Should Students Be Allowed To ♥ Boobies In School?

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As two students walk out from their Constitutional Law exam, one of them exclaims, “Wow! That was hard!” After struggling all day on the golf course, Todd tells his opponent, “I don’t know what is going on today, it just won’t go in the hole.” When the math professor realized she did not go over the intricacies of the last problem, she said “Let’s put that to the side for now and do it later.” While discussing the latest iPhone released, one coworker talking about the battery life said “I am really surprised with how long it lasts.” All of these statements seem perfectly innocent until someone says “that’s what she said” as Steve Carell so famously did numerous times while playing Michael Scott in The Office.¹ These sexual double entendre, called “That’s What She Said Jokes,” are commonly used jokes that can turn any innocent statement into an extremely perverted comment that the speaker did not intend.²

At issue here are the double entendre being used in schools. But students are not getting in trouble for “That’s What She Said Jokes.” The students are getting reprimanded for the “I ♥ Boobies! (KEEP A BREAST)” rubber bracelets that they are wearing. Just as there are two sides to every story, there are two meanings to this bracelet. Upon first glance of a high school or middle school student wearing these bracelets, one might think that the kids are being very immature. In reality, these bracelets are part of a national breast cancer movement by The Keep A Breast Foundation. This organization’s goal is to spark conversation among youth on this very serious and deadly issue.³ There is a split among the federal courts in determining whether these bracelets

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² See TWSS, http://www.twssstories.com/ (last visited Nov. 8, 2014) for more double entendre.
warrant First Amendment freedom of speech protection in schools. Since there is no uniform judicial standard, the main issue is how should the courts determine what type of student speech warrants protection. Since this bracelet has two plausible meanings, how do the schools and courts decide whether they should be allowed or banned in schools? Issues like this are currently affecting all public schools, even though a particular school might not be dealing with these bracelets. As discussed later on, there is no uniform standard for determining when certain speech can be protected in schools. Some courts defer to school administration, while other courts apply a different test looking to see if there is a political or social message in the speech.

Deference should be shown to the schools in their initial determination of what should be banned, similar to the reasonableness standard, but this should not be absolute because sometimes, partially due to a generational gap, a student’s interpretation of a phrase may be different than what an older principal or teacher might believe the phrase to mean. Students must have an alternative plausible interpretation of the saying, and it must be one that relates to a social or political issue. This too is not absolute because almost anything relates to a political or social issue. Then, there also must be an examination as to whether it causes a substantial disruption according to *Tinker*, or if it is considered lewd and vulgar according to *Fraser*. Since lewd and vulgar are vague and subjective terms, the court should examine various factors in determining whether the speech would reach the level of lewd and vulgar, and thus be prohibited in schools.

Part One of this paper will provide a detailed history of the four Supreme Court cases that lay the foundation for all decisions regarding student speech. Part Two will examine the split of authority in the federal courts regarding the “I ♥ Boobies! (KEEP A BREAST)” bracelets. The courts use different forms of analysis which leads them to different conclusions. Part Three, the argument section, which will propose an alternate form of analysis by combining the two tests and
balancing various factors that distinguish the bracelets from *Fraser*. This is followed by the conclusion in Part Four, which will use the newly proposed test to show that the bracelets should be given First Amendment freedom of speech protection.

**Part I: First Amendment, Freedom of Speech Precedence in Schools**

The First Amendment provides that “Congress shall make no law… abridging the freedom of speech.” As Justice Marshall stated, the “First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” Although we are given this right, the right to free speech is not unlimited. The government, when acting as sovereign, “is empowered to impose time, place, and manner restrictions on speech;” “make reasonable content-based decisions about what speech is allowed on government property that is not fully open to the public;” “decide what viewpoints to espouse in its own speech or speech that might be attributed to is;” “and categorically restrict unprotected speech, such as obscenity.” These exceptions essentially state that “not all speech is of equal First Amendment importance’ and that ‘speech on matters of public concern…is at the heart of the First Amendment’s protection.” That being said, the government is still not allowed to “prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

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4 U.S. Const. am. I.
5 Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
7 Id. at 303; see Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550, 560 (2005).
8 Id. see Miller v. California, 413 U.S. 15, 23 (1973), see also FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) stating that obscenity offends because it is “no essential part of any exposition of ideas, and is of such slight social value as a step to truth that any benefit that may be derive from it is clearly outweighed by the social interest in order and morality.”
9 Id. at 314 (quoting Snyder v. Phelps 131 S. Ct. 1207, 1215 (2011)).
10 B.H., 725 F.3d at 314 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
Although minors are not allowed to enjoy all of the freedoms that adults may enjoy, a child in school still has the right to freedom of speech and does not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\(^\text{12}\) These “minors are entitled to a significant measure of First Amendment protection and the government does not have a free-floating power to restrict the ideas to which children may be exposed.”\(^\text{13}\) Since the government cannot restrict all First Amendment protection given to children, “the nature of those rights is what is appropriate for children in school.”\(^\text{14}\) The “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”\(^\text{15}\) That means that “the younger the children, the more latitude the school authorities have in limiting the expression.”\(^\text{16}\) Determining “‘what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,’ rather than with the federal courts.”\(^\text{17}\) The limits of the student’s First Amendment rights to free speech are further expounded in the following four Supreme Court cases.

The First Amendment freedom of speech in schools originated in \textit{Tinker v. Des Moines Indep. Cnty. Sch. Dist.}, when high school students John Tinker, and Christopher Eckhardt, along with John’s younger sister Mary Beth Tinker, “publicized their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year’s Eve.”\(^\text{18}\) After the school became aware of the plan, a policy was adopted that declared that “any student wearing an armband to school would be asked

\(^{13}\) \textit{B.H.}, 725 F.3d at 314 (quoting \textit{Brown v. Entm’t Merchs. Ass’n}, 131 S. Ct. 2729, 2736 (2011)).
\(^{15}\) \textit{Bethel Sch. Dist. v. Fraser}, 478 U.S. 675, 682 (1986).
\(^{18}\) \textit{Tinker}, 393 U.S. at 504.
to remove it, and if he refused he would be suspended until he returned without the armband.”

The three children wore the black armbands to school and “were all sent home and suspended from school until they would come back without their armbands,” which was after New Year’s Day. In total, seven students, ranging from second grade to eleventh grade, were suspended for wearing the black armbands. The Court noted that “there is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.”

However, the dissent noted that “their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone.” Also, “a teacher of mathematics had his lesson period practically ‘wrecked’ chiefly by disputes with Mary Beth Tinker, who wore her armband for her ‘demonstration.’” It was also noted that the black armbands diverted students’ minds from their regular lessons, and John Tinker himself stated that he felt self-conscious because he wore the controversial armband.

The Court declared that “the First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” In deciding school policies, “school officials do not possess absolute authority over their students, they are ‘persons’ under the Constitution, and their

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19 Id.
20 Id.
21 Id. at 516 (Black, J., dissenting).
22 Id. at 508 (majority opinion).
23 Id. at 517 (Black, J., dissenting).
24 Tinker, 393 U.S. at 517 (Black, J., dissenting).
25 Id. at 518 (majority opinion).
26 Id. at 506.
fundamental rights must be respected by the State.”

Also, when there is an “absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” To prohibit certain actions, school officials need more than “undifferentiated fear or apprehension of disturbance” “that always accompany an unpopular viewpoint”, the forbidden conduct would have to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”

The Court ultimately held that students have the right to speech inside and outside the classroom as long as the conduct does not “materially disrupt classwork or involve substantial disorder or invasion of the rights of others.”

The students have a right to free speech, and since there was no disruption or interference in the school, the school officials were not allowed to ban the black armbands.

After the decision in Tinker, which is considered “the high watermark of the Supreme Court protecting the constitutional rights of students,” three additional cases were decided that placed limitations on the general rule in Tinker. In Bethel Sch. Dist. v. Fraser, high school student Matthew Fraser delivered a speech nominating a classmate for student elective office in front of 600 students, many of them 14 year olds. After two teachers warned him of the inappropriateness of his speech, Fraser delivered the rousing speech referring “to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.” During the speech, “some students hooted and

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27 Id. at 511.
28 Id.
29 Id. at 508.
30 Tinker, 393 U.S. at 509.
31 Id. (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).
32 Id. at 513.
33 Id. at 515.
35 Fraser, 478 U.S. at 677.
36 Id. at 677-78 (Matthew Fraser “gave the following speech at a high school assembly in support of a candidate for student government office: ‘I know a man who is firm – he’s firm in his pants, he’s firm in his shirt, his character is firm -- but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts -- he
yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent’s speech. Other students appeared to be bewildered and embarrassed.”\textsuperscript{37} One teacher even “found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.”\textsuperscript{38} The Court noted that there is a “marked distinction between the political message of the armbands in \textit{Tinker} and the sexual content of Fraser’s speech”\textsuperscript{39} and “Constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”\textsuperscript{40} The Court declared that it is a “highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”\textsuperscript{41} in order to prevent the school’s educational mission from being undermined.\textsuperscript{42} In describing the role and purpose of public schools, the Court said that “public education must prepare pupils for citizenship in the Republic...It must inculcate 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.”\textsuperscript{43} The determination of appropriate speech in accordance with the school’s mission “properly rests with the school board”\textsuperscript{44} and not the courts or legislature. Ultimately, the Court held that “the First Amendment does not prevent the schools from” imposing sanctions for offensively lewd, indecent, and vulgar speech.\textsuperscript{45}
The next case, *Hazelwood Sch. Dist. v. Kuhlmeier*, involved three students at Hazelwood East High School who were staff members of the Spectrum, the school newspaper, which was written and edited by students who were enrolled in the Journalism II class.\(^{46}\) The students believed that their First Amendment rights were violated after school officials deleted two pages in the newspaper because two of the articles were deemed inappropriate.\(^{47}\) Principal Robert Eugene Reynolds did not approve the article that “described three Hazelwood East students’ experiences with pregnancy” and the other article which “discussed the impact of divorce on students at the school.”\(^{48}\) He didn’t want the pregnant girls to be identified, and he also believed the content, which discussed “sexual activity and birth control were inappropriate for some of the younger students at the school.”\(^{49}\) The principal also did not approve that the student in the divorce article complained about her father, while the father did not consent to its publication nor did he have an opportunity to respond to the comments made about him.\(^{50}\)

The Court said that public schools are not a forum for public expression, but “school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public’ or by some segment of the public, such as student organizations.”\(^{51}\) This decision did not use the *Tinker* standard since the policies of the school did not intend for the Spectrum to have indiscriminate use by students, and school officials reserved the forum as a supervised learning experience where they could regulate the contents as needed.\(^{52}\) The Court reasoned that “educators are entitled to exercise

\(^{46}\) *Hazelwood Sch. Dist.*, 484 U.S. at 262.
\(^{47}\) *Id.*
\(^{48}\) *Id.* at 263.
\(^{49}\) *Id.*
\(^{50}\) *Id.*
\(^{51}\) *Id.* at 267 (citing Perry Education Assn v. Perry Local Educators’ Assn., 460 U.S. 37, 47 (1983)).
\(^{52}\) *Hazelwood Sch. Dist.*, 484 U.S. at 270.
greater control over this form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”\textsuperscript{53} The Tinker rule is not to be followed “for determining when a school may refuse to lend its name and resources to the dissemination of student expression.”\textsuperscript{54} The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns”\textsuperscript{55} since the rights of students “must be applied in light of the special characteristics of the school environment.”\textsuperscript{56}

The last of the limitations on Tinker was announced in Morse v. Frederick. In this case, Principal Deborah Morse allowed students to stand alongside the road as the Olympic Torch Relay passed by the school on its way to the Winter Olympics in Salt Lake City, Utah.\textsuperscript{57} As the torchbearers and camera crew passed, Joseph Frederick and his friends held up a sign which read “BONG HiTS 4 JESUS.”\textsuperscript{58} Morse ordered the banner to be taken down because she thought the banner encouraged illegal drug use which violated the school policy that “prohibits any assembly or public expression that…advocates the use of substances that are illegal to minors.”\textsuperscript{59} Following the reasoning in Fraser and Hazelwood, which “acknowledged that schools may regulate some speech ‘even though the government could not censor similar speech outside the school,” \textsuperscript{60} the

\textsuperscript{53} Id. at 271.
\textsuperscript{54} Id. at 272-73.
\textsuperscript{55} Id. at 273.
\textsuperscript{56} Id. at 265 (citing Tinker, 393 U.S. at 506).
\textsuperscript{57} Morse, 551 U.S. at 397.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 398.
\textsuperscript{60} Id. at 405-06 (citing Hazelwood Sch. Dist., 484 U.S. at 266).
Court held “that schools may take reasonable steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”\(^{61}\) The majority’s limited holding regarding speech that can be interpreted as encouraging drug use was emphasized in a notable concurrence by Justice Alito and Justice Kennedy. The two Justices joined the majority opinion “on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”\(^{62}\) With these four cases in mind, we turn to the current controversy regarding the “I ♥ Boobies! (KEEP A BREAST)” bracelets.

Part II: The “I ♥ Boobies!” Split of Authority in the Federal Courts

Cancer is a common and deadly disease that affects many people around the world and it is estimated that there were 585,720 cancer deaths in 2014.\(^{63}\) One of the leading cancer research organizations is the American Cancer Society, which has a mission “dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service,”\(^{64}\) while starting a movement among cancer patients for more birthdays.\(^{65}\) The American Cancer Society provided statistics for breast cancer and estimated that in 2015, “1 in 8 (12%) women in the US will develop invasive breast cancer during their lifetime. About 231,840 new cases of invasive breast cancer were expected to be diagnosed among U.S. women, as well as an estimated 60,290 additional cases of

\(^{61}\) Id. at 410.
\(^{62}\) Id. at 422 (Alito, J., concurring).
in situ breast cancer.” It is also estimated that in 2015, “approximately 40,290 U.S. women were expected to die from breast cancer. Only lung cancer accounts for more cancer deaths in women.” Since breast cancer is such a deadly disease, there are many national organizations that are researching and raising money to find a cure. Some of these organizations are: The National Breast Cancer Foundation, Inc., Susan G. Komen, and The Keep A Breast Foundation (Keep A Breast), just to name a few.

The Keep A Breast Foundation’s mission statement provides that its nonprofit organization is the “leading youth-focused, global, nonprofit breast cancer organization,” and its “mission is to eradicate breast cancer for future generations” by providing “support programs for young people impacted by cancer” and by educating “people about prevention, early detection, and cancer-causing toxins in our everyday environment.” The organization plans to accomplish this goal with the motto “art. education. awareness. action.” This four prong approach is designed to draw attention to breast cancer in a cool and trendy way so young people can learn about cancer and hopefully take up an initiative to help raise awareness. The company believes that “young women’s negative body image seriously inhibit their awareness of breast cancer” and “the Foundation’s products often seek to reduce the stigma by speaking to young people in a voice they can relate to.” Keep A Breast tried to “start a conversation about that taboo in a light-hearted way and to break down inhibitions keeping young women from performing self-examinations”

67 Id.
70 See, supra, n. 3.
73 Id.
74 B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013) (internal quotations omitted)
with the “I ♥ Boobies!” campaign.\textsuperscript{75} The organization sells various items including bags, t-shirts, hats, jackets, and different colored silicone bracelets which read “check y♥rself! (KEEP A BREAST)” and “I ♥ Boobies! (KEEP A BREAST).”\textsuperscript{76} These bracelets, which became extremely popular, are considered “the ‘pink ribbon’ of the younger generation.”\textsuperscript{77} The “I ♥ Boobies! (KEEP A BREAST)” bracelets are at the core of the circuit split, which gives rise to the question whether these bracelets warrant First Amendment freedom of speech protection in public schools.

As the “I ♥ Boobies! (KEEP A BREAST)” bracelets became more popular, they became the pop-culture fashion trend that all of the kids needed to have in school,\textsuperscript{78} similar to the Livestrong bracelet trend in 2004,\textsuperscript{79} and the Silly Bandz trend in 2010.\textsuperscript{80} This led to incidents in many states where school officials banned or confiscated the bracelets.\textsuperscript{81} Three of these incidents

\textsuperscript{75} Id. (internal quotations omitted)


\textsuperscript{78} See B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 299 (3d Cir. 2013) (B.H. acknowledged that she bought the bracelet “because she saw ‘a lot of friends wearing’ the bracelets.”).


\textsuperscript{80} Bruce Horovitz, Silly Bandz Fad Fades in a Matter of Months, USA Today. (Dec. 17, 2010), http://usatoday30.usatoday.com/money/industries/retail/2010-12-17-sillybandz17_ST_N.htm (discussing the immediate success then decline of the company who produced rubber band bracelets in various different shapes).

in Wisconsin, Indiana, and Pennsylvania found their way in federal court. The issue in those three cases was whether the “I ♥ Boobies! (KEEP A BREAST)” bracelets constituted free speech for the students in middle schools and high schools. The federal courts came to different conclusions in deciding this issue. Two federal courts deferred to the school administration in holding that the “I ♥ Boobies! (KEEP A BREAST)” bracelets should not receive First Amendment free speech protection among students, thus allowing school officials to ban the bracelets in school. The other case, which went up to the Third Circuit Court of Appeals, did not defer to the school administration and determined that the bracelets should be given First Amendment protection in schools.

In *K.J. v. Sauk Prairie Sch. Dist.*, which was decided in Wisconsin, the plaintiff who wore the bracelet was a thirteen year old female who attended Sauk Prairie Middle School as a seventh grade student.\(^{82}\) The middle school originally banned the “I ♥ Boobies! (KEEP A BREAST)” bracelets, but later allowed students to wear them inside-out\(^{83}\) even though there were no disruptions inside the classrooms or outside the school.\(^{84}\) The middle school also tried to provide an alternative for the students by selling bracelets that read “Sauk Prairie Eagles support breast cancer awareness.”\(^{85}\) Principal Ted Harter concluded that the bracelet “was a sexual innuendo in violation of the dress code” that simply “elicit[s] attention by sexualizing the cause of breast cancer awareness.”\(^{86}\) He also stated that it was a “distraction, that it was inappropriate slang, and that other people, including some teachers, were offended,” and the “slogan was inappropriate and

\(^{82}\) *K.J.*, 2012 U.S. Dist. LEXIS 187689 at *2.

\(^{83}\) Note: The inside of the bracelet contains the Foundation’s website (www.keep-a-breast.org) and the Foundation’s motto (“art. education. awareness. action.”)

\(^{84}\) *K.J.*, 2012 U.S. Dist. LEXIS 187689 at *3-4.

\(^{85}\) *Id.* at *4.

\(^{86}\) *Id.* at *4-5.
trivialized the disease.” Harter had a “goal of fostering respectful discourse by encouraging students to use ‘correct anatomical terminology’ for human body parts.”

The school officials believed they could prohibit the bracelets by relying on Fraser, which held “that school officials may prohibit students from using certain lewd, vulgar, or offensive terms at school regardless whether the speech causes a substantial disruption.” The federal court in the western district of Wisconsin went on to define what it means for a word to be vulgar, saying that “lewd and indecent sexual innuendo is one way that speech may be vulgar, offensive or inappropriate, but not the only one. The word ‘vulgar’ is ambiguous, with senses ranging from ‘common’ and ‘plebeian,’ to ‘lacking in cultivation’ and ‘morally crude’ to ‘offensive in language’ and ‘lewdly or profanely indecent.’” This court is of the view “that Fraser permits schools to prohibit vulgar or offensive speech that is related to, but falls just short of being, profane, obscene or indecent.”

The court also took the view that “courts should show deference to judgments by school administrators about the propriety of putatively lewd or vulgar speech.” Considering student speech in schools and deference to school officials:

An education in manners and morals cannot be reduced to a simple formula, nor can all that is uncivil be precisely defined . . . If the schools are to perform their traditional function of “inculcat[ing] the habits and manners of civility,” Fraser, 478 U.S. at 681, they must be allowed the space and discretion to deal with the nuances. The touchtone is reasonableness.

87 Id. at *5.
88 Id. at *22.
89 Id. at *7 (citing Fraser, 478 U.S. at 680).
91 Id. at *14.
92 Id.
93 Id. at *15 (citing Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530, 1542 (7th Cir. 1996)).
That means that school officials can prohibit speech that is lewd or vulgar as long as their determination is reasonable. Conversely, the school cannot prohibit speech if their determination is unreasonable. The court determined that “the statement ‘I ♥ Boobies! (KEEP A BREAST)’ straddles the line between vulgar and mildly inappropriate. ‘Boobies’ is a morally immature and crude term for breasts. Merriam Webster’s Collegiate Dictionary 1326 (10th ed. 1997) defines ‘booby’ as ‘BREAST – sometimes considered vulgar.’” It is a “sexual innuendo that is vulgar, at least in the context of a middle school.” After the court decided that the term “I ♥ Boobies! (KEEP A BREAST)” was a vulgar sexual innuendo, it determined that it was unlikely that the plaintiffs can show that it was unreasonable for the school to make this decision. Since the school’s ban was reasonable, the court allowed the bracelet ban to be upheld.

A similar case that resulted in the same outcome as K.J. v. Sauk Prairie Sch. Dist. was J.A. v. Fort Wayne Cmty. Sch. Here, plaintiff was a sophomore at North Side High School, and she was given an “I ♥ Boobies! (KEEP A BREAST)” bracelet by her mother who was a breast cancer survivor. North Side High School dress code “prohibits students from wearing ‘inappropriate’ plastic bracelets that contain ‘messages that are solicitous, profane, or obscene’” and under this policy, the school had previously confiscated bracelets that read “I’m a free bitch,” “Fuck Off,”

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94 Id. at *17.
95 Id.
97 Id.
98 Id. at 24. (The court reasoned that court did not restrict the breast cancer awareness message, since they allowed students to wear the bracelets inside out, and they also provided their own bracelets which read “Sauk Prairie Eagles support breast cancer awareness” as an alternative. The school tailored the restriction to the age and maturity of students, so the bracelets were not banned in the high school. Schools have to be more concerned about appropriateness of speech regarding human sexuality. Lastly, “if a school committee and administration decide to limit clothing with sexually provocative slogans, and diffuse somewhat an already highly charged atmosphere, in order to protect students and enhance the educational environment—even where the specific items banned may be relatively innocuous in today’s world—the court is unlikely to conclude that this action violates the First Amendment.” Citing Pyle v. South Hadley School Committee, 824 F. Supp. 7, 11 (D. Mass. 1993).)
99 Id.
101 Id. at *2-3.
“Sexy,” “Ask me about my wiener,” “Bad Ass,” and “Save the Boobs.” After an incident where a male student wearing the bracelet harassed a female student, the school determined “that the bracelet’s terminology was ‘offensive to women and inappropriate for school wear’ making the bracelet ‘lewd, vulgar, obscene, solicitous, and/or plainly offensive speech.’” A number of students, including J.A., had their “I ♥ Boobies! (KEEP A BREAST)” bracelets confiscated, and that prompted this lawsuit.

The federal court in the northern district of Indiana engaged in similar analysis as K.J. v. Sauk Prairie Sch. Dist. in determining whether these bracelets were entitled to First Amendment freedom of speech protection. The court also relied on the Fraser rule, which gave schools deference in determining what type of speech is lewd or vulgar. This is reasonable “because vulgarity, lewdness, and obscenity are determined by ‘opinions and perspectives’ that ‘vary widely from one community to the next’” depending on contextual subtleties. School officials “‘know the age, maturity, and other characteristics of their students’” and they are in a better position than federal judges to determine what speech would be lewd or vulgar. In examining the school’s ban on the “I ♥ Boobies! (KEEP A BREAST)” bracelets, the court used a reasonableness standard to determine “whether an objective observer could reasonably interpret the slogan as lewd, vulgar, obscene, or plainly offensive,” and this requires the court to “evaluate the context, content, and form of speech in addition to the age and maturity of the students.” The court does not have to examine the subjective intent nor social or political issues involved; the only inquiry is “whether

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102 Id. at *3.
103 Id. at *3-4.
104 Id. at *4.
105 See Fraser, supra, n. 45 at 685.
107 Id. (citing B.H., 725 F.3d at 334, fn. 5 (Hardiman, J., dissenting)).
108 Id. at *7-8 (citing B.H., 725 F.3d at 308).
109 Id. at *8-9.
the school made an objectively reasonable decision in determining that the bracelet was lewd, vulgar, obscene, or plainly offensive."¹¹⁰

The court concluded that the phrase “I ♥ Boobies!” may be lewd or vulgar as interpreted by a reasonable observer.¹¹¹ In reaching this decision, the court noted three instances in the school that show “that the bracelet’s message can also connote a sexual attraction to breasts, especially when it is used by teenage boys.”¹¹² These three incidents, along with the “low maturity level at the school,” made it reasonable enough for the school officials to ban the bracelet.¹¹³ Since the ban was reasonable, and nothing indicated unreasonableness, the court deferred to the school’s decision, and upheld the ban.¹¹⁴

The two previous cases upheld the bracelet ban because the courts simply deferred to school administration who had a reasonable explanation for banning the bracelets. In B.H. v. Easton Area Sch. Dist., the Third Circuit came to the opposite conclusion, which results in a split among the federal courts. B.H. and K.M. were middle-school students at Easton Area Middle School and the two teenage girls wore the “I ♥ Boobies (KEEP A BREAST)” bracelets, as the trend took the country by storm.¹¹⁵ A few teachers noticed the bracelets; “one found the bracelets offensive because they trivialized breast cancer. Others feared that the bracelets might lead to offensive comments or invite inappropriate touching.”¹¹⁶ The assistant principal, Anthony

¹¹⁰ Id. at *12.
¹¹¹ Id. at *16.
¹¹² J.A., 2013 U.S. Dist. LEXIS 117667 at *14-15 (The three incidents were “First, Defendant banned the bracelet after a male student stared at a girl and repeated the words "I love boobies" while wearing the bracelet. Second, Plaintiff testified that male students liked to repeat the phrase while wearing the bracelets, not because they were supporting breast cancer awareness, but because they liked saying "boobies." Third, there was an incident where some high school students were "taunting" a particular student about the bracelet.”). ¹¹³ Id. at *17.
¹¹⁴ Id.
¹¹⁵ B.H., 725 F.3d at 298-99.
¹¹⁶ Id. at 299.
Viglianti, told the teachers that “they should ask students to remove wristbands that had the word ‘boobie’ written on them, even though there were no reports that the bracelets had caused any in-school disruptions or inappropriate comments.”\(^{117}\) After the girls were seen with the bracelets on, they were escorted to Mr. Viglianti’s office, where the girls still refused to take off their bracelets, “citing their rights to freedom of speech.”\(^{118}\) The school punished them with “one and a half days of in-school suspension” citing “disrespect, defiance, and disruption.”\(^{119}\) Easton Area Middle School has a strict dress-code policy that bans distasteful “clothing imprinted with nudity, vulgarity, obscenity, profanity, and double entendre pictures or slogans.”\(^{120}\) Ultimately, the schools ban of the “I ♥ Boobies (KEEP A BREAST)” bracelets was based on the “dress-code policy together with the bracelets’ alleged sexual innuendo.”\(^{121}\) The school reasoned that the bracelets’ sexual double entendre “could be harmful and confusing to students of different physical and sexual development levels,” and that middle-school students, who generally have immature views of sex, would interpret the bracelet with a sexual connotation, and not as a message promoting breast cancer.\(^{122}\)

The court reasoned that “the bracelets did not contain lewd speech under Fraser and did not threaten to substantially disrupt the school environment under Tinker.”\(^{123}\) The court concluded that “because the ‘I ♥ Boobies! (KEEP A BREAST)’ bracelets are not plainly lewd and express support for a national breast-cancer-awareness campaign…they may not be categorically restricted

\(^{117}\) Id.
\(^{118}\) Id. at 300.
\(^{119}\) Id. (internal quotations omitted).
\(^{120}\) B.H., 725 F.3d at 300 (noting that the school has banned shirts that promote “Hooters and Big Pecker’s Bar and Grill, as well as clothing bearing the phrase ‘Save the ta-tas.’”).
\(^{121}\) Id. at 301.
\(^{122}\) Id.
\(^{123}\) Id.
The court announced that there were three categories that determine when a school is allowed to limit a student’s freedom of speech. They are:

1. Plainly lewd speech, which offends for the same reasons obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues.
2. Speech that does not rise to the level of plainly lewd but that a reasonable observer could interpret as lewd may be categorically restricted as long as it cannot plausibly be interpreted as commenting on political or social issues.
3. Speech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted.

Under category one, “plainly lewd speech ‘offends for the same reasons obscenity offends’ because speech in that category is ‘no essential part of any exposition of ideas’ and thus carries very ‘slight social value,’” and this speech can be restricted even if it could be interpreted as commenting on any political or social issue.

Under category two, “schools may also categorically restrict ambiguous speech that a reasonable observer could interpret as lewd, vulgar, profane, or offensive – unless… the speech could also plausibly be interpreted as commenting on a political or social issue.” Here, “courts should defer to a school’s decisions to restrict what a reasonable observer would interpret as lewd, vulgar, profane, or offensive” since “school officials know the age, maturity, and other characteristics of their students far better than judges do.”

The court also used the “political and social issue” language from Justice Alito and Kennedy’s concurrence in Morse, which states that student speech cannot be restricted if it involves political or social issues. The majority used the “narrowest grounds” approach in determining that Alito’s concurrence should be the controlling opinion of Morse. Category three essentially said...
that schools cannot ban speech that is not plainly lewd, and could plausibly be interpreted as commenting on political or social issues.\footnote{B.H., 725 F.3d at 298}

The court determined that the “I ♥ Boobies! (KEEP A BREAST)” bracelets were not plainly lewd.\footnote{Id. at 320.} The bracelets do not have any “resemblance to Fraser’s ‘pervasive sexual innuendo’ that was ‘plainly offensive to both teachers and students,’” and the bracelets are not “akin to the seven words that are considered obscene to minors on broadcast television.”\footnote{Id. (The seven words were “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits” Pacifica Found., 438 U.S. at 751.).} The term ‘boobie’ is merely a sophomoric synonym for breast, and any “reasonable observer would plausibly interpret the bracelets as part of a national breast-cancer-awareness campaign, an undeniably important social issue.”\footnote{Id.} The court noted that there were no substantial disruptions in school, and that “student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to ‘a showing of mild curiosity’ by other students, ‘discussion and comment’ among students, or even some ‘hostile remarks’ or ‘discussion outside of the classrooms’ by other students.”\footnote{Id. at 321-22 (citing Holloman v. Harland, 370 F.3d 1252, 1271-72 (11th Cir. 2004)).} Although the court established a broad rule allowing lewd speech as long as it comments on a social or political issue, the court issued a limited holding only disallowing the ban on the “I ♥ Boobies! (KEEP A BREAST)” bracelets.\footnote{Id. at 323.} The court did not enjoin the school’s regulation on other types of apparel like “Save the ta-tas” shirts or testicular-cancer-awareness merchandise.\footnote{B.H., 725 F.3d at 323.}
Judge Hardiman filed a dissent criticizing the majority for following the Fifth Circuit in declaring Justice Alito’s concurrence as the controlling opinion of Morse. He, along with Judge Chagares, Jordan, Greenaway, and Greenberg, argued that “Morse’s ‘narrow’ holding does not apply unless a school has regulated student speech that it viewed as advocating illegal drug use,” and Morse shouldn’t be used “to modify the distinct carve-out established in Fraser” that bans lewd or vulgar speech. In analyzing whether the “I ♥ Boobies! (KEEP A BREAST)” bracelets deserve constitutional protection, the dissent focused on objective reasonableness, and determined that in a middle school context, the bracelets could be seen as an inappropriate sexual innuendo. The bracelet would fall into one of the Fraser categories of lewd, indecent, or vulgar speech, and thus, censorship by school officials would be constitutional. Judge Greenaway also filed a dissent stressing the difficulties and impracticalities of applying the majority’s newly adopted test when school officials are determining what they are and are not allowed to ban.

**Part III: The New Proposed Test**

As seen above, the federal courts have reached two different conclusions in determining whether the “I ♥ Boobies! (KEEP A BREAST)” bracelets constitute free speech in school. This is because the courts used different forms of analysis. The courts in *K.J.* and *J.A.* showed great

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138 Id. at 325 (Hardiman, J., dissenting) (noting that nine of ten appellate courts have used the Morse majority as the controlling opinion. Only the Fifth Circuit uses the Justice Alito’s concurrence in Morse as the controlling opinion).

139 Id. at 333 (Hardiman, J., dissenting).

140 Id. (Hardiman, J., dissenting).

141 Id. at 335 (Hardiman, J., dissenting).

142 See Fraser, supra, n. 45 at 685.

143 B.H., 725 F.3d at 339 (Greenaway, Jr., J., dissenting) (noting that there is no guidance to the two questions: “What words or phrase fall outside of the ambiguous designation other than the ‘seven dirty words’?” and “how does a school district ever assess the weight or validity of political or social commentary?” On one hand, a student can say breast, but on the other hand, the student cannot say tits because it is one of the “seven dirty words.” This will leave the school officials confused when trying to handle different slang terms like “ta tas.” This would also leave schools powerless when anatomically correct terms are used on merchandise as part of a campaigns (“I ♥ penises,” ‘I ♥ vaginas,’ ‘I ♥ testicles,’ or ‘I ♥ breasts.’”). Lastly, it is argued that this test provides no parameters in that most things can be thought of as touching on a political and social issue.).
deference to the school administration and permitted the bracelet ban since the school made a reasonable decision in deciding whether an objective observer would interpret the slogan as lewd or vulgar. The student would have to allege that the school’s interpretation was unreasonable, and this task is close to impossible. Essentially, once it is determined that the school made a reasonable decision, that decision will most likely be upheld by the courts. The Third Circuit in *B.H.* held that the bracelets constituted free speech because of its alternate interpretation which dealt with a political or social issue. Although I agree with the decision in *B.H.*, I do not agree with the reasoning that got to this conclusion, for I believe that it produces a slippery slope argument which would not be applied effectively and consistently in all the student speech cases that arise throughout the country. The rule pronounced in *B.H.* will then lead to more litigation and splits among various federal courts. Instead of this broad and overreaching rule announced in *B.H.*, the courts should follow a more uniform approach of balancing factors to determine whether the speech is lewd or vulgar.

The importance of education “spans from the ideas of our founding fathers to the legislative and legal efforts of today.”\(^{144}\) The “fundamental purpose of American public schools is to teach the basic skills of reading, writing, and arithmetic… Such education is essential to preserve the political and economic foundations of our society.”\(^{145}\) *Brown v. Board of Education* stressed the importance of schools by saying that:

> Education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities…It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to...


adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.\textsuperscript{146}

In educating the youth of this country, schools have to do more that teach kids “about ‘books, the curriculum, and the civics class.’ Society also expects schools to ‘teach students the boundaries of socially appropriate behavior,’ including the ‘fundamental values of habits and manners of civility essential to a democratic society.’”\textsuperscript{147} Schools not only educate the youth, but one of the main goals is to turn them into law abiding citizens, and this is done by exposing the students to different issues in a controlled school setting. This way, the students will be better prepared to handle situations when they are outside of school without the guidance of a teacher. As stated by two historians in \textit{Fraser}, “public education must prepare pupils for citizenship in the Republic…. It must inculcate 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.”\textsuperscript{148} This is repeated in \textit{Ambach v. Norwich}, which states “the objectives of public education as the inculcation of fundamental values necessary to the maintenance of a democratic political system.”\textsuperscript{149} This means educating the youth to be tolerant of others who speak of “divergent political and religious views, even when they are unpopular.”\textsuperscript{150} Since schools are the instruments of the state, they “may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech.”\textsuperscript{151} With education being such an important function for the continued prosperity of this country, schools are allowed to construct the curriculum in a way that they feel will teach the students various lessons in the most

\textsuperscript{147} \textit{B.H.}, 725 F.3d at 305-06 (quoting \textit{Fraser}).
\textsuperscript{148} Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986).
\textsuperscript{149} \textit{Id.} (citing Ambach v. Norwich, 441 U.S. 68, 76-77 (1979)).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 683.
effective way. Although the schools are allowed to construct the curriculum in this way, they should still be conscious of society and the students in making decisions about the curriculum and school policies. That being said, they must be careful to preserve the rights of free speech, so that the students are exposed to various viewpoints. Courts should be aware of the discretion that the school administration possesses and not be completely deferential to them, because there is a risk that the school could trample students’ freedom of speech.

When the court has to examine a school’s decision regarding its curriculum or policies, the reasonableness standard used in K.J. and J.A. should not be the only test that the courts apply. Although the students have a limited right to freedom of speech when they are at school, they still do possess the right. The reasonableness standard would give school administration too much freedom and discretion when they are limiting student speech. Also, it is close to impossible for a student to rebut the presumption that the teacher’s interpretation is unreasonable. An integral part of school and learning is not only what the teachers are teaching in the classroom, but it is the interaction among friends and other students in the hallway, in the cafeteria, and outside on the playground. This is where students can spark conversations about subjects that do not deal with “the three R’s of reading, writing, and arithmetic.” As noted in B.H.153 and K.J.,154 the bracelets that the girls wore sparked a lot of conversations among peers that helped raise awareness about breast cancer, ways to prevent the cancer, and how it affects others in the community. Schools should not be able to silence student speech because it is controversial. As stated by Justice Brandeis, “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced

153 B.H., 725 F.3d at 299.
silence.\textsuperscript{155} I do not think that school administration should be given full discretion in determining what is considered lewd and vulgar, simply because they might be able to justify most things as long as it is reasonable. That being said, school administration should initially be given deference since they are in the best position to determine what students can maturely handle, but this should not be complete deference according to a reasonableness standard.

The analysis used in \textit{B.H.} is also flawed, and should not be used by federal courts. By following the concurrence in \textit{Morse}, the courts will not allow a school to ban student speech if it can plausibly be interpreted as discussing a political or social issue. Frankly, this is the wrong interpretation of \textit{Morse}. Justice Alito joined the majority “on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”\textsuperscript{156} The court in \textit{B.H.} merely applied the second factor in the analysis relating to political or social issues. It failed to acknowledge that the first part relates to reasonable interpretation advocating illegal drugs. \textit{Morse} is a limited holding that places a restriction on the rule in \textit{Tinker}, which only deals with the use of illegal drugs, and nothing else. Similarly, \textit{Fraser} deals with lewd and vulgar speech, and \textit{Hazelwood} deals with a school sponsored expressive activity. The Third Circuit premised their decision on the misinterpretation of \textit{Morse} so the rule would fit the desired outcome.

Also, the \textit{B.H.} holding is too broad of a rule since any issue can be interpreted as political or social. As the dissent in \textit{B.H.} points out, this can lead to a slippery slope argument, and the school administration would not be able to do anything about it.\textsuperscript{157} The dissent specifically notes

\textsuperscript{155} Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
\textsuperscript{156} Morse, 551 U.S. at 422 (Alito, J., concurring).
\textsuperscript{157} B.H., 725 F.3d at 337-38 (Hardiman, J., dissenting).
that “The Testicular Cancer Awareness Project sells “feelmyballs” bracelets to encourage male self-examinations and general awareness.” In following the analysis from the B.H. majority, as long as the bracelets do not cause a substantial disruption at school, these bracelets would have to be allowed in schools because they deal with the social issue of testicular cancer. The decision in B.H. also would not be limited to the “I ♥ Boobies! (KEEP A BREAST)” bracelets. It would mean that the once banned shirts that read “save the ta-tas” and the bracelets that said “Save the Boobs” would also have to be allowed at schools since they relate to a social issue. What constitutes a social or political issue is also very broad, and can include various subject areas that do not belong in a school environment. For example, if a kid wears a shirt that advocates legalization of drugs, or a shirt that insults the President, these would also have to be allowed in schools as long as there is not a substantial disruption since they deal with a political issue. And it is also likely that these messages worn by the students will portray bias. In educating students, the school should be responsible for teaching objective facts, and letting the students come to their own conclusions. Both sides of the issue should be presented to the students, so they could then have educated conversations without being swayed by someone’s biases. This is not to mention how this standard is very unpredictable, and subjective based on when the case was decided. For example, in Nuxoll v. Indian Prairie Sch. Dist. #204, decided in 2008, later affirmed by Zamecnik v. Indian Prairie Sch. Dist. #204 in 2011, the Seventh Circuit held that the school could not ban a student from wearing a shirt that said “Be Happy, Not Gay” because gay was “only tepidly negative; ‘derogatory’ or ‘demeaning’ seems to be too strong a characterization.”

159 Supra, n. 137.
160 Supra, n. 102.
161 Nuxoll v. Indian Prairie Sch. Dist. #204, 523 F.3d 668 (7th Cir. 2008).
162 Zamecnik v. Indian Prairie Sch. Dist. # 204, 636 F.3d 874 (7th Cir. 2011).
163 Nuxoll, 523 F.3d at 676.
hard to imagine a court in 2015 holding that this shirt should be allowed in schools, even if there was no substantial disruption, because telling someone to not be gay is derogatory and demeaning. That being said, this rule would make it extremely difficult to apply because most things can be related to social or political issues, and most of these issues change as time passes. However, I do think that the political and social analysis should be incorporated in the court’s analysis, but it should not be as broad and overreaching as the majority in \textit{B.H.} hold.

In establishing a new standard for all courts to follow, a multidimensional analysis should be performed. First, the courts should show deference to the schools similar to the reasonableness test used in \textit{K.J} and \textit{J.A}. This is because “school officials know the age, maturity, and other characteristics of their students far better than judges do” and they will be better off in determining how school children will react to various social or political issues.\textsuperscript{164} Judge Ponsor, in asserting the importance of deference to school officials, said that in placing limits on vulgarity in schools, those issues “are to be debated and decided within the community; the rules may even vary from one school district to another as the diversity of culture dictates.”\textsuperscript{165} As stated above, this deference cannot be absolute and it cannot be the only thing that the courts consider in making their determination on the freedom of speech issue. If the court finds that the school administration made a reasonable decision in banning the student speech, the court should then see if there is an alternative plausible meaning that relates to a social or political issue. This follows the analysis in \textit{B.H.} and once again this is not absolute, as seen with the troubles above. The political and social element of the test is a way to ensure that school administration does not complete discretion in making decisions, and that they should be mindful of political and social messages that students

\textsuperscript{164} See \textit{B.H.}, supra, n. 128 at 308.
may want to portray. If the student speech is considered political or social, the court should then see if it passes *Tinker*, and *Fraser*.

After determining that there is an alternate interpretation to the saying, the court must see if it passes the *Tinker* test.\(^{166}\) If there is a substantial disruption, not simply a fear of a substantial disruption, then the school is allowed to ban whatever speech the students are claiming to be free. For example, the Fifth Circuit banned a student from wearing a shirt with the Confederate flag because it would “cause substantial disruption of or material interference with school activities” in a school that had previously shown racial hostility and tension.\(^{167}\) Presumably, if there was no substantial disruption, this shirt would have constituted free speech under the *B.H.* analysis even though it speaks to such a radical political viewpoint. To the contrary, the student in *Nuxoll v. Indian Prairie School District #204*, was allowed to wear the shirt that read “Be Happy, Not Gay” because the school could not show that it would result in a substantial disruption in the school environment, nor did the court think the word was lewd or vulgar.\(^{168}\) Both would be considered offensive shirts, but the court came to differing conclusions based on the substantial disruption test in *Tinker*. This, however, should not end the discussion of whether the school should ban speech.

The next step in the analysis should look at the *Fraser* rule that bans lewd, and vulgar content.\(^{169}\) Since “lewd” and “vulgar” are terms that have different meanings depending on who is interpreting them, the court should implement factors in determining whether the speech should be considered lewd and vulgar. These factors should be balanced to determine whether speech should be prohibited in schools, and none of these factors should be dispositive. The first factor

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\(^{166}\) See *Tinker*, supra, n. 32 at 513.

\(^{167}\) *A.M. v. Cash*, 585 F.3d 214, 222 (5th Cir. 2009).

\(^{168}\) *Nuxoll*, 523 F.3d at 676.

\(^{169}\) See *Fraser*, supra, n. 45 at 685.
should be looking at the age and maturity of the students in the school. This includes the age of the students who are expressing their freedom of speech, and also the age of the students who are exposed to the speech. There are some things that are perfectly acceptable for a high school student to say, but if an elementary school student would say the same thing, it would make anyone cringe. In Fraser, a high school senior delivered a speech with many sexual innuendos, which may have been acceptable and comical for many of the senior high school students.\textsuperscript{170} The problem was he was delivering the speech to many 14 year old freshmen who were in the audience and who did not understand the sexual jokes.\textsuperscript{171} Here, in the case of the bracelets, the bracelets were being worn by middle school, and high school students. There is a noticeable distinction between middle school and high school students. There are some things that high school students can handle more than middle school students, and this is evident in K.J. where the school banned the bracelets in the middle school, but not in the high school.\textsuperscript{172} Regardless, the bracelets only said the word boobies, and that pales in comparison to the sexual metaphors delivered in Fraser.

Going off this notion, the court should look at how the speech is presented, and to how many people. Is it a captive audience situation where students are required to be in attendance or is it three students talking to themselves on the playground? Censorship would be more appropriate when the controversial speech is exposed to more students, compared to the speech only being exposed to a few students. In Fraser, there were over 600 students who were required to be in the auditorium to listen to the school sponsored speeches.\textsuperscript{173} Here, with the bracelets, nothing was being said, and the word boobies was printed on a bracelet. The bracelet is not shown to 600 students at once, and the school is not requiring anyone to view the bracelets. This is simply

\textsuperscript{170} Fraser, 478 U.S. at 677.
\textsuperscript{171} Id.
\textsuperscript{172} K.J., 2012 U.S. Dist. LEXIS 187689 at *4.
\textsuperscript{173} Fraser, 478 U.S. at 677.
a message which is imprinted on a rubber bracelet. No student is required to look at the bracelet, and one bracelet is not going to be shown to 600 students. It is likely that many students and faculty will not even notice what is written on the bracelet, which can easily be covered by a shirt or if it flips inside out.

Another factor for the court to consider is how many people are participating in the controversial form of speech. This could be used to demonstrate how powerful and popular the viewpoint is. For the most part, this factor should weigh for protection of speech if a majority of the students are participating in the speech, compared to if only a few kids are participating in the speech. Although the popularity of the viewpoint cannot be used to ban the speech, it can be used to demonstrate what others in the school think. In *Fraser*, only one student was making the speech, while a few students in the audience were participating with gestures.\textsuperscript{174} This is different from the bracelets, which many of the students in the school were wearing. It was a popular item that united many students over the issue of breast cancer. This was not one individual’s divergent view, which would weigh towards censorship. There were many students who were wearing the bracelet, and they should be afforded a little more protection than someone acting alone.

The courts should also examine the explicitness of the message. If the message not explicit, and does not clearly state anything that deserves censorship, then the schools should not ban the speech. In *Fraser*, nothing explicit was being said, only disguised sexual metaphors.\textsuperscript{175} Even though the speech was an elaborate sexual metaphors, and did not specifically refer to any sexual body parts or acts, the speech was still sexual in nature referring to his friend as “firm,” and someone who “pounds it in.”\textsuperscript{176} This differs from the bracelets where nothing sexually explicit is

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\textsuperscript{174} *Id.* at 677-78. \\
\textsuperscript{175} *Id.*. \\
\textsuperscript{176} *Id.*. 
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written on the bracelet. It merely says “I ♥ Boobies! (KEEP A BREAST).” The mention of boobies does not turn the bracelet into a sexually explicit message. Also, the reference to “(KEEP A BREAST)” at the end of the bracelet indicates that there is some other meaning to the bracelet that makes it more meaningful than a bracelet that only says “I ♥ Boobies!”

This relates to another factor which has to do with the value of the speech. This is similar to the political and social issue that would have already have been satisfied in this test. This factor would look at speech that does not necessarily have a clear political or social meaning, but still has a meaningful message. It would eliminate mildly inappropriate speech that is that has no social or political value like “BONG HiTS 4 JESUS”177 or “Coed Naked Band; Do It To The Rhythm.”178 Here, the bracelet has a significant meaning, and money used to purchase the bracelet is being used to research and fight cancer. The creators of the bracelet used the words strategically to ensure the bracelets success among the youth. The Keep A Breast Foundation wants to make the youth more aware of breast cancer so they designed a cool, somewhat scandalous, and trendy fashion statement. If the bracelet did not have a breast cancer awareness message to it, this factor would favor the schools, but since there is a positive message to the bracelet, it cuts towards freedom of speech.

Part IV: Conclusion

The use of this balancing test stated above would be much more effective and provide guidelines for the courts to determine school speech issues. This test is better than the broad rule in B.H., and protects a student’s freedom of speech which might be at risk if courts rely solely on the reasonableness test. Ultimately, the “I ♥ Boobies! (KEEP A BREAST)” bracelets issue would

177 Id., at 397.
result in the same outcome as *B.H.* under the proposed test. Under the proposed form of analysis, courts would begin their analysis with the reasonableness test. It is likely that the courts would defer to school administration and determine that the ban is reasonable similar to *K.J.* and *J.A.* This doesn’t end the analysis, and the courts would then look to see whether there is an alternate meaning to the bracelet which involves a political or social issue. The courts, similar to *B.H.* would determine that there is an alternate breast cancer awareness meaning which would contrast with the schools initial determination to ban the bracelets. This result essentially sets aside the reasonableness test and the courts must go further and examine the *Tinker* and *Fraser* tests. Here, there were no substantial disruptions within the school, so the court would have to go through the various factors to determine if the bracelet is considered lewd and vulgar as held in *Fraser*. Using the factors, the courts would look at the age and maturity of the students, and determine that the students in middle school and high school would be able to handle the bracelets since there has not been any previous disruptions because of the bracelets. The courts will see that this is not akin to a speech in front of an audience since it is a small rubber bracelet which many people might not even notice. This is also a case where many students are wearing the bracelet, and it is not just one student acting out. The court will also see that the bracelet is not sexually explicit compared to *Fraser*, and lastly, the bracelet has a meaningful message which relates to breast cancer awareness. The court will then find that the bracelet should be given First Amendment freedom of speech protection, and allow it in schools.