No. 20-255

In the
Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,

Petitioner,

v.

B.L., A MINOR, BY AND THROUGH HER FATHER LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PENNSYLVANIA SCHOOL BOARDS ASSOCIATION AND PENNSYLVANIA PRINCIPALS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Pennsylvania School Boards Association (PSBA), organized in 1895, is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of the Commonwealth of Pennsylvania, numerous area vocational technical schools and community colleges, and the members of governing boards of those public school entities. PSBA is dedicated to promoting excellence in school board governance through leadership, service, and advocacy for public education, which in turn benefits taxpayers and the public interest in the education of Pennsylvania's youth. PSBA endeavors to assist state and federal courts in selected cases bearing upon important legal issues of statewide or national significance, by offering the benefit of its statewide and national perspective, experience, and analysis relative to the many considerations, ramifications, and consequences that should inform the resolution of such cases.

The Pennsylvania Principals Association is one of the largest state principals' associations in the nation and is affiliated with the National Association of Elementary School Principals (NAESP) and the National Association of Secondary School Principals (NASSP). It serves principals, assistant principals,

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[1] Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice of *amici curiae*'s intent to file this brief at least 10 days prior to the due date. All parties have consented to the filing of this brief.

and other educational leaders throughout the state. The mission of the Pennsylvania Principals Association is to ensure a quality education for every child by comprehensively supporting the educational leaders of our schools. One of its goals is to positively influence the policymaking process at the local, state, and federal levels.

PSBA and PA Principals file this *amici curiae* brief in order to highlight the confusion that the lower court's decision causes in an area where clarity is critical, and to emphasize how the decision's strict on-campus, off-campus distinction places school officials in an untenable position.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari in order to resolve the doctrinal confusion that the decision below has created and ensure that school administrators are able to preserve discipline and safety within their school communities. The lower court's decision candidly acknowledged that it was opening a circuit conflict on the appropriate analysis to apply to disruptive and offensive student speech that originates outside a school's boundaries but is directly and intentionally aimed at the school community. The Third Circuit stands alone in holding that student speech is categorically immune from school discipline whenever it originates "off-campus," Pet.App.31a, regardless of whether the speech was (as here) directed at the school community and was patently disruptive to school programs. As a result, different students—and different school administrators—in different parts of the country now operate under

different free speech regimes depending on whether they live within the Third Circuit or another jurisdiction. That lack of clarity is antithetical to our federal Constitution, which affords the same rights, with the same limitations, uniformly across our Nation. Worse yet, its reasoning conflicts with the Pennsylvania Supreme Court's treatment of the issue. As a result, within Pennsylvania, the applicable constitutional analysis differs depending on whether a claim is brought in state or federal court.

The decision below thus sows confusion where the need for clarity is acute, particularly in Pennsylvania. The school environment functions best when both students and administrators can be certain of clear constitutional lines between protected speech and the permissible correction of disruptive behavior. As this Court has acknowledged since its seminal decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, (1969), the school environment is unlike the public square where the government's regulation of protected speech is presumptively impermissible. Instead, within a school community, disruptive speech threatens to infringe on other students' right to receive the full benefit of an education in a safe environment conducive to learning. Thus, school administrators must not be prevented from taking corrective action against inappropriate conduct, including speech that has a disruptive and corrosive effect on the school community.

The Third Circuit's rigid on-campus, off-campus distinction ignores changes in technology and the changing nature of the 21st century school

environment. The modern reality of social media, virtual learning, and a growing list of extracurricular activities has expanded the school experience beyond the four corners of a school district's real property. Students' conversations, relationships, and learning take place increasingly online—through channels that transcend geographic boundaries. The facts of this very case demonstrate the reality of modern schooling: The same speech that previously might have been disseminated through printed flyers or notes passed in the hallway is now accomplished through Snapchat, Instagram, Facebook, and Twitter.

While the method of speech is different, the purpose and effect are the same. Whether a disruptive or harmful tweet is sent from the school cafeteria or after the student has crossed the street on her walk home, it has the same impact. Indeed, that is the very premise of school policies and state laws that seek to eradicate the pernicious effects of cyberbullying on the learning environment. Cyberbullying is real and its damaging effects on the school environment are real. Yet, the Third Circuit's formalistic rule renders schools powerless whenever a hateful message is launched from off-campus. Here, Respondent's speech was directed predominantly at her cheering squad, and was detrimental to team discipline and morale. But the same legal principles apply to individuals or groups who would unleash hurtful attacks on other students within the context of the school community.

The doctrinal confusion and rigid analysis engendered by the lower court's decision is especially problematic in the free speech context, which already affords less leeway for balancing competing interests.

The key wisdom of *Tinker* and its progeny is that the school context is different. While the Constitution requires the strict enforcement of free speech rights against government encroachment where adults are voluntarily engaging in the marketplace of ideas, the need for instruction and correction of students in the school environment requires a more flexible approach. By limiting that flexibility to the metes and bounds of on-campus speech, the Third Circuit undermines the essence of this Court's doctrine and casts confusion on the teachers and administrators trusted to educate and instruct our Nation's youth.

Because the decision below opens a circuit split and creates confusion where clarity is paramount, this Court should grant certiorari to resolve these important questions.

ARGUMENT

I. The Decision Below Sows Confusion Where Clarity Is Especially Important.

A. School Administrators Need Clarity on Their Ability to Correct Disruptive and Harmful Conduct by Their Students.

This Court has long recognized that the treatment of free speech is different in the school environment. In *Tinker*, while noting that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court held that "the special characteristics of the school environment" permits schools to regulate student speech in ways that the government could never undertake in a different forum. 393 U.S. at 506. In order "to prescribe and control conduct in the schools," *id.* at 507, teachers and administrators may regulate

student speech that "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (citation and internal quotations omitted). And because our schools are entrusted to "inculcate the habits and manners of civility" in their students, the Court has held that schools may "prohibit the use of vulgar and offensive terms." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 683 (1986) (citation omitted). It is thus well established that schools possess greater authority to correct disruptive and offensive conduct by their students.

Moreover, these considerations are critical given the need for corrective action by school teachers and administrators. As this Court has recognized, "[m]aintaining order in the classroom has never been easy." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Teachers and school staff require the basic tools to preserve "order and a proper educational environment" in order to benefit all students and ensure that everyone has a chance to learn. *Id.* Moreover, any interest that students have in free speech "must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel Sch. Dist. No. 403*, 478 U.S. at 681. Basic corrective action is essential to maintain those boundaries, protecting all students from having their educational experience degraded by abuse or disorder.

Recognizing those values, this Court has consistently held that the school context "is not confined to . . . the classroom." *Tinker*, 393 U.S. at 512. Rather, the educational environment

encompasses all aspects of student life—from the cafeteria to the athletic field. *See id.* Nor does a school's legitimate interest in correcting disruptive and detrimental conduct by its students stop strictly at the schoolhouse gate. Indeed, this Court's decision in *Morse v. Frederick*, 551 U.S. 393, 397 (2007), applied school speech standards to inappropriate student speech that occurred across the street from the school but in the context of a school-sanctioned event. In doing so, this Court explicitly acknowledged that there is "some uncertainty at the outer boundaries as to when courts should apply school speech precedents." *Id.* at 401 (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)). More than a decade later, the boundaries of the "school context" remain uncertain.

In the years since *Tinker*, *Bethel*, and *Morse*, the lower courts have continued to struggle to apply those doctrinal principles to the ever-changing circumstances of the modern school environment. Technology and social media have presented an especially difficult problem for administrators. In light of those problems, the circuits have grappled with the question of when administrators may address speech that originated off-campus—yet all have rejected the Third Circuit's categorical rule. Some have extended *Tinker* to speech if "it was reasonably foreseeable" that the speech would reach the schoolhouse. *See Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2d Cir. 2007); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011); *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1151 (9th Cir. 2016). Others have required a "nexus" between the speech

and the school's "pedagogical interests," *see Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), or extended *Tinker* to speech that was "intentionally direct[ed] at the school community," *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc). Even the Pennsylvania Supreme Court has applied *Tinker* to speech that originated off-campus yet had a "sufficient nexus" to the school. *J.S. ex. rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002). And all of those courts had previously been unanimous in rejecting a categorical rule limiting *Tinker* to on-campus speech.

The Third Circuit thus stands as an outlier in creating an artificial binary between off-campus and on-campus speech. Pet.App.15a-16a. That ruling throws a cloud of uncertainty over how teachers and school administrators in the Third Circuit should respond to speech that originates off-campus, and it only highlights the ambiguities faced by teachers across the nation. For instance, teachers and administrators need to know whether they can take action to protect students who are mocked or harassed by their classmates on Facebook and impose corrective consequences for that bullying. They need guidance on how to handle students who might promote drug use on Instagram. They need assistance on what to do if students expose each other's private information on 4Chan or Reddit. These problems are real for teachers and administrators on a near-daily basis, and can often cause grievous harm to both the victims of the cyberbullying and the school environment as a whole.[2]

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[2] *See also, e.g.*, Fact Sheet: The Consequences of Bullying, STOPBULLYNG.GOV (August 2017), available at

See, e.g., Mike Maneval, *South Williamsport Area School District's Cyberbullying Policies Questioned After 'Vile' Social Media Post*, WILLIAMSPORT SUN-GAZETTE (Sept. 16, 2020), https://bit.ly/3cqXz4x. Yet, the Third Circuit's decision, especially compared to the weight of authority that came before it, offers little in the way of assistance for teachers who struggle to protect and nurture their charges.

These doctrinal ambiguities therefore frustrate the need for clarity in this important area. The boundary line of *Tinker*'s rule permitting correction of disruptive, offensive, and harmful conduct often determines whether a school's efforts to preserve discipline and good order are constitutionally permissible. *Cf. Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204, 214 (3d Cir. 2001) (Alito, J.) (explaining that there is no "harassment exception" to the First Amendment, and that *Tinker* will govern most school speech cases). Indeed, schools have a duty to protect their charges, and often face lawsuits for alleged failures to do so. *E.g.*, 34 C.F.R. § 106.44 (duty to respond to sexual harassment). Thus, neither students nor administrators benefit from confusion on that point.

This litigation is a case in point: A student who incorrectly believes herself to be beyond *Tinker*'s reach might unwittingly subject herself to discipline from the school. And a school that believes itself to be within *Tinker*'s exception could end up facing a costly

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https://bit.ly/3cmoXAm; Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RESEARCH CENTER (Sept. 27, 2018), https://pewrsr.ch/3kBTJs0.

and burdensome lawsuit. Yet a school that fails to act often faces litigation for any attendant disruption. It is thus critical that this Court provide more guidance on these crucial questions, ensuring that schools are not trapped between lawsuits for free speech violations or lawsuits for failing to maintain order. Schools must have constitutional leeway to teach students that good behavior has rewards, and that bad behavior has consequences.

B. The Decision Below Creates Doctrinal Confusion.

Rather than balancing the competing concerns that this Court has identified, or grappling with the modern reality of social media and virtual learning, the Third Circuit imposed a strict on-campus, off-campus rule that openly creates both a circuit split in the federal courts and a vertical split within Pennsylvania. While acknowledging these core doctrinal principles and precedents, the Third Circuit blew right through them to hold that Respondent's speech—which was directed at her fellow cheerleaders and which hurled expletives at school extracurriculars—was deemed "off-campus" merely because she pressed "send" while not standing within the school.

While the Third Circuit purports to provide clarity through its strict line, Petitioner amply demonstrates that its rule creates national and statewide uncertainty. The decision below admits to opening a circuit conflict that subjects students and administrators in different jurisdictions to different constitutional standards. Indeed, this case would have been decided differently had it occurred in any of

the other five circuits to have confronted this question—or if it had been brought in Pennsylvania state court rather than federal court. For example, it seems plain that B.L. should have foreseen that her Snap would come to the school's attention. *Cf. D.J.M. ex. rel. D.M.*, 647 F.3d at 766 (applying a foreseeability-like test); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (asking about foreseeability). Likewise, it seems plain that B.L.'s Snap, directed at the cheerleading squad and visible by many cheerleaders and students, had a "nexus" with the school. *J.S. ex. rel. H.S.*, 807 A.2d at 865. And it seems plain that B.L.'s speech was "directed at" the school community. *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012); *Bell*, 799 F.3d at 392.

That doctrinal discord on a core constitutional question is inconsistent with the rule of law. Ultimately, only this Court can definitively resolve the question. "Because uniformity among federal courts is important on questions of this order," this Court should "grant[] certiorari to end the division of authority." *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

II. The Third Circuit's Strict On-Campus, Off-Campus Distinction Places School Administrators in an Untenable Position.

The current realities facing students and administrators make the need for doctrinal clarity all the more important in this area. The reach of social media continues to extend further into everyday life; the current pandemic has accelerated virtual learning; and school activities increasingly make up a

significant part of students' lives. Moreover, various initiatives are rightly aimed at preventing the harmful psychological effects of cyberbullying. As a result, school administrators are more and more expected to address conduct that originates beyond the schoolhouse walls but has a direct and significant impact on the school community. Yet, the Third Circuit's strict on-campus, off-campus distinction places school administrators in the untenable position of being responsible for more and more student conduct while possessing less and less leeway to maintain order and instill civility.

Social media is ubiquitous in modern society—and especially so amongst school-age children. "Fully 95% of teens have access to a smartphone, and 45% say they are online 'almost constantly.'" Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RESEARCH CENTER (May 31, 2018), https://pewrsr.ch/3hT9s48. The result is that "[o]n average, teens are online almost *nine hours a day*, not including time for homework." *Social Media and Teens*, AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY (March 2018), https://bit.ly/2EqFg2G (emphasis added). Thus, speech from insults to slander that in previous days might have passed through hand-written notes or letters is now exchanged through smartphones and social media apps. And those conversations and activities hardly stop and start at the schoolhouse gate. Instead, they flow continuously within the same community of students before, during, and after school. School administrators are thus forced to deal with the fallout of our modern society of rapid and mass

communication, all within the context of adolescent children.

The disruption caused by these modern forms of communication is real—and the threat of cyberbullying is real.[3] Indeed, one recent study found that 59% of teenagers in the United States have experienced some form of cyberbullying. *See* Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, *supra*. And a full 24% say their social media use has been "mostly negative." Anderson, *Teens, Social Media & Technology*, *supra*. Plainly, messages sent within the student community, whether during or after school hours, frequently impact the educational environment. Respondent's message here is illustrative: In response to her vulgar Snap about school and a school sponsored extra-curricular activity, many of her fellow students and teammates expressed concern over the disruptive effect it had on the school's cheerleading squad. Her coaches were thus forced to deal with it, within the school context.

Indeed, the conduct at issue here was far from trivial. B.L.'s profane outburst had a direct and damaging effect on the cheerleading squad's team morale and camaraderie. Where, as here, team cohesiveness is a critical element to the success of a school program, conduct that is detrimental to that

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[3] Indeed, cyberbullying is such a threat that the Pennsylvania Office of Attorney General offers in-school educational programs and other information on the issue and how parents can help combat it. *See* Pennsylvania Office of Attorney General, *Cyber Safety: Protecting Our Children Online*.

cohesiveness denies other students the full benefit of the program. Nothing in *Tinker* nor this Court's other precedents suggest that an actual or anticipated disruption must involve chaotic schoolwide tumult before it can be considered to "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513.

Bullying concerns are even more obvious. Students engaged in bullying frequently hurl their most hurtful and insensitive insults at their victims from the safety and comfort of their homes, but the corrosive effect on the learning environment is undeniable. Students victimized by such bullying suffer both "negative immediate effects" and "long-term impacts on psychosocial development, self-esteem, academic achievement and mental health." Carrie-Anne Myers & Helen Cowie, *Cyberbullying Across the Lifespan of Education: Issues and Interventions from School to University*, INT'L J. ENVTL. RES. & PUB. HEALTH (Apr. 4, 2019), available at https://bit.ly/2HhyKMI. These students are then "less academically engaged," obtaining "lower grades" than their peers—which is nothing to say of the trauma they suffer. Jaana Juvonen et. al., *Bullying Experiences and Compromised Academic Performance Across Middle School Grades*, 31 J. EARLY ADOLESCENCE 152, 153, 166 (2011), available at https://bit.ly/2G5qleD. Perhaps most troubling of all, "cyberbullying victims were almost *twice* as likely to have attempted suicide" compared to their peers. Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying*, 46 WAKE FOREST L. REV. 641, 645 (2011) (citation omitted) (emphasis added). Teachers and administrators who are tasked

with fostering an inclusive and safe environment cannot be powerless to correct the root of these problems.

Finally, the nature of free speech rights makes the balancing act even more difficult. Whereas other conduct permits a more flexible approach, there is little wiggle room for teaching through corrective discipline where speech is shrouded in constitutional protection. That makes it all the more important to avoid casting a blanket, inflexible rule merely because a school's response in a specific case might seem to be an overreaction. Indeed, the Third Circuit's broad ruling here would render unconstitutional a coach's decision simply to bench B.L. or give her extra laps after practice.

By their very nature, free speech rights typically trump other interests. That is why *Tinker* was careful to carve out flexibility for schools, so that the protection of free speech would not overtake the mission of our schools or other students' right to receive an education. Consequently, speech that has the effect of degrading the value of educational programs to other students or the effect of denying access to programs for even a single bullied student should be regarded as sufficiently disruptive and invasive of others' rights to fall within the *Tinker* standard.

Rather than apply that principle to the modern school community, the Third Circuit drew a line based on artificial boundaries that ignores the reality that Respondent's Snap was about the school and its extracurricular activities, was aimed at her fellow

students and teammates, and had a concrete disruptive effect on the school community.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant certiorari and reverse.

Respectfully submitted,

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