FIRST AMENDMENT — STUDENT SPEECH — THIRD CIRCUIT LIMITS CENSORSHIP OF "AMBIGUOUSLY LEWD" SPEECH — *B.H. ex rel. Hawk v. Easton Area School District*, 725 F.3d 293 (3d Cir. 2013) (en banc).

In *Bethel School District No. 403 v. Fraser*,[1] the Supreme Court held that school administrators may sanction vulgar, lewd, or plainly offensive student speech without violating the First Amendment.[2] Under *Fraser*, such speech can be censored even when there is no risk that it will substantially disrupt the school environment or otherwise invade the rights of others; *Fraser* thus constitutes one of three major exceptions to the "general rule" for student speech protections originally articulated by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.[3] Recently, in *B.H. ex rel. Hawk v. Easton Area School District*,[4] the Third Circuit held that the *Fraser* exception allows schools to restrict (a) speech that is "plainly lewd" or (b) speech that a reasonable observer could interpret as being lewd and which cannot plausibly be interpreted as commenting on social or political issues.[5] Under this framework, "ambiguously lewd" speech which *does* comment on political or social issues is no longer within the ambit of *Fraser* and requalifies for full *Tinker* protections.[6]

Hawk represents a serious and principled attempt by a circuit court of appeals to cabin *Fraser*'s scope. The need to pare down *Fraser*'s otherwise-categorical exclusion of "ugly"[7] speech from constitutional protection is grounded in bedrock First Amendment principles, in the

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[1] 478 U.S. 675 (1986).

[2] *Id.* at 685; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 n.4 (1988) ("The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly rather than on any propensity of the speech to 'materially disrup[t] classwork or involv[e] substantial disorder or invasion of the rights of others.'" (alterations in original) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969))).

[3] 393 U.S. 503. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, established the second exception: administrators can restrict student speech within "school-sponsored expressive activities" whenever the educators' "actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. The third exception was articulated in *Morse v. Frederick*, 551 U.S. 393 (2007), which held that administrators may restrict student speech that can "reasonably be regarded as encouraging illegal drug use." *Id.* at 397.

[4] 725 F.3d 293 (3d Cir. 2013) (en banc).

[5] *Id.* at 298.

[6] *Id.* at 309.

[7] *See* Christopher Cavaliere, Student Work, *Category Shopping: Cracking the Student Speech Categories*, 40 STETSON L. REV. 877, 882 (2011) (internal quotation marks omitted) ("*Fraser* allowed a school to silence a nebulous category of speech that may have included anything from merely 'inappropriate' speech to 'plainly offensive' student expression. In other words, *Fraser* created a category of student speech that we might conveniently call 'ugly' student expression." (footnote omitted)).

Supreme Court's prior student speech jurisprudence, and in the contemporary Court's highly speech-protective orientation. What the Third Circuit lacked, however, was clear and unambiguous Supreme Court precedent supporting its interpretation, and as a result lower courts have resisted — and will likely continue to resist — adopting this new framework.[8] These limitations highlight why the Supreme Court itself must ultimately clarify, and ideally limit, *Fraser*'s reach.

The *Hawk* plaintiffs were two Pennsylvanian students, B.H. and K.M., who attended Easton Area Middle School in 2010. On October 28, in observance of Breast Cancer Awareness Day, both girls attended school wearing bracelets manufactured by the Keep A Breast Foundation, a nonprofit organization dedicated to raising breast cancer awareness among young women. Keep A Breast's signature "I Love Boobies" campaign involves a line of colorful bracelets inscribed with the campaign's slogan — "I ♥ Boobies (KEEP A BREAST)" — along with the organization's tagline and website. The campaign aims to destigmatize breasts and breast health using language that resonates with young people, with the ultimate goal of sparking frank and open conversations about breast cancer prevention.[9] Keep A Breast describes the bracelets as "the 'pink ribbon' of the younger generation."[10] B.H. and K.M. were given in-school suspensions for refusing to remove their bracelets — which the school had officially banned — and were prohibited from attending the school's upcoming Winter Ball.[11]

B.H. and K.M. subsequently brought suit under 42 U.S.C. § 1983 seeking a preliminary injunction against the ban.[12] The district court granted the injunction; while it assumed that, under *Fraser*, lewd, vulgar, indecent, and plainly offensive student speech lacks any First Amendment protections,[13] the court concluded that the bracelets did not fall within any of these proscribed categories.[14]

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[8] *See, e.g.*, J.A. v. Fort Wayne Cmty. Sch., No. 1:12-CV-155 JVB, 2013 WL 4479229, at *4–5 (N.D. Ind. Aug. 20, 2013).

[9] *Hawk*, 725 F.3d at 298–300.

[10] Luis Mendoza, *This Is My Pink Ribbon — Why Do You Wear Your Keep a Breast I Love Boobies! Bracelet?*, KEEP A BREAST FOUND. (Oct. 1, 2013), http://www.keep-a-breast.org/this-is-my-pink-ribbon.

[11] *Hawk*, 725 F.3d at 299–300.

[12] *Id.* at 300–01 (citing 42 U.S.C. § 1983 (2006)).

[13] *See* H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392, 402 (E.D. Pa. 2011).

[14] The word "boobies" was not lewd, the court concluded, because it is a common and innocuous alternative term for female breasts, among other usages; indeed, school administrators had used the word over the school's public address system while announcing the ban. *Id.* at 397, 405–08. The phrase "I ♥ Boobies" was also not vulgar because its use as part of a well-publicized breast cancer awareness campaign sanitized any lurking sexual connotations. *Id.* at 406.

The Third Circuit, sitting en banc, upheld the lower court's ruling. Writing for the majority, Judge Smith[15] asserted that "[t]he scope of a school's authority to restrict lewd, vulgar, profane, or plainly offensive speech under *Fraser* is a novel question left open by the Supreme Court, and one which we must now resolve."[16] *Fraser* did not directly apply, the majority reasoned, because that case involved only "plainly lewd speech that did not comment on political or social issues"[17] and "not speech that a reasonable observer could interpret as either lewd or non-lewd."[18] The court emphasized that the student in *Fraser* engaged in a "sexually explicit monologue"[19] that was "plainly offensive to both teachers and students — indeed to any mature person."[20] The majority concluded that *Fraser*'s holding should be limited to only "plainly lewd" speech; the court argued that such speech can always be restricted in schools because it has the same deleterious effects on discourse — and suffers from the same categorical lack of First Amendment value — as obscenity does in nonschool contexts.[21]

The majority concluded that the "I ♥ Boobies" bracelets were not "plainly lewd."[22] Since *Fraser* did not directly address this kind of "ambiguously lewd" speech, the majority endeavored to determine when such speech could be proscribed. It concluded that, while administrators have some discretion to limit ambiguously lewd speech,[23] there is one scenario where the students' free speech rights prevail — when ambiguously lewd speech can also be plausibly construed as commenting on social or political issues.[24] In these cases, the students' First Amendment interests outweigh the government's pedagogical interest in maintaining a certain level of discursive civility at school.[25]

Doctrinally, the majority grounded its heightened protection for social and political commentary in Justice Alito's concurring opinion in *Morse v. Frederick*,[26] which Justice Kennedy joined. *Morse* involved a

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[15] Judge Smith was joined by Chief Judge McKee and Judges Sloviter, Scirica, Rendell, Ambro, Fuentes, Fisher, and Vanaskie.

[16] *Hawk*, 725 F.3d at 298.

[17] *Id.* at 307.

[18] *Id.* at 306.

[19] *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)) (internal quotation marks omitted).

[20] *Id.* (quoting *Fraser*, 478 U.S. at 683) (internal quotation marks omitted).

[21] *Id.* at 305–06; *cf.* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735 (2011) (affirming the constitutionality of obscenity-to-minors restrictions).

[22] *Hawk*, 725 F.3d at 320 (applying similar reasoning as the district court below).

[23] *See id.* at 308–09. This power derives from the school's legitimate interest in teaching the "fundamental values of 'habits and manners of civility' essential to a democratic society." *Fraser*, 478 U.S. at 681 (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

[24] *Hawk*, 725 F.3d at 309.

[25] *See id.* at 309, 314.

[26] 551 U.S. 393 (2007).

student who, while on a school outing, unfurled a banner in front of television cameras inscribed with the phrase "BONG HiTS 4 JESUS."[27] While both concurring Justices formally joined the 5–4 majority in *Morse* — which held that schools may categorically prohibit speech that can reasonably be interpreted as advocating illegal drug use — they wrote separately to emphasize their understanding that "[the majority opinion] provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."[28] According to the concurrence, even a student's pro-drug message could avoid categorical censorship if it could "plausibly be interpreted as commenting . . . on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[29]

Applying the "narrowest grounds" doctrine,[30] the *Hawk* majority concluded that Justice Alito's added restriction should be read as a controlling gloss on *Morse*: "Because the votes of Justices Alito and Kennedy were necessary to the majority opinion and were expressly conditioned on their narrower understanding that speech plausibly interpreted as political or social commentary was protected from categorical regulation, that limitation is a binding part of *Morse*."[31] For the majority, the fact that Justices Alito and Kennedy had also formally joined the majority opinion should not matter; to have this fact be determinative would "elevate[] formalism over substance at the expense of ignoring the very conditions on which a necessary member of the majority expressly chose to join the majority."[32]

The *Hawk* majority then extended this doctrinal detour to the status of "ambiguously lewd" speech under *Fraser*. If, as the concurrence in *Morse* indicated, social and political commentary could insulate a student's pro-drug message from censorship — despite a school's compelling interest in shielding students from the "grave" and "immediately obvious" threats posed by drugs[33] — then the pro-civility interests recognized in *Fraser* should likewise yield to a student's First Amend-

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[27] *Id.* at 397 (internal quotation marks omitted).

[28] *Id.* at 422 (Alito, J., concurring); *see also id.* at 397 (majority opinion).

[29] *Id.* at 422 (Alito, J., concurring) (quoting *id.* at 445 (Stevens, J., dissenting)).

[30] *See* Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

[31] *Hawk*, 725 F.3d at 310; *see also id.* at 312 ("Had they known that lower courts would ignore their narrower understanding of the majority opinion — or had the majority opinion expressly gone farther than their limitations — then, by their own admission, they would not have joined the majority opinion. That would have transformed the five-justice majority opinion into a three-justice plurality opinion, with their concurring views becoming the controlling narrowest grounds under an uncontroversial application of the *Marks* doctrine.").

[32] *Id.* at 313.

[33] *Id.* (quoting *Morse*, 551 U.S. at 425 (Alito, J., concurring)) (internal quotation marks omitted).

ment rights when social or political commentary is in the mix.[34] Circling back to the facts at hand, the *Hawk* majority concluded that breast cancer awareness is a legitimate topic of social and political concern, meaning that school administrators could not exercise their discretion to prophylactically ban the ambiguously lewd bracelets.[35]

Judge Hardiman, writing in dissent,[36] took issue with every step of the majority's approach. His dissent called the majority's elevation of Justice Alito's *Morse* concurrence "a misunderstanding of the Supreme Court's 'narrowest grounds' doctrine"[37] and noted that only the Fifth Circuit had explicitly recognized Justice Alito's concurrence as controlling; all other circuits had cited Chief Justice Roberts's majority opinion as the determinative opinion in the case.[38] The dissent further argued that, even had Justice Alito's concurrence modified *Morse*, there was no reason to extend that modification to *Fraser*'s distinct exception to *Tinker*'s general rule.[39] Judge Hardiman thus applied *Fraser* using an objective-reasonableness standard: so long as the bracelets could reasonably be interpreted as falling into one of *Fraser*'s proscribable categories, their censorship would be constitutional. He arrived at the opposite conclusion of the district court, finding that it was objectively reasonable for administrators to interpret "I ♥ Boobies" as meaning "I am attracted to female breasts," especially in the middle school context, and that the bracelets' "cancer message is not *so* obvious or overwhelming as to eliminate the double entendre."[40]

Judge Greenaway[41] filed a short dissent highlighting the impracticalities of the majority's new test. He objected to the majority's vague distinction between "plainly" and "ambiguously" lewd speech and its inability to concretely define "social and political" commentary. Since both of these amorphous determinations must be made before speech can fall within the majority's proscribability sweet spot, Judge Greenaway argued that the new test would be difficult to apply in practice.[42]

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[34] *Id.* at 314 ("It would make no sense to afford a T-shirt exclaiming 'I ♥ pot! (LEGALIZE IT)' protection under *Morse* while declaring that a bracelet saying 'I ♥ boobies! (KEEP A BREAST)' is unprotected under *Fraser*.").

[35] The court also briefly considered, and rejected, arguments that the bracelets could foreseeably cause a "substantial disruption" of the school environment or otherwise injure the rights of others in violation of *Tinker*'s general rule. *See id.* at 321–23.

[36] Judge Hardiman was joined by Judges Chagares, Jordan, Greenaway, Jr., and Greenberg.

[37] *Hawk*, 725 F.3d at 325 (Hardiman, J., dissenting). The dissent argued that "the narrowest grounds rule applies only to 'discern a single holding of the Court in cases in which no opinion on the issue in question has garnered the support of a majority.'" *Id.* at 326 (quoting Vasquez v. Hillery, 474 U.S. 254, 261 n.4 (1986)).

[38] *Id.* at 328–29.

[39] *See id.* at 330–33.

[40] *Id.* at 336 (internal quotation marks omitted).

[41] Judge Greenaway was joined by Judges Chagares, Jordan, Hardiman, and Greenberg.

[42] *Hawk*, 725 F.3d at 338–40 (Greenaway, J., dissenting).

As Chief Justice Roberts observed in *Morse*, "[t]he mode of analysis employed in *Fraser* is not entirely clear,"[43] leaving its precise scope open to interpretation.[44] The Third Circuit in *Hawk* refused to interpret *Fraser* as holding that school administrators may censor any and all speech they reasonably deem to be inappropriate. Instead, it chose to vindicate traditional First Amendment interests by protecting "ambiguously lewd" speech with social or political value; this approach is a sensible implementation of *Tinker*, *Fraser*, and *Morse* that reflects the speech-protective orientation of the current Supreme Court. Yet the Third Circuit's analysis has its own doctrinal weaknesses that will likely dissuade sister courts from adopting its new framework, absent explicit guidance from the Supreme Court itself.

Contrary to the Third Circuit's new approach, most courts have opted to read *Fraser* as creating a categorical exception from First Amendment protections for student speech containing lewd, vulgar, profane, indecent, or offensive connotations in a school context, per the reasonable judgment of school administrators.[45] Language in *Fraser* may support this maximalist and formalist interpretation; for example, the opinion argues that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" and that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions."[46] This approach was applied by Judge

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[43] Morse v. Frederick, 551 U.S. 393, 404 (2007); *see also* David L. Hudson, Jr. & John E. Ferguson, Jr., *The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 194 (2002); Scott A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions — For the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1425 (2011) ("*Fraser*'s various ill-explained rationales made it a Rorschach precedent, viewable as either distinguishing or undercutting *Tinker*.").

[44] *See* Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion* Fraser, 90 DENV. U. L. REV. 131, 146–47 (2012) (describing both broad and narrow readings of the case).

[45] *See, e.g.*, J.A. v. Fort Wayne Cmty. Sch., No. 1:12-CV-155 JVB, 2013 WL 4479229, at *5 (N.D. Ind. Aug. 20, 2013) ("[T]he bracelet's commentary on social or political issues does not provide additional protection under the First Amendment. This Court will ask solely whether the school made an objectively reasonable decision in determining that the bracelet was lewd, vulgar, obscene or plainly offensive."); Broussard *ex rel.* Lord v. Sch. Bd., 801 F. Supp. 1526, 1535–36 (E.D. Va. 1992) (stating that "speech that is merely lewd, indecent, or offensive is subject to limitation," under *Fraser*, *id.* at 1536); *see also* Hudson & Ferguson, *supra* note 43, at 183 ("The lower courts have applied [*Fraser*] in different ways to reach different outcomes. The majority of courts have cited *Fraser* in such a way as to give public school officials free reign to censor vulgar, lewd, or plainly offensive student speech. Some courts have gone a step further and prohibited student speech that contains offensive ideas.").

[46] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); *see also* C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 366 (1989) ("It is unclear whether the Chief Justice is claiming that such sexually indecent speech is a category of speech entirely excluded from 'the freedom of

Hardiman in his *Hawk* dissent, by the district court below, by district courts in other "I ♥ Boobies" cases,[47] and in other student speech cases that have involved mildly or ambiguously inappropriate speech.[48] Combined with a highly deferential posture toward the determinations of school administrators,[49] the standard is relatively easy to apply and to adjudicate; school administrators have a clear upper hand under this expansive reading of *Fraser*.[50]

While a formalistic reading of *Fraser* may be easier to administer, the Third Circuit's pragmatic balancing approach is superior for three reasons. First, the formalistic approach enables only a flat, one-dimensional inquiry into the alleged deficiencies of the speech, obviating any inquiry into its positive qualities or relative degree of inappropriateness.[51] The *Fraser* Court asserted that there was a "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech."[52] Yet a range of politically inclined, *Tinker*-esque expression may, incidentally, flirt with one of *Fraser*'s disfavored categories. The blurring of political "message" and sexual "content" is especially acute when, as in *Hawk*, socially and politically salient issues important to young people are inextricably tied to sex, sexual identity, and sexual health.[53] These topics are particularly vulnerable to broad censorship under a strong reading of *Fraser*.

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speech' in the school context, obviating any need for first amendment review, or that such speech is merely less protected . . . .").

47 *See Fort Wayne Cmty. Sch.*, 2013 WL 4479229, at *5; K.J. *ex rel.* Braun v. Sauk Prairie Sch. Dist., No. 11-cv-622-bbc, 2012 U.S. Dist. LEXIS 187689, at *22 (W.D. Wis. Feb. 6, 2012).

48 *See, e.g.*, *Broussard*, 801 F. Supp. at 1536–37 (holding that the words "Drugs Suck" could constitute vulgar and offensive sexual innuendo, even if the sexual meaning was attenuated).

49 *See 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."); *see also* S. Elizabeth Wilborn, *Teaching the New Three Rs — Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 131 (1995) ("Although Chief Justice Burger paid lip service to the importance of permitting the expression of a variety of viewpoints in the schools, without hesitation, he deferred to the school authorities' conclusory determination that Fraser's speech seriously disrupted the school's educational activities." (footnote omitted)).

50 *See* Calvert, *supra* note 44, at 156.

51 *See* Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 636 (2002) ("In deciding that a school could punish a student for his lewd and obscene speech, the Court focused not on the lack of reasons for protecting student speech, but on the school's reasons for regulating it.").

52 *Fraser*, 478 U.S. at 680.

53 For example, numerous conflicts have arisen in the context of student speech addressing sexual orientation. *See, e.g.*, Couch v. Wayne Local School District, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/couch-v-wayne-local-school-district (last visited Nov. 24, 2013); Eugene Volokh, *May "Jesus Is Not a Homophobe" T-shirt Be Banned from Public High School as "Indecent" and "Sexual"?*, VOLOKH CONSPIRACY (Apr. 4, 2012, 3:36 PM), http://www.volokh.com/2012/04/04/may-jesus-was-not-a-homophobe-t-shirt-be-banned-from-public-high-school-as-indecent-and-sexual; *see also* Gillman *ex rel.* Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1374 (N.D. Fla. 2008) (striking down school's ban on pro-LGBT messages and symbols, arguing that "[t]he nation's high school students, some of whom are of voting age, should not be foreclosed

To help illustrate its holding, the *Fraser* Court pointed out that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's ['Fuck the Draft'] jacket."[54] But this binary invocation obscures the subtlety and indeterminacy of much politically tinged student expression. Overextending *Fraser* causes language that is ambiguous, subtle, sly, cheeky, or merely sophomoric to be treated the same as Cohen's jacket or Fraser's protracted sexual diatribe, even though a school's pedagogical interests are significantly weaker in these cases. With no possibility of a contextual, fact-sensitive balancing of competing values, even speech that comments on vitally important social and political issues can be undermined by the most innocuous sexual double entendre or crude connotation.

The narrowness of a formalistic *Fraser* inquiry cannot capture the multiple axes of values and interests at play in the more nuanced student speech disputes. The Third Circuit's novel interpretation of *Fraser* in *Hawk*, on the other hand, requires that some proportionality exist between students' constitutional interests and the school's pedagogical goals before censorship can occur. Indeed, language exists in *Fraser* itself which appears to advocate for a balancing approach,[55] adding to the opinion's multiple possible interpretations.

A second and related benefit of the Third Circuit's approach is that it remains more faithful to the basic constitutional regime established by *Tinker*. Without some form of balancing, *Fraser* turns *Tinker* on its head by systematically privileging a school's pedagogical interest in maintaining discursive civility over any and all First Amendment interests whenever the two interests conflict.[56] Some courts have even read *Fraser* expansively to mean that administrators may censor speech whenever it, in their opinion, "undermine[s] the school's basic educational mission."[57] By categorically elevating broad government

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from [the] national dialogue [surrounding LGBT rights]"); Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd., 483 F. Supp. 2d 1224, 1229 (S.D. Fla. 2007) (rejecting school's characterization of gay-straight alliance as a "sex-based" club).

[54] *Fraser*, 478 U.S. at 682 (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring in the result)) (internal quotation marks omitted); *see* Cohen v. California, 403 U.S. 15, 16 (1971).

[55] *See Fraser*, 478 U.S. at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior."). However, other parts of the opinion can be read as espousing a more categorical prohibition. *See, e.g.*, *id.* at 683; *see also* Dienes & Connolly, *supra* note 46, at 364–65 ("Chief Justice Burger purported to apply a balancing test . . . . But his denigration of the value of Fraser's speech and his efforts to distinguish the speech of Fraser from that of Tinker suggests that the Chief Justice placed almost no weight on the free speech side of the scales.").

[56] *See* Hudson & Ferguson, *supra* note 43, at 201.

[57] *Fraser*, 478 U.S. at 685; *see, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (upholding censorship of t-shirt depicting image of Marilyn Manson under *Fraser*, asserting that such shirts "contain symbols and words that promote values that are so patently

interests above students' fundamental rights, a formalistic reading of *Fraser* effectively requires students to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[58] Yet *Tinker* contains explicit protections for boundary-pushing speech that may be in tension with the preferences of school administrators.[59] The Third Circuit's approach recognizes that the exchange of socially and politically valuable ideas "out of a multitude of tongues" is a core First Amendment value, especially in schools,[60] that cannot be overridden by government prerogatives ex ante.

Finally, *Hawk*'s balancing approach represents a good faith effort to project the implications of more recent cases onto the *Fraser* doctrine. The majority opinion in *Morse* recognized, but declined to clarify, the fuzzy scope of *Fraser*'s exception; indeed, the opinion conspicuously avoids any articulation of *Fraser*'s formal holding.[61] The Court in *Morse* opted to create a new *Tinker* exception for drug-related speech rather than resolve the case under an expansive reading of *Fraser*. In doing so, it observed:

> Petitioners urge us to adopt the broader rule that [BONG HiTS 4 JESUS] 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.[62]

Morse signals that the *Fraser* exception is not absolute and that the risk of chilling political or religious expression may play a part in the

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contrary to the school's educational mission"); *see also* Sarah Tope Reise, Comment, *"Just Say No" to Pro-Drug and Alcohol Student Speech: The Constitutionality of School Prohibitions of Student Speech Promoting Drug and Alcohol Use*, 57 EMORY L.J. 1259, 1279–80 (2008).

[58] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[59] *See id.* at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. . . . [S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966))); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting) (arguing that "mere incompatibility with the school's pedagogical message" is not a "constitutionally sufficient justification for the suppression of student speech").

[60] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (internal quotation mark omitted); *see also id.* ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ."); Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT L. REV. 55, 79 (2004) ("Political, religious, literary, intellectual, and artistic expression can contribute to the development of children's moral powers, so expression in these categories merits special protection."); Wilborn, *supra* note 49, at 150 ("Even student speech that school authorities may consider gross or repellent oftentimes may further First Amendment values.").

[61] Chief Justice Roberts would only concede that "*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute." Morse v. Frederick, 551 U.S. 393, 405 (2007).

[62] *Id.* at 409 (citation omitted).

student speech calculus. Yet by failing to articulate a clear test for when a determination of "offensiveness" — or any other proscribed category — is legitimate, the opinion did not provide courts with an alternative standard to apply in lieu of existing, highly speech-restrictive interpretations of *Fraser*. Justice Alito's *Morse* concurrence addressed the issue more squarely and identified a concrete threshold — the plausible existence of any social or political commentary — for when exceptions to *Tinker* no longer apply.[63] Indeed, commentators writing before *Hawk* recognized the value of Justice Alito's opinion as a prepackaged solution to *Fraser*'s overextension.[64]

Unfortunately, the Third Circuit's doctrinal strategy of grafting Justice Alito's concurrence onto *Morse*'s majority opinion created new problems. The move necessitated a consideration of the Supreme Court's complex "narrowest grounds" doctrine and, arguably, strained existing precedent in that area. Specifically, *Hawk*'s collateral innovation of extending the "narrowest grounds" doctrine to where there is a true majority opinion is, perhaps more than its First Amendment analysis, vulnerable to judicial second-guessing and attack.[65] Courts unwilling to explore novel, largely uncharted *Fraser* interpretations will appreciate the doctrinal "out" provided by the narrowest grounds wrinkle. Indeed, the nine circuits that have already declined to interpret Justice Alito's *Morse* concurrence as controlling are ill-positioned to take up the Third Circuit's new approach[66] despite all of its substantive advantages.

For those courts, *Fraser*'s muddy language and the *Morse* majority's refusal to provide clarity constitute scant guidance for applying the exception in hard cases, meaning that the status quo of mixed *Fraser* interpretations will likely continue into the future. Only the Supreme Court can provide concrete guidance on how students, administrators, and judges are to evaluate student speech that falls within the vast chasm between *Tinker*'s solemn armbands and *Fraser*'s pointed provocations.

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63 *See id.* at 422 (Alito, J., concurring).

64 *See* Calvert, *supra* note 44, at 137.

65 One core objection is that such a holding would allow a concurring minority of Justices to decide narrower issues that the majority chose to avoid and to resolve those issues in ways with which members of the majority would not agree. *See Hawk*, 725 F.3d at 327 (Hardiman, J., dissenting) (citing Alexander v. Sandoval, 532 U.S. 275, 285 n.5 (2001)); *see also* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008).

66 *See* J.A. v. Fort Wayne Cmty. Sch., No. 1:12-CV-155 JVB, 2013 WL 4479229, at *4–5 (N.D. Ind. Aug. 20, 2013) ("The Third Circuit majority recognized that their novel reading of *Morse* implied 'reject[ing] the Seventh Circuit's . . . approach.' The Seventh Circuit is in good company, as eight other appellate courts have adopted the rule articulated by the majority opinion in *Morse* instead of Alito's concurrence." (alterations in original) (citation omitted) (quoting *Hawk*, 725 F.3d at 313 n.17)).