Bracelets and the Scope of Student Speech Rights in *B.H. ex rel. Hawk v. Easton Area School District*

Jacquelyn Burke
*Boston College Law School, jacquelyn.burke@bc.edu*

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BRACELETS AND THE SCOPE OF STUDENT SPEECH RIGHTS IN B.H. EX REL. HAWK v. EASTON AREA SCHOOL DISTRICT

JACQUELYN BURKE*

Abstract: The U.S. Court of Appeals for the Third Circuit held that a district wide ban of bracelets containing the word “boobies” was an impermissible restriction of students’ First Amendment speech rights. The majority’s focus on the bracelets’ social message is critical for the preservation of students’ rights to discuss social issues, particularly health issues. Alternatively, Judge Hardiman’s dissent focused on the bracelets’ alleged sexual innuendo and did not give credence to the bracelets’ purpose. Judge Hardiman advocated upholding the ban due to the bracelets’ supposed sexual nature. Had Judge Hardiman prevailed, knowledge and awareness of a vital health issue would have been wrongly suppressed because of the disease’s connection to a sexual body part. It is important that the majority prevailed in order for students to maintain their rights to discuss and be well informed on social issues.

INTRODUCTION

During the 2010–2011 school year, middle school students, B.H. and K.M. wore bracelets with the slogan “I ♥ boobies! (KEEP A BREAST)” to the Easton Area Middle School.1 These bracelets, made by the Keep a Breast Foundation (“KABF”), were created with the purpose of stimulating dialogue and raising awareness about breast cancer in young women.2 Although there were no disturbances or disruptions to other students’ education as a result of these bracelets, the school and eventually the entire school district banned wearing the bracelets.3 B.H. and K.M.’s respective mothers filed a lawsuit against the school district challenging the constitutionality of the ban on § 1983 grounds for the infringement of the girls’ First Amendment right to free speech.4 This statute creates a civil cause of action for the deprivation of constitutional rights, privileges, or immunities.5

2 See id. at 298.
3 Id. at 299–300.
The Third Circuit, siding with the girls and their mothers, held that the ban infringed on the girls’ First Amendment speech rights. The court found that because “I ♥ boobies! (KEEP A BREAST)” is not “plainly lewd” and instead advocates for a social issue (breast cancer awareness), wearing the bracelets may not be unconditionally banned. Judge Hardiman wrote a dissent arguing that the bracelets were lewd and an inappropriate discourse in a school setting. Adopting Judge Hardiman’s perspective would have narrowed speech as it relates to young women’s awareness of vital health issues. The court noted that the fact that this social issue involved breasts did not justify its censorship. The Easton School District’s ban highlights the dangers of allowing censorship to prevail over awareness raising dialogue.

Education in schools should go beyond just the curriculum, and extend to learning about how to engage social issues and confront difficult realities. Because preventative care is essential for women in taking control of their health, all young women—including middle school students—should have every right to raise awareness and knowledge of breast cancer.

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6 See B.H. ex rel. Hawk, 725 F.3d at 323–24.
7 Id. at 302.
8 Id. at 336 (Hardiman, J., dissenting) (espousing the idea that expressions that are overly “sexualized” are inappropriate for young adults).
9 See id. at 324 (majority opinion) (pointing out that “schools cannot avoid teaching our citizens-in-training how to appropriately navigate the ‘marketplace of ideas.’” (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969))); Brief of the Keep a Breast Foundation in Support of Appellees and Affirmance at 34, B.H. ex rel. Hawk, 725 F.3d 293 (No. 11-2067) [hereinafter Brief of Keep a Breast Foundation]. The bracelets are not intended to be sexual speech, but instead “speech designed to raise awareness of breast cancer and reduce stigma associated with openly discussing breast health.” Brief of Keep a Breast Foundation, supra at 29. The bracelets carry a message of positive body image and support for breast cancer awareness. See id. at 22. The district court rejected the school district’s notion that all references to women’s breasts are “inherently sexual” and there is nothing offensive about talking about “breasts and breast health, even in a middle school context.” Brief of Appellees at 50, B.H. ex rel. Hawk, 725 F.3d 293 (No. 11-2067).
10 See Brief of the Student Press Law Center in Support of Appellees B.H. & K.M. et al., and Affirmance at 4–5, B.H. ex rel. Hawk, 725 F.3d 293 (3d Cir. 2013) (No. 11-2067) [hereinafter Brief of the Student Press Law Center].
11 See id. at 5–6, 34. (stating that the “social value” of breast cancer awareness is critical to the freedom of expression and ideas). The language of the “boobies” campaign takes aim at negative body images and taboos about self-touching in order to make women comfortable with speaking about their bodies. See Brief of Keep a Breast Foundation, supra note 9, at 29. B.H. bought the bracelet in order to raise awareness and initiate dialogue on that subject. Brief of Appellees, supra note 9, at 7–8 (noting that breast cancer screening helps catch it at its early stages when it is most treatable).
12 See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986). Public schools must prepare students to be citizens as well as teach students habits, manners, and values necessary for adult life in this country. Id.
13 See B.H. ex rel. Hawk, 725 F.3d at 335 (Hardiman, J., dissenting); Brief of Keep a Breast Foundation, supra note 9, at 8.
I. THE BANNED BRACELETS, A NATIONAL BREAST CANCER AWARENESS CAMPAIGN, AND THE IMPLICATIONS OF CENSORING STUDENT SPEECH

KABF is the international foundation that created the bracelets as part of an ongoing effort to raise awareness about breast cancer.\(^\text{14}\) KABF believes that young women’s “negative body image[s]” significantly restrict their knowledge and understanding of breast cancer.\(^\text{15}\) By targeting the bracelets to adolescent girls, KABF hoped to start a conversation about breast cancer in a light-hearted way.\(^\text{16}\) Their goal was for young women to become more comfortable speaking about breast cancer while simultaneously combating negative body images, educating young women about breast cancer, and encouraging them to perform self-examinations.\(^\text{17}\) B.H. and K.M. purchased these KABF bracelets in the fall of 2010 and wore them to the Easton Area Middle School.\(^\text{18}\) Shortly thereafter, the school banned the bracelets and punished the girls for continuing to wear them to school.\(^\text{19}\) The entire school district banned the bracelets.\(^\text{20}\) The girls, however, brought suit against the district and successfully obtained an injunction against the ban.\(^\text{21}\)

A. Bracelets, Boobies, and the Ban

After purchasing KABF’s “I ♥ boobies! (KEEP A BREAST)” bracelets with their mothers, B.H. and K.M. began wearing the bracelets to the Easton Area Middle School.\(^\text{22}\) Although wearing the bracelets did not cause any disturbances among the other students, the middle school teachers noticed the girls wearing them.\(^\text{23}\) In late September 2010, the Easton Area Middle School principal told the schoolteachers they should ask students to remove wristbands with the word “boobies” on them.\(^\text{24}\)

The principal predicted an increase of students wearing the bracelets in October because it was breast cancer awareness month, and in anticipation of the school’s recognition of those events she made an announcement over

\(^\text{14}\) See B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013).
\(^\text{15}\) See id.; Brief of Keep a Breast Foundation, supra note 9, at 14.
\(^\text{16}\) See B.H. ex rel. Hawk, 725 F.3d at 298.
\(^\text{17}\) See id.
\(^\text{18}\) Id. at 298–99.
\(^\text{19}\) Id. at 299–300.
\(^\text{20}\) Id. at 300.
\(^\text{21}\) Id. at 301.
\(^\text{22}\) See id.
\(^\text{23}\) Id. at 299.
\(^\text{24}\) See Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 509–10 (1969) (speech that does not “materially and substantially interfere” with normal schools activities, or otherwise create a disorder or disturbance is entitled to protection under the First Amendment); B.H. ex rel. Hawk, 725 F.3d at 299.
the school loudspeaker banning any bracelets that contained the word “boobsies.” The same day the announcement was made, a security guard noticed B.H. was still wearing the “I ♥ boobsies!” bracelet and demanded that she comply with the principal’s directive. B.H. refused to remove the bracelet until after a meeting with the principal. No disagreements or confrontations with other students over the bracelets had occurred at any time that day.

B.H. and K.M. both wore their bracelets again the next day and again refused to remove them at lunch when asked to do so by a school security guard. As a result of the girls’ refusal to remove their bracelets, the school imposed a punishment of one-and-a-half days of in-school suspension and forbade them from attending the school’s winter ball. Shortly thereafter, the school district instituted a district-wide ban on the bracelets even though there had been no bracelet-related incidents involving other students.

B. The Bracelets’ Rise to the Third Circuit

Through their mothers, B.H. and K.M. sued the Easton Area School District under 42 U.S.C. § 1983. The girls sued for a temporary restraining order that would allow them to attend the winter ball as well as a preliminary injunction against the school’s imposition of the bracelet ban. At the request of the United States District Court for the Eastern District of Pennsylvania, the school relented and allowed the girls to attend the dance. The district court then denied the temporary restraining order.

After conducting an evidentiary hearing, the district court preliminarily enjoined the school district’s bracelet ban. The court determined that it was clear that the school district’s rationale for disciplining the girls had changed since their punishment. Initially, the girls were told they were

25 B.H. ex rel. Hawk, 725 F.3d at 299.
26 Id.
27 Id. at 300.
28 Id.
29 Id.
30 Id.
31 Id.
32 42 U.S.C. § 1983 (2012) (creating a cause of action for deprivation of rights, privileges, or immunities secured by the Constitution); B.H. ex rel. Hawk, 725 F.3d at 300. Because the girls were minors, they were unable to sue on their own and needed to file a claim through their mothers. B.H. ex rel. Hawk, 725 F.3d at 300.
33 B.H. ex rel. Hawk, 725 F.3d at 301.
34 Id.
35 See id. Because the school permitted the girls to attend the ball on its own, the restraining order became a moot point. See id.
36 Id.
37 Id.
disciplined for “disrespect,” “defiance,” and “disruption,” yet the court discovered that the district-wide ban was ultimately based on the school’s dress code policy and the bracelets’ theoretical sexual innuendo.\textsuperscript{38} Witnesses at the district court evidentiary hearing stated that the assistant principals at the middle school claimed that the bracelets conveyed a potentially harmful and confusing “sexual double entendre” to students.\textsuperscript{39} Moreover, the assistant principals allegedly believed that, given the students’ immaturity regarding sex, they were likely to interpret the bracelets in a sexual way.\textsuperscript{40} At the conclusion of the hearing, the court found that because the bracelets did not contain lewd speech or threaten to substantially disrupt the school environment, B.H. and K.M. were likely to succeed upon the merits.\textsuperscript{41} Accordingly, the district court granted the preliminary injunction, and the school district appealed to the Third Circuit.\textsuperscript{42}

The Third Circuit has jurisdiction under 28 U.S.C. § 1292(a)(1) to review “[i]nterlocutory orders of the district courts[ . . . ] granting, continuing, modifying, refusing or dissolving injunctions.”\textsuperscript{43} The Third Circuit reviewed the district court’s findings of fact for clear error and its legal conclusions de novo to determine whether a preliminary injunction ceasing the district-wide ban was an abuse of discretion.\textsuperscript{44} The Third Circuit affirmed the district court’s decision by relying on policy and Supreme Court precedent.\textsuperscript{45}

\begin{itemize}
\item \textsuperscript{38} Id.; Brief of Appellants & Volume I of the Joint Appendix at 9, H. v. Easton Area Sch. Dist., 827 F. Supp. 2d 392, 394 (E.D. Pa. 2011) (No. 11-2067) [hereinafter Brief of Appellants II].
\item \textsuperscript{39} B.H. ex rel. Hawk, 725 F.3d at 301; Brief of Appellants II, supra note 38, at 9.
\item \textsuperscript{40} B.H. ex rel. Hawk, 725 F.3d at 301. KABF explicitly stated in an amicus brief, however, that the phrase “I ❤ boobies” was never intended to be sexy, and KABF has strategically chosen who sells the bracelets to ensure the message was not misconstrued sexually. See Brief of Keep a Breast Foundation, supra note 9, at 23. KABF refused the requests of truck stops, convenience stores, vending machine companies, and pornographers to sell the bracelets. Id. KABF also refused to sell the bracelets to porn stars because it did not think that having such individuals as sponsors would be consistent with KABF’s mission and message to eliminate any sexual undertones from the “I ❤ boobies” campaign. Id. at 24.
\item \textsuperscript{41} B.H. ex rel. Hawk, 725 F.3d at 301.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} 28 U.S.C. § 1292 (a)(1) (2012) (granting appellate jurisdiction over interlocutory orders); B.H. ex rel. Hawk, 725 F.3d at 301 (quoting Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 252 n.10 (3d Cir. 2002)).
\item \textsuperscript{44} B.H. ex rel. Hawk, 725 F.3d at 301–02.
\item \textsuperscript{45} Id. at 324.
\end{itemize}
II. THE THIRD CIRCUIT’S DECISION ON THE STATUS OF SPEECH RIGHTS IN PUBLIC SCHOOLS

The Third Circuit affirmed the district court’s decision to grant an injunction against the bracelet ban. The court found that upholding the injunction was in the public’s best interest. Additionally, the Third Circuit stated that giving school officials a free reign to restrict speech is incompatible with Supreme Court precedent. The majority determined that in order to preserve judicial review of “student-speech” restrictions, school officials cannot have absolute discretion. Alternatively, Judge Hardiman’s dissent advocated for vacating the preliminary injunction because of the bracelets’ alleged sexual innuendo and double entendre.

A. The Third Circuit Upholds the Injunction for Public Policy Reasons

The United States Court of Appeals for the Third Circuit affirmed the district court’s decision in granting the injunction. In determining whether the preliminary injunction was appropriate, the Third Circuit analyzed four factors. The court analyzed whether (1) the girls had a reasonable probability of success on the merits; (2) whether the girls would be irreparably harmed by denying the injunction; (3) whether granting the injunction would do greater harm to the school district and; (4) whether granting the injunction was in the public interest.

In weighing the four factors, the court focused heavily on the fourth element—whether the injunction was in the public interest. The court found that public interest considerations favored B.H. and K.M. because

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47 See id. at 302 (citing Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 170–71 (3d Cir. 2001)).
48 See Morse v. Frederick, 551 U.S. 393, 407 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. at 260, 276 (1988) (holding that schools can control the style and content of school sponsored publications that are reasonably related to legitimate educational concerns); Tinker v. Des Moines Sch. Dist., 393 U.S. 505, 509–10 (1969) (holding that school districts must show more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” in order to restrict expression by imposing a standard of “material” and “substantial” interference); B.H. ex rel. Hawk, 725 F.3d at 316–17 (stating that evaluating the meaning of student speech and what can be restricted has been considered by the Supreme Court repeatedly and total deference to school officials has been rejected).
49 See B.H. ex rel. Hawk, 725 F.3d at 316.
50 See id. at 335–37 (Hardiman, J., dissenting).
51 See id. at 323 (majority opinion).
52 See id. at 302 (citing Highmark, Inc., 276 F.3d at 170–71).
53 See id.
54 Id.
free-flowing dialogue on social issues is essential for their free speech rights and for the awareness of the whole student body.55

B. The Third Circuit’s Ruling Is Consistent with Free Speech Jurisprudence

The Third Circuit rejected the school district’s argument based upon the Supreme Court’s ruling in *Hazelwood Sch. Dist. v. Kuhlmeier*, which held that schools may define their school’s general educational mission and prohibit speech inconsistent with that mission.56 The Third Circuit reiterated that, though it was entitled to some deference, the school district did not have the ultimate discretion to determine what is lewd and vulgar.57 The Easton Area School District used a “parade of horribles” argument in support of their retaining discretion by giving examples of potentially inappropriate bracelets, like “I ♥ balls!” for testicular cancer.58 The Third Circuit, however, flatly rejected this argument and stated that there was a significant lack of data or empirical evidence to support such predictions and fears.59

The Third Circuit instead noted that there is empirical data indicating that school districts, if given the power to do so, would eliminate all speech touching on or relating to sex.60 For example, the school administrators initially testified that even in the context of a breast cancer awareness campaign, the word “breast” could be construed as sexual and thus subject to censorship.61 More fundamentally, the Third Circuit determined that in order to preserve judicial review of speech restrictions in schools, administrators may not have absolute discretion.62 To give school officials free reign

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55 See id. at 324; Brief of the Student Press Law Center, supra note 10, at 6. There is a message about breast cancer awareness tied to these bracelets that has social value and is an essential part of the exposition of ideas. *Id.* These bracelets foster and contribute to a dialogue on breast cancer. *Id.* at 28. (“The students in this case wanted nothing more than to be participants in a substantive public issue as do students everywhere.”)

56 See *Kuhlmeier*, 484 U.S. at 266; *B.H. ex rel. Hawk*, 725 F.3d at 316.

57 See *Kuhlmeier*, 484 U.S. at 266. When school sponsored publications are censored without valid educational purposes, the students’ First Amendment rights are potentially in danger. See *id.* at 273; see also *Morse*, 551 U.S. at 407 (finding that the school’s interest in deterring student drug use justified what would otherwise be a restriction of the student’s First Amendment rights); *Tinker*, 393 U.S. at 506 (holding that students do not lose their constitutional rights when they enter a school); *B.H. ex rel. Hawk*, 725 F.3d at 316.

58 *B.H. ex rel. Hawk*, 725 F.3d at 317.

59 See *id.* at 317–18.

60 *Id.*

61 *Id.*

62 See *Morse*, 551 U.S. at 407; *Kuhlmeier*, 484 U.S. at 273 (holding schools can control the style and content of school sponsored publications that are reasonably related to legitimate educational concerns); *Tinker*, 393 U.S. at 509–10 (holding that school districts must show more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” in order to restrict expression by imposing a standard of “material” and “substantial” interference); *B.H. ex rel. Hawk*, 725 F.3d at 316–17 (stating that the evaluation of the meaning of
to restrict speech would be incompatible with Supreme Court precedent.\(^\text{63}\)

Because that the bracelets could reasonably be interpreted as raising awareness for a social or political issue, they were protected speech.\(^\text{64}\)

The court found that because “I ♥ boobies (KEEP A BREAST)” is not “plainly lewd” but rather expresses support for a social issue (breast cancer awareness), wearing the bracelets could not be categorically restricted.\(^\text{65}\)

In finding so, the majority focused on the social message and dialogue stimulated by the bracelets.\(^\text{66}\)

This approach differs distinctly from Judge Hardiman’s dissent, which characterized the bracelets primarily as items with sexual undertones.\(^\text{67}\)

Although the First Amendment prevents the government from constitutionally restricting expression because of its content or message, the Supreme Court has given schools and school districts broader latitude in regulating the speech of their students.\(^\text{68}\)

In the landmark case \textit{Tinker v. Des Moines School District}, the Supreme Court held that schools may restrict speech that threatens to “materially and substantially interfere” with the school environment or that invades the rights of others.\(^\text{69}\)

In \textit{Tinker}, a group of students wore black armbands to school to demonstrate their objection to the Vietnam War.\(^\text{70}\)

The school principals instituted a policy that required that students who wore the armbands would be asked to remove them.\(^\text{71}\)

Nevertheless, students at the school wore the bands to intentionally challenge the

@student speech and what can be restricted has been considered by the Supreme Court repeatedly and total deference to school officials has been rejected).

\(^{63}\) See \textit{B.H. ex rel. Hawk}, 725 F.3d at 317.  
\(^{64}\) See \textit{id.} at 320.  
\(^{65}\) Id.  
\(^{66}\) See \textit{id.} at 324 (finding that educators’ jobs go beyond teaching just the curriculum to include teaching students how to be citizens and engage in ideas such as public health campaigns).  
\(^{67}\) See \textit{id.} at 335 (Hardiman, J., dissenting). KABF’s brief discusses at length how the marketing and placement of the bracelets has been attentive to this issue by intentionally working to keep them educational and non-sexual, thus ensuring that the focus is on the social message conveyed by the bracelets. \textit{See Brief of Keep a Breast Foundation, supra} note 9, at 23–24. For example, KABF refused the requests of truck stops, convenience stores, vending machine companies, and pornographers to sell the bracelets. \textit{Id.} KABF also refused to sell the bracelets to porn stars because having such individuals as sponsors would be inconsistent with KABF’s mission and message. \textit{Id.}  
\(^{68}\) See \textit{Morse}, 551 U.S. at 395; \textit{Ashcroft v. ACLU}, 542 U.S. 656, 666 (2004) (stating that the government may not restrict speech based solely on content or message).  
\(^{69}\) See \textit{Tinker}, 393 U.S. at 509–10 (holding that school districts must show more than a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” in order to restrict expression by imposing a standard of “material” and “substantial” interference).  
\(^{70}\) See \textit{id.} at 504. In response to the school’s prohibition on the black armbands, the Supreme Court held that expressions without any disorder or disturbance are entitled to First Amendment protection, and if the school could not show that the armbands materially and substantially interfered with the operation of the school then conduct could not be forbidden. \textit{See id.} at 509, 512.  
\(^{71}\) \textit{Id.} at 504.
The Supreme Court held that the ban unduly restricted the students’ free speech rights because the armbands did not interrupt school activities or intrude on the affairs of other students. In cases since Tinker, the Supreme Court has held that the government can censor student speech, even in the absence of substantial disruption or invasion of others’ rights, in limited circumstances.

The Third Circuit determined that the Easton Area School District failed to show how the bracelets posed a disruption that would justify them being banned under Tinker. In Tinker, the Supreme Court found that despite the fact that the armbands caused verbal disputes and wrecked a teacher’s lesson plan, they did not create a substantial enough disruption to justify their ban. The breast cancer awareness bracelets, in contrast, had only two related incidents that could qualify as disruptions, but both occurred post-ban and were insufficiently substantial to justify the ban.

The school district also argued that the ban could be upheld under the government’s right to categorically “restrict lewd, vulgar, profane, or plainly offensive speech” in schools. The right to restrict lewd speech was recognized by the Supreme Court in Bethel School District No. 403 v. Fraser. In Fraser, at a high school assembly, a student nominated a peer for a position in the class government through a speech laden with sexual metaphor. The school suspended the speechmaker, and he brought a suit claiming that his free speech rights had been violated. The Supreme Court in Fraser upheld the student’s suspension and found that “lewd,” “vulgar,” “indecent,” and plainly “offensive” student speech is categorically unprotected in a public school.

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72 Id.
73 See id. at 512.
74 See Kuhlmeier, 484 U.S. at 108 (holding that the school can control the style and content of school sponsored publications that are reasonably related to legitimate educational concerns); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (finding a student’s elaborate sexual metaphors in speech were lewd forms of expression that were not protected by the First Amendment).
75 See Tinker, 393 U.S. at 509; B.H. ex rel. Hawk, 725 F.3d at 321.
76 See Tinker, 393 U.S. at 517–18.
77 See B.H. ex rel. Hawk, 725 F.3d at 321. The court reasoned that the two related incidents were slight disturbances that could not justify this restriction on free speech. Id.
78 B.H. ex rel. Hawk, 725 F.3d at 302; see Fraser, 478 U.S. at 686 (holding that schools had the authority to restrict language that was profane, vulgar, or lewd).
79 Fraser, 478 U.S. at 686.
80 Id. at 678.
82 See Fraser, 478 U.S. at 683, 686. The Court stated that public education goes beyond classroom curriculum and encompasses teaching students about society’s shared values. Id. Moreover,
In *B.H. ex rel. Hawk*, the school district argued its suspension was justified under *Fraser* in two ways: (1) it was banning speech that was unambiguously lewd, vulgar, or profane; and (2) it was not restricting speech that comments on any social or political issue. The Third Circuit agreed that unless the speech in question could be interpreted as commentary on a social or political issue, then schools may ban forms of expression that could reasonably be interpreted as profane or lewd. In that regard, the Third Circuit found that the ban could not be upheld under *Fraser* because the bracelets were not objectively lewd. Additionally, because breast cancer awareness is a social issue the ban could not be justified under *Fraser*.

### C. Justice Hardiman’s Dissenting Opinion

Rather than focusing on the social message behind the bracelets, Judge Hardiman focused on the bracelets’ supposed sexual innuendo in his dissent, and as a result, characterized them as a form of lewd speech. Judge Hardiman wrote that the majority’s approach would allow for lewd speech in public schools so long as it met the majority’s notion of social or political messaging, a position Judge Hardiman found contrary to *Fraser*.

Judge Hardiman stated that it is objectively reasonable to interpret these bracelets as inappropriate sexual innuendo and double entendre, and therefore it would be more appropriate to reverse the district court and vacate the preliminary injunction. He reasoned that the district court was misguided in focusing on the strategic purpose of the words, and also that the case’s holding would set a dangerous precedent. Judge Hardiman stated that the majority’s holding prohibiting schools from banning bracelets seeking to raise breast cancer awareness would force schools in the future to permit more shocking messages. He reasoned that if these bracelets are

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83 See *B.H. ex rel. Hawk*, 725 F.3d at 302, 307.
84 See id. at 302 (finding that if the speech could be interpreted as commenting on a social or political issue, it could not be restricted by the school).
85 See id.
86 See id. The Third Circuit emphasized that because the bracelet can reasonably be interpreted as social speech, it is entitled to protection from bans. See id. at 314, 320 (finding that the bracelets advocated for the national breast cancer awareness campaign, thus qualifying as a social message).
87 See id. at 335–37 (Hardiman, J., dissenting).
88 See *Fraser*, 478 U.S. at 682; *B.H. ex rel. Hawk*, 725 F.3d at 338 (Hardiman, J., dissenting).
89 See *B.H. ex rel. Hawk*, 725 F.3d at 338 (Hardiman, J., dissenting).
90 See id. at 336–37.
91 See id.
permissible, then it would be difficult to articulate a principle that would limit other messages such as “I ♥ Balls” to support testicular cancer.

III. THE NECESSITY OF STUDENTS’ FREEDOM OF SPEECH

Judge Hardiman’s proposed standard would give school officials the power to restrict any speech in the school context that could reasonably be interpreted as sexual innuendo or double entendre, regardless of the speech’s beneficial social or political message. Consequently, Judge Hardiman would have vacated the preliminary injunction and upheld the district-wide ban, which inevitably would have stymied young women’s education and awareness of breast cancer. Under Judge Hardiman’s standard, student speech, specifically young women’s speech, would be unduly restricted. The bracelets were targeted at young women in order to educate them about a fatal health issue specific to women, and to disallow their presence in school is to stifle the spreading of knowledge about breast cancer. An express purpose of KABF to inspire young people “to be their own advocates” in order to spread knowledge about breast cancer. For women under the age of forty, breast cancer is the leading cause of cancer-related deaths, making dialogue about this issue especially important. Despite of this grave risk, Judge Hardiman would ban speech that garners awareness on the subject in public schools, primarily because such speech involves a sexual body part.

The Supreme Court has recognized that the teaching function of schools goes beyond purely academics and includes conversations revolving around social and political issues. The majority in B.H. ex rel. Hawk recognized this and reflected on the unique challenges teachers face to-

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92 See id. at 337.
93 See B.H. ex rel. Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 335 (Hardiman, J., dissenting) (3d Cir. 2013).
94 See id. at 338; Brief of Keep a Breast Foundation, supra note 9, at 1.
95 See B.H. ex rel. Hawk, 725 F.3d at 335 (Hardiman, J., dissenting); Brief of the Student Press Law Center, supra note 10, at 2. At stake in this case is the protection of students’ right to free speech from the “overzealous” application of school policy that can unjustly limit students’ non-curricular education. Brief of the Student Press Law Center, supra note 10, at 2.
96 See Brief of Keep a Breast Foundation, supra note 9, at 1, 7, 29 (stating that the purpose of the bracelets is to “promote awareness and knowledge of the breast cancer epidemic among all young people and to encourage them to advocate for their own health” and that failure to permit them would frustrate the purpose of the bracelets entirely).
97 See Brief of Keep a Breast Foundation, supra note 9, at 4.
98 See id. at 48.
99 See B.H. ex rel. Hawk, 725 F.3d at 335 (Hardiman, J., dissenting); Brief of Keep a Breast Foundation, supra note 9, at 8.
100 See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986). Public schools must both prepare students to be citizens and teach them habits, manners, and values necessary for adult life in this country. Id.
Teachers constantly compete with distractions such as cell phones and bullying as they try to reach students. The majority stressed the importance of educators trying to teach students proper social values in this over-stimulated environment. Accordingly, the majority properly recognized the value of speech crafted to stimulate discussion in this environment, such as the KABF’s “I ♥ boobies! (KEEP A BREAST)” bracelets.

Unjustly silencing speech that can stimulate dialogue about breast cancer, and other diseases that involve sexual body parts, is harmful for students’ health and development. Because breast cancer is a disease that requires self-education and awareness in order to be properly diagnosed, suppression of this kind of speech could have grave long-term consequences. The majority correctly recognized that a bracelet intended to raise breast cancer awareness is just the type of socially valuable idea that should be allowed in schools.

CONCLUSION

In B.H. ex rel. Hawk, the Third Circuit held that a school district could not ban students from wearing bracelets that raised breast cancer awareness simply because the bracelets could be interpreted as being sexual in nature. The Third Circuit relied on public policy and Supreme Court precedent in holding against the school district. In finding the bracelet ban an unconstitutional infringement upon B.H. and K.M.’s First Amendment rights, the Third Circuit correctly protected student speech on social issue, even issues that involve sexual body parts such as breast cancer.

In his dissenting opinion, Judge Hardiman wrongly disregarded the social message behind the bracelets, and overstated their sexual nature. Breast

101 See B.H. ex rel. Hawk, 725 F.3d at 324.
102 See id.
103 See Fraser, 478 U.S. at 683; see also McCauley v. Univ. of the V.I., 618 F.3d 232, 243 (3d Cir. 2010) (“Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.”).
104 See Tinker v. Des Moines Sch. Dist., 393 U.S. 505, 511 (1969). The Court reasoned that the classroom is where ideas are exchanged and where the nation’s future leaders are being trained through engagement and exposure to a wide variety of those ideas. Id.; see B.H. ex rel. Hawk, 725 F.3d at 324. Schools cannot avoid teaching students how to engage with the exchange of varied ideas. See Tinker, 393 U.S. at 511; B.H. ex rel. Hawk, 725 F.3d at 324. Fear of confronting unpopular ideas in the classroom does not justify restricting social speech of value. See Tinker, 393 U.S. at 511; B.H. ex rel. Hawk, 725 F.3d at 324.
105 See Brief of Keep a Breast Foundation, supra note 9, at 7 (arguing that “breast cancer screening . . . can help find breast cancer early when it is most treatable . . . ”).
106 See id.
107 See id. at 1; Brief of the Student Press Law Center, supra note 10, at 5 (arguing that the bracelets undeniably carry a socially valuable message).
cancer is deadly disease, and the fact that it involves a sexual body part does not justify restricting conversation about it.