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 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 PETITIONERS

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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, and other educational leaders throughout the state. The mission of the Pennsylvania 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. All parties have consented to the filing of this brief.

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 extent to which the lower court's decision departs from the long-standing recognition by courts and scholars that the disciplinary authority of teachers and other school officials does and must extend beyond the schoolhouse gate, 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

From the adoption of the First and Fourteenth Amendments through the twentieth century, it has been clear that teachers and administrators need at least some flexibility to correct off-campus speech that directly affects their schools. To hold otherwise, as the Third Circuit did, would invite all sorts of mischief, allowing students to bully classmates and massively disrupt classrooms with just the click of a button once safely beyond the schoolhouse gates. Because that view is inconsistent with the original meaning of the First and Fourteenth Amendments, has never been the law of this Court, and would throw classrooms into chaos, this Court should reverse.

From the earliest days of our Nation, teachers and school administrators have played a critical role in providing a healthy environment for all students to learn—so long as they possess the necessary tools to

undertake that difficult task. Thus, at the time of the Fourteenth Amendment's ratification, it was widely accepted that teachers and schools had the authority "to set and enforce rules and to maintain order." *Morse v. Frederick*, 551 U.S. 393, 414 (2007) (Thomas, J., concurring). Cases and treatises from the era confirmed that teachers could correct disruptive behavior *and* speech that directly affected their schools—even when that behavior or speech originated off campus.

Nothing in this Court's precedents have since imposed any arbitrary on-campus, off-campus line. Far from it, this Court has consistently recognized that the schoolhouse is different, and that teachers, coaches, and the principals in charge of schools require some flexibility to undertake their difficult jobs. In line with that history, the lower courts—until the Third Circuit's recent decision—had consistently held that schools could correct certain off-campus speech that would plainly reach and substantially interfere with the school.

The need for teachers and principals to correct certain off-campus misdeeds is only more acute in the modern, social-media age. Technology and social media have drastically altered both students' and teachers' lives, allowing students to disrupt the classroom environment from far beyond the schoolhouse gates—or even from within a classroom, but with electronic facades designed to hide the true location of the students' online activities. Given the vast increase in cyberbullying, online harassment, and other forms of web-based problems that plague modern schools, it is crucial that courts do not

artificially hamstring teachers and administrators from fostering an environment conducive to the learning and growth of all students. To impose any rigid on-campus, off-campus distinction would place schools in an untenable position, unleashing chaos in the classroom and inviting students to disrupt schools or bully classmates online with impunity.

ARGUMENT

I. A Rigid On-Campus, Off-Campus Distinction Lacks Historic Precedent.

The Founders recognized the need for teachers to correct disruptive behavior—even if that behavior originated beyond the schoolhouse gates. That understanding continued throughout the nineteenth century, and was largely followed by the federal courts until the outlier decision below. If anything, the need for appropriate tools to safeguard a healthy learning environment has become only more important when dealing with social media posts that can sow widespread disruption and discord with just the tap of a screen.

A. Nineteenth-Century Teachers Could Correct Off-Campus Misbehavior that Affected the Schoolhouse.

At the time the Fourteenth Amendment was ratified, it was widely understood that teachers had wide latitude to correct misbehavior or disruptive speech when it affected their classrooms—even when that behavior or speech occurred off campus. Teachers stood *in loco parentis* to their students, and their authority was governed largely by statute and common law. *See Morse*, 551 U.S. at 413 (Thomas, J., concurring); Michael Imber et al., EDUCATION LAW 98

(5th ed. 2014). Both cases and commentators made clear that teachers could take corrective action when off-campus speech disrupted their schoolhouse. And just a few simple analogies to cases from the time underscore the greater need for flexibility when coping with the digital age.

Indeed, as one leading commentator from that era explained, "the authority of the schoolmaster extends . . . [to] *conduct out of school* and off the school premises," when that conduct violates a school rule and "has a direct and immediate tendency to injure the school or its discipline." Finley Burke, A TREATISE ON THE LAW OF PUBLIC SCHOOLS 129 (1880) (emphasis added). Another confirmed: "[t]he authority of the teacher is not confined to the school-room or grounds," but extends to "all acts of his pupils which are detrimental to the good order and best interests of the school." Floyd Russell Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 730 (1890). Simply put, the question was not whether the misconduct occurred at school or "after [the student] returned home," but whether the misconduct would cause disruption at school. *Id.*; *see also* Francis Wharton, A TREATISE ON CRIMINAL LAW § 632 (10th ed. 1896).

That principle was often rooted in the doctrine of *in loco parentis*, which predated the Founding of the Nation. *E.g.*, 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *452-53 (1765); *Lander v. Seaver*, 32 Vt. 114 (Vt. 1859); *Gott v. Berea College*, 161 S.W. 204, 206 (Ky. 1913); *Heritage v. Dodge*, 9 A. 722, 723 (N.H. 1887); *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 187 (1866); *State v. Pendergrass*, 19 N.C. 365,

365-66 (N.C. 1837). But not always. Courts also often emphasized the need to ensure "the proper and successful management of the school" and protect "the good of the whole school." *E.g.*, *Douglas v. Campbell*, 116 S.W. 211, 212-13 (Ark. 1909); *Kinzer v. Directors of Indep. Sch. Dist. of Marion*, 105 N.W. 686, 686-88 (Iowa 1906). And still other courts noted the need for schools to educate not only on science and literature, but also "self-restraint" and "other civic virtues"—a need that this Court has recognized in modern times. *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886); *see also Bd. of Educ. v. Helston*, 32 Ill. App. 300, 306 (Ill. App. 1889); *Morse*, 551 U.S. at 404-05.

Regardless of their exact justification, many leading cases of the era further confirmed the need for flexibility in a wide variety of contexts, and they only highlight the importance of upholding it today. For example, the celebrated case of *Lander v. Seaver*, 32 Vt. 114, is directly on-point.[2] In *Lander*, a schoolmaster had punished a student for using "contemptuous language, with a design to insult" the schoolmaster, "in the presence of other pupils of the same school." *Id.* at 120. The court noted that the central issue was whether the schoolmaster could punish the student for that language—even though the speech had occurred "after the school had been

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[2] *Lander* was cited by leading treatises of the day, as well as other cases and journal articles since. *E.g.*, Burke, A TREATISE ON THE LAW OF PUBLIC SCHOOLS 129; Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 730; M. R. Sumption, *The Control of Pupil Conduct by the School*, 20 L. & CONTEMP. PROBLEMS 80, 87 & n. 19 (1955); *Morse*, 551 U.S. at 415 (Thomas, J., concurring); *Patterson*, 7 A. at 274.

dismissed," and the student "had returned home." *Id.* And the court held that the schoolmaster *could* punish the student for his off-campus speech because the speech had "a direct and immediate tendency to injure the school . . . and to beget disorder" in the schoolhouse. *Id.*

Nor was *Lander* an outlier. On the contrary, many cases from the ratification era allowed a teacher to issue corrective measures for off-campus speech or misdeeds that sowed disorder at school. They held that a school could "suspend a pupil" for publishing a poem off-campus that caused disruption at school because, as in *Lander*, the poem had "a direct and immediate tendency to influence" the schoolhouse. *State ex. rel. Dresser v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232, 235 (Wis. 1908). Those cases also held that a teacher could take corrective measures for students who fought "away from the school-house, and not during school hours." *Hutton v. State*, 5 S.W. 122, 123 (Tex. App. 1887); *see also Balding v. State*, 4 S.W. 579 (Tex. App. 1887). They upheld a student's suspension from school for being "drunk and disorderly on the streets of . . . town" on Christmas day. *Douglas*, 116 S.W. at 212-13. And they even upheld a student's suspension from school for (of all things) participating in a football game outside of school. *Kinzer*, 105 N.W. at 686-88.

The concerns animating those cases have only more urgency today. For example, one needs only to substitute a Snapchat message into *Lander* to see that the result would be the same, but with an even stronger basis. A student could spread their "contemptuous language" more quickly and widely

through Snapchat, to the point of having their messages read at school the next day. A Snap of the poem in *Dresser* would help further distribute it; a Snap of the drunk and disorderly behavior in *Balding* would only spread the news of misconduct; and fighting over Snapchat as in *Hutton* would be more visible to the wider school community.

At the time the Fourteenth Amendment was ratified, the public understanding of a school's authority was clear: Teachers and school administrators had flexibility to take appropriate steps to correct even off-campus behavior that disrupted their schools. Whatever other lines or limits may have existed, neither courts nor schools artificially limited teachers' authority to the four corners of the classroom. And just a few simple analogies to cases from the era underscore the greater need for such flexibility today.

B. Nothing in *Tinker* or Its Progeny Created an On-Campus, Off-Campus Distinction.

Nor have this Court's decisions limited teachers, coaches, principals, and other school administrators[3]

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[3] At the time of the cases noted above, such as *Lander*, teachers often did the work of principals—or vice versa, with little to distinguish them in schools that had more than one teacher. But throughout the twentieth century, principals and school administrators took on a more independent role, and increasingly have taken on responsibility for enforcing discipline in schools. See Kate Rousmaniere, THE PRINCIPAL'S OFFICE: A SOCIAL HISTORY OF THE AMERICAN SCHOOL PRINCIPAL 34-44 (2013). Indeed, the Pennsylvania Principals Association has recently done a survey of its members, and found that nearly half of school administrators spend over an hour per day on discipline-related

through any arbitrary on-campus, off-campus limit. Instead, this Court has consistently recognized the unique and difficult task before educators, and afforded them flexibility to protect the discipline and well-being of their students more generally. To suddenly draw a rigid on-campus, off-campus line on school officials' authority would thus lack historic grounding twice over.

As this Court made clear in *Tinker*, neither students nor educators "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). But, the Court also held, teachers and administrators retain the authority to correct misconduct that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (citation and internal quotations omitted). Over the years, the Court has refined and explicated that line—but it has never suggested that off-campus speech or misconduct that "materially and substantially interfere[s]" with the school environment is beyond the ability of teachers to address. *See id.*

Far from it, this Court has recognized that "[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 thus require the basic tools to preserve "order and a proper educational environment" in order to benefit all students and

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issues, involving themselves in over a dozen social-media problems throughout a school year with bullying or harassment as their number one disciplinary issue.

ensure that everyone has a chance to learn. *Id.* And, as this Court has explained, 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 v. Fraser*, 478 U.S. 675, 681, 683 (1986). The simple fact is that teachers and administrators are "responsible for maintaining discipline, health, and safety," and need appropriate tools to fulfill those duties. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002).

Picking up on those cues, the courts of appeals had, until the outlier decision below, rejected any rigid on-campus, off-campus categorical rule. Some extended *Tinker* to off-campus 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 required a "nexus" between the speech and the school's "pedagogical interests." *E.g.*, *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011). And others extended *Tinker* to speech that was "intentionally direct[ed] at the school community." *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc).[4] While

[4] To be sure, the present case does not involve a threat, as did many of the cases before the courts of appeals above, and this Court need not reach the situation of a true threat. Regardless, the basic point remains that this Court should reject any rigid on-campus, off-campus distinction, and reaffirm the basic

perhaps different hues, the gist of these tests all adhered to the basic principle set forth in *Tinker* and rooted in caselaw going back to the Founding that teachers and administrators have leeway to correct off-campus misbehavior that directly affects the schoolhouse environment.

Moreover, both this Court and the lower courts have recognized that even greater leeway is required when dealing with extracurriculars or athletics. *See Earls*, 536 U.S. at 831-32. "By choosing to 'go out for the team,'" students who enjoy the privilege of those extracurriculars generally "subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995). As this Court observed in *Vernonia*, such students must adhere to special rules of conduct and, "[s]omewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.*

Thus, lower courts have held that schools can disqualify students from running for Senior Class Secretary when, as Junior Class Secretary, they wrote crude complaints on a blog post from home. *Doninger v. Niehoff*, 527 F.3d 41, 43, 46, 52 (2d Cir. 2008). They have held that a school can remove football players from the team after those players petitioned to fire the coach. *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007). And they have held that a school may require

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framework set forth in *Tinker* for even off-campus speech that substantially disrupts the school.

a basketball player to apologize to her teammates for circulating a disrespectful letter, or face ejection from the team. *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 772 (8th Cir. 2001). As anyone who has ever been a member of any team understands, those rulings are rooted not only in history but in common sense.

Asking students receiving the special benefits of extra-curricular participation to agree to adhere to a higher standard of behavior both on and off campus does not, as the Third Circuit suggested, require them to waive constitutional rights as a condition of participation. *See B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 192-93 (3d Cir. 2020). In giving short shrift to the special nature of the extra-curricular context, the court below missed a key point: the difference is not about waiving rights, but about making promises to the team and living up to those promises.

II. A Strict On-Campus, Off-Campus Rule Would Place Educators In An Untenable Position.

Given the rise of social media, the need for flexibility is only greater in modern times. The reach of internet activity 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. As a result, school administrators are called on more and more to address conduct that originates beyond the schoolhouse walls but has a direct and significant impact on the school community. Worse still, it is increasingly difficult to determine whether a student

has launched an online attack from home or from school, with students often using fake accounts or private networks to circumvent basic limits on school networks. Any strict on-campus, off-campus distinction would thus place teachers and administrators in an untenable position—threatening to throw classrooms into disarray and sow discord among students, while leaving teachers powerless to cope with cyberbullying and other online misconduct. Especially given how much of students' social lives now occur online, any such rule would effectively shut teachers and coaches out of their students' lives, freezing them out of even the most basic social interactions that are critical to self-discipline, team morale, and sportsmanlike conduct.

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—within the context of adolescent children.

Respondent's conduct here is illustrative: In response to her vulgar outburst attacking her school and the school sponsored extra-curricular activity she was part of, 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.

Thus, the conduct at issue here highlights the greater leeway that coaches need to secure the benefits of their team for all team members. 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 cohesiveness denies other students the full benefit of the program. *See Acton*, 515 U.S. at 657; *Wildman*, 249 F.3d at 772. For better or for worse, "team chemistry . . . is instrumental in determining a team's success," and "[m]utual respect for the coach [and team] is an important ingredient of team chemistry." *Lowery*, 497 F.3d at 594-95. Actions or words that interfere with that chemistry thereby harm the rest of the team. *Id.* Yet, under the Third Circuit's rule, a coach could be forced to stand by and watch as her team disintegrated because of one student's repeatedly abusive

statements and conduct—simply because the student attacked her teammates on social media from home.[5]

There is nothing in *Tinker* even faintly suggesting that to constitute substantial disruption there must be some school-wide upheaval or tumult. Any conduct that damages team chemistry, degrades the value of school programs to others, or effectively denies access to other students can and must be regarded as a substantial disruption.

Bullying concerns are even more obvious.[6] Indeed, one recent study found that 59% of teenagers in the United States have experienced some form of cyberbullying. *See* Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, PEW RESEARCH CENTER (Sept. 27, 2018), https://pewrsr.ch/3suken5. And 24% say their social media use has been "mostly negative." Anderson, *Teens, Social Media & Technology*, *supra*.

While students engaged in bullying frequently hurl their most hurtful and insensitive insults at their victims from the safety and comfort of their homes, the

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[5] Worse, if the student's speech was fully protected, would the coach be forced to promote the student to team leadership positions based solely on objective metrics such as running times or batting averages—because to do otherwise might be to target protected speech? These and other questions abound under the strict on-campus, off-campus test urged by Respondent.

[6] 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*.

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. ENV'T RSCH. & PUB. HEALTH (Apr. 4, 2019), *available at* https://bit.ly/2HhyKMI. Bullied students are then "less academically engaged," which leads to "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).

Plainly, messages sent within the student community, whether during or after school hours, from wherever launched, frequently damage the educational environment. Parents, in turn, often look to school officials to protect their children from online bullying from their school peers. And in the case of students so bullied that they cannot bear the thought of going to school due to the mental and physical distress it causes them, bullying effectively denies access to that environment.

Worse still, an on-campus, off-campus line could not be enforced given the increased complexity of technology and sophistication of students. More and more, students are learning to disguise their movements online, using virtual private networks (VPNs) to hide their activities—including whether they are accessing the internet at school or at home.[7] Once students access a VPN, they can make it seem as if they are using a computer in another location, circumventing both electronic and geographic limits alike. Students are also becoming the victims and perpetrators of so-called "spoofing" attacks, during which one person adopts a fake social media account or internet profile to impersonate someone else, encouraging others to share personal information or bullying others behind an online mask.[8] By using VPNs or spoofing accounts, students already make teachers' and principals' jobs harder—thus showing the impossible situation that educators would face

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[7] *See, e.g.*, Jennifer Goforth Gregory, *What is Virtual Private Network, and Why Are Teens Using It?*, YOURTEEN (last accessed Feb. 25, 2021), https://bit.ly/3pP9P3R; Wright Gazaway, *Lake Oswego Student Says School Hasn't Responded to Ongoing Racism*, ABC2 (Dec. 11, 2020), https://bit.ly/2NzJCsL; Scott Gordon, *As Madison Schools Attempt to Limit Social Media Use, Students Push Back*, WISCONTEXT (May 15, 2017), https://bit.ly/3pLaUcH.

[8] *See, e.g.*, Caylee Kirby, *User Makes Copycat Account of Superintendent's Twitter, Posts Fake School Closing Message*, WTOL11 (Feb. 8, 2021), https://bit.ly/37IQMlp; *Roseville Mom: Cyber-Bullying of Daughter Has Led to Phone Spoofing Harassment*, FOX2 (Aug. 13, 2019), https://bit.ly/3pQOW8e; Phil Pinarski, *Beware of 'Spoof Social Media Accounts' Encouraging Kids to Gossip, Alabama Schools Warn Parents*, CBS42 (Aug. 29, 2020), https://bit.ly/3dFvhG7.

from a rigid on-campus, off-campus rule. Would teachers and principals be required not only to identify the perpetrator behind these online attacks, but also determine the location from which the user accessed a computer or smart phone when bullying or disrupting the school?[9]

Teachers and administrators who are tasked with fostering an inclusive and safe environment cannot be powerless to correct the root of these problems. Yet, Respondents' rigid rule would leave no space for addressing these dilemmas. Whereas other attempts to address the situation, such as seeking dialogue with administrators or raising the issue at public school board meetings, would permit a more flexible approach, a blanket inflexible holding from this Court would freeze the limits of schools' abilities to cope with these issues in place across the country. The constitutional rigidities that would result make it all the more important to avoid freezing certain limits in

[9] These concerns are far from hypothetical. In the short time since the Third Circuit's ruling, the Western District of Pennsylvania has dealt with a case of a student who allegedly threatened his fellow students, and also posted images to his Instagram account of people using automatic weapons, of school shootings, and of ethnic cleansing. *See Tanya Hewlette-Bullard ex rel. J.H-B. v. Pocono Mountain Sch. Dist.*, No. 3:19-cv-00076, 2021 WL 674240, at *3 (Feb. 22, 2021). The court denied the summary judgment to the school district, reasoning that the case turned in large part over whether the student's Instagram posts were the cause of his exclusion from classes—because the posts were protected by Third Circuit precedent. *Id.* at *8. The case thus may raise the specter of a trial as to where the Instagram posts were made, under the assumption that posts made at home which seem to encourage school shootings are protected.

place merely because one school's response in a specific case might seem to be an overreaction. Indeed, Respondent's view would render unconstitutional a coach's decision simply to bench B.L. or give her extra laps after practice.

* * *

Rather than adopt such an inflexible rule, this Court should adhere to the flexible approach set forth in *Tinker*, and grounded in precedent stretching back to the Founding. Such an approach would support the mission of our schools and safeguard the rights of all students to receive an education. And while most off-campus speech would not fall within the purview of teachers under that rule, certain off-campus speech that was substantially disruptive to the schoolhouse could be subject to appropriate corrective measures. Teachers would be able to teach, and coaches could coach, knowing that they could address speech that directly degrades the value of educational programs, erodes team morale, or bullies another student.

CONCLUSION

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

Respectfully submitted,

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