants,

v.

TRI COUNTY AREA SCHOOLS;
ANDREW BUIKEMA, in his individual capacity;
WENDY BRADFORD, in her individual capacity,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
(1:23-cv-00423)

REPLY IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENT

Defendants' Response explicitly concedes a core concern of Judge Bush's dissent: The majority's approach "will produce disparate outcomes across different schools" for identical *non-disruptive* political speech. Resp. 16. Defendants likewise do not challenge Judge Bush's assertion that no other circuit follows the majority's approach.

Instead, Defendants insist that permitting students' First Amendment rights to fluctuate wildly across schools and classrooms based on administrators' and teachers' personal views of what constitutes "vulgarity" is "a feature of the panel opinion, not a bug." *Id.* This is unprecedented. In no other area of First Amendment law has the Supreme Court or this Court tethered a speaker's constitutional rights to the tastes of the enforcing government official. That is why the First Amendment provides the same protection for a political pamphlet in Central Park as it does on the National Mall, regardless of the park staff on duty. And it should provide the same protection for students' non-disruptive political messaging in Michigan as it does for students in Tennessee, no matter the idiosyncrasies of school staff.

In support of their position, Defendants misconstrue *Tinker*, claiming it, too, leads to "disparate" outcomes because speech that provokes "substantial disruption" in one school may have no impact on another. *Id.* at 17. The critical problem with Defendants' argument is that *what constitutes substantial disruption—i.e.*, the test for whether a student's speech is protected—remains constant. The diverging outcomes thus stem from whether different schools can satisfy that same objective test. That is why this Court held that a school that provided evidence of substantial disruption from confederate flag apparel could permissibly prohibit it while a school unable to furnish such evidence could not. *Compare Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), *with Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001).

As Judge Bush warns, the majority's approach makes *the test* disparate. The majority defines censorable *Fraser* "vulgarity" as whatever each administrator and teacher subjectively deems vulgar. This turns the First Amendment on its head, empowering the government to decide the scope of citizens' free speech rights rather than serving as a neutral limit on the government's power to censor. "First Amendment standards … must give the benefit of any doubt to protecting

rather than stifling speech." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010) (cleaned up). The majority's approach inverts that rule. It gives government officials not only the "benefit of the doubt," but the power to subjectively (and inconsistently) determine a student's free speech rights.

Finally, Defendants' new "appendix"—42 pages of outside-the-record material—bolsters Judge Bush's dissent. Under the majority's approach, each example the appendix offers is subject not to a neutral test, but to the countless eccentricities and personal preferences of individual instructors. As Judge Bush explained, that is not tenable, nor is it necessary. The Third and Ninth Circuits' standard provides a "more manageable and constitutionally faithful rule grounded in bedrock First Amendment principles": Non-disruptive political apparel enjoys First Amendment protection unless it is "plainly" profane or lewd. *B.A. v. Tri Cnty. Area Schs.*, 156 F.4th 782, 813 (6th Cir. 2025) (Bush, J., dissenting) (cleaned up). Rather than going out on the untested limb fashioned by the majority, this Court should join its sister circuits.

Dated: December 3, 2025

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This reply contains 543 words (excluding the parts excludable under the Rules), which is less than 15% of the word limit for petitions. *See* Federal Rule of Appellate Procedure 40(d)(3)(A). This reply complies with the typeface and type-style requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14-point font.

Dated: December 3, 2025

/s/ Conor T. Fitzpatrick

Conor T. Fitzpatrick
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION

CERTIFICATE OF SERVICE

The undersigned certifies that on December 3, 2025, an electronic copy of Reply in Support of Appellants' Petition for Rehearing and Rehearing En Banc was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the brief will be accomplished by the CM/ECF system.

Dated: December 3, 2025

/s/ Conor T. Fitzpatrick

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