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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CATO INSTITUTE, AND P.J. O'ROURKE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind.[1] PLF believes that when government blocks or forces the free expression of ideas, it is contrary to our political and philosophical founding and detrimental to human flourishing. To that end, PLF litigates to vigorously enforce guarantees of free speech and challenge speech restrictions that can be used, as this Court has warned, for "invidious, thought-control purposes." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015) (citation omitted).

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. This case interests Cato because the issue of school regulation of noncurricular, off-campus speech is only growing in importance in the digital age.

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[1] Pursuant to this Court's Rule 37.3(a), all parties consent to the filing of this brief. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

P.J. O'Rourke is one of America's leading political satirists, an H.L. Mencken Research Fellow at the Cato Institute, and an occasional producer of profane expression, both socially and in media. Formerly the editor of the *National Lampoon*, he has written for a host of publications—some sacred, some profane—and is currently editor-in-chief of the web magazine *American Consequences*. O'Rourke's 20 books, including three *New York Times* bestsellers, have been translated into a dozen languages and are worldwide bestsellers. Having raised three kids through their teenage years, he has heard the exact rant at issue in this case at the family dinner table.

INTRODUCTION AND SUMMARY OF ARGUMENT

When B.L. was a high school sophomore, she failed to make the varsity cheerleading team and was very upset about it. That weekend, while at the mall with a friend, she vented her frustrations by posting a picture to Snapchat where she raised her middle finger accompanied by the caption, "Fuck school fuck softball fuck cheer fuck everything." App. 5a. One student took a screenshot of B.L.'s post and showed it to her mother, a team coach, at which point B.L.'s private post was deemed to be her school's business. The coaches decided that B.L. violated a rule requiring cheerleaders "to have respect" for coaches and other cheerleaders, and to avoid "foul language and inappropriate gestures" and conduct that would tarnish the image of the school. App. 6a. When the coaches suspended B.L. from the junior varsity cheerleading team, her family sued the school district for violating B.L.'s First Amendment rights. App. 6a.

Both lower courts in this case ruled in B.L.'s favor. The Third Circuit concluded that her "snap" was fully protected speech and held that, while *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 513 (1969), and related cases created "a limited zone of heightened government authority" within the confines of the school or school sponsored activities, this standard did not apply to fully off-campus speech. App. 9a–10a, 25a.

This Court should adopt the holding below, that *Tinker*'s reduced First Amendment protections apply only when speech occurs in a context "owned, operated, or sponsored" by the school. App. 31a. Especially in a time when tens of millions of American students are engaged in "remote learning," the term "off-campus" provides no useful distinction. The focus, therefore, should be on school supervision and control. Students should not be subject to constant monitoring of their thoughts and expression by school administrators or staff. Nor should the constitutionally protected right of parents to raise their children be replaced by omniscient and omnipresent school oversight.

Allowing school administrators to punish speech in times and places outside their control and supervision also improperly focuses on the *reaction* to speech rather than the speech itself. First Amendment protection cannot vary based on offended reactions to speech. Moreover, our culture currently is experiencing a dangerous trend of punishing individuals for speech on social media with the intent and effect of stifling ideas. Empowering school administrators to punish students for any-time-any-place speech creates an incentive for students,

parents, and staff to engage in informant-style behavior that is anathema to American values.

The decision below should be affirmed.

ARGUMENT

I

OMNISCIENT SCHOOL ADMINISTRATION UNDERMINES FIRST AMENDMENT VALUES

When this Court decided *Tinker* in 1969, on-campus versus off-campus speech was a meaningful distinction that reflected the need for school administrators to maintain order during classes and extracurricular activities. Some fifty years later, when millions of K-12 students are engaged in "remote learning" and ever-present internet access blurs all geographic boundaries, *Tinker* has become a relic of a more compartmentalized time. Application of *Tinker* results in the erosion of parents' rights to direct the upbringing of their children, undermines the role of law enforcement, and encourages a culture of snitching and the heckler's veto which is deeply contrary to First Amendment values. This Court should retire the *Tinker* test in favor of a rule that permits schools to regulate student speech *only* when the speech occurs in a place or during a time controlled and supervised by school staff, and only when necessary to address *objective* disruption of the learning environment. A student speaking in other places and times enjoys full First Amendment protection.

A. Parents retain responsibility for their children outside of school-supervised and school-controlled activities.

While schools must quell disruptions that occur during school-supervised and controlled activities, speech that takes place outside the school environment (e.g., at a student's home on a weekend) should be beyond the school's disciplinary reach.[2] *See* Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School's Disciplinary Arm Reach Speech Made in a Student's Bedroom?*, 48 Willamette L. Rev. 195, 222 (2011). Allowing schools to regulate students' speech beyond these boundaries at any time and in any place creates "an omnipresent authority to loom over students." Nicholas McGrath, Note, *The Omnipotent School Administrator: Seeking to Curb Restriction of Off-Campus Student Speech in the Wake of* C.R. v. Eugene School District 4J, 97 Neb. L. Rev. 258, 277 (2018).

This "omnipresent authority" not only threatens to "strangle the free mind at its source," *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), but also to improperly supplant "the 'liberty' specially protected by the Due Process Clause [that] includes the right[] . . . to direct the education and upbringing of one's children . . . ." *Washington v.*

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[2] Defining the distinction between speech inside and outside the school environment will not present an intractable line-drawing problem. Schools' ability to discipline vulgar speech already depends upon that distinction. *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.").

Glucksberg, 521 U.S. 702, 719–20 (1997) (citations omitted). This liberty interest also "includes the right to discipline them." *Doe v. Heck*, 327 F.3d 492, 523 (7th Cir. 2003). When students are not on school property or engaged in school-supervised or controlled activities, parents retain the authority to decide what sort of language they will accept from their children and what consequences follow when children do not meet parents' expectations.[3] Parents' approaches to their children's speech will differ, but this does not warrant replacing parental prerogative with government control. *See Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1284–85 (11th Cir. 2008) (upholding a "parental-rights statute" that conditions students' ability to refrain from pledging allegiance to the flag upon their parents' written consent).

An example of a school overreaching and replacing the parent's prerogative to raise their child with standardized control is shown in *Burge ex rel. Burge v. Colton Sch. Dist. 53*, 100 F. Supp. 3d 1057 (D. Or. 2015). In that case, a student made inappropriate comments about a teacher on Facebook. His mother, who monitored her children's Facebook pages daily, saw his comments less than 24 hours after he posted

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[3] Schools do not stand squarely in the shoes of parents because they act in furtherance of state policy rather than exercising authority conferred by parents. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985). To the extent "*in loco parentis*" remains a meaningful concept, it is about protecting the child, not protecting the school, staff, or classmates from being disrespected, and even in that limited context, the school's responsibilities are circumscribed. *See Patel v. Kent School Dist.*, 648 F.3d 965, 973, 976 (9th Cir. 2011) (school's *in loco parentis* responsibility was not a custodial relationship requiring a special duty under the Fourteenth Amendment; parent may pursue state tort claim in state court).

them and immediately instructed him to delete the post, which he did. *Id.* at 1065. This was conscientious parenting and should have ended the matter. And, in fact, it did end the matter for six weeks, until the parent of another student anonymously gave a printout of the post to the school principal. At that point, "the potential spark of disruption had sputtered out, and all that remained was the opportunity to punish." *Id.* at 1074 (citation omitted). This opportunity should have been left solely to the parents of the child. *See also D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1222 (2010) (parents responded to teen's threatening message posted on website by terminating his internet access, grounding him, restricting his phone use, taking away driving privileges, and having him evaluated by a psychiatrist).[4]

[4] It is true, as the Eighth Circuit observed, that "teachers and administrators in today's world are expected to undertake greater responsibilities than what the one-room schoolhouse teacher shouldered. Educators serve as surrogate parents, psychologists, social workers, and security guards, above and beyond their normal teaching responsibilities." *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 635 (8th Cir. 2002). However, these roles, though expansive, cannot be—and are not—all-encompassing. In particular, these roles cannot supplant the role of the parent. *See* Bendlin, *supra*, at 224 ("School teachers are obligated by law to report suspected child abuse, but they are not expected to intervene and handle the abusive home situation themselves. Problems of abuse, hunger, and dysfunctional family relationships are left to the professionals who are trained and dedicated to solving them.").

B. School disciplinary processes should not displace law enforcement's responsibility to investigate threats and tort law's ability to redress defamatory statements.

Just as parents retain responsibility to determine the consequences of their children's behavior (including speech) when the children are not under school supervision and control, so too do law enforcement agencies retain responsibility to investigate behavior (including speech) that poses a threat or otherwise violates the law. Focusing on school shootings specifically, the Ninth Circuit reflected that "school administrators face the daunting task of evaluating potential threats of violence . . . [and] an error in judgment can lead to a tragic result." *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013). But a threat made in a time or place beyond a school's control or supervision should be communicated to the police, not the school—or the school's response should be to alert the police. If a police investigation finds no danger, the school should have no further authority to discipline private speech.

In *C1.G. v. Siegfried*, 477 F. Supp. 3d 1194 (D. Colo. 2020), *appeal filed*, No. 20-1320 (10th Cir. Sept. 10, 2020), a student posted a picture to Snapchat of himself and three friends at a thrift shop wearing hats and wigs, including one hat that resembled a foreign military hat from the World War II period. C.G. posted the picture to Snapchat with the caption: "Me and the boys bout to exterminate the Jews," a tasteless reference to an internet meme that was intended to be humorous. A few hours later, C.G. removed the picture and posted an apology. While the

picture existed, however, another student took a screenshot and showed it to her father, who called the police and spread it to "others in the Jewish community." Police officers responded to C.G.'s house and determined there was no threat against anyone. *Id.* at 1200. Nonetheless, the district court held that C.G.'s school had authority under *Tinker* to discipline him for his private speech.[5]

Alerting the police may have been heavy-handed in C.G.'s case, but a person who perceives a real potential threat *should* contact the police. After all, if a threat is made against a mall or a workplace, the matter is not resolved by the human resources department. Why should adults get the benefit of a police response while schoolchildren are left with school administrators who lack the resources or authority to make a full investigation?

Moreover, civil remedies exist outside of the school for speech that causes emotional or reputational harm. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (defamation law safeguards the dignity of citizens); *Layshock v. Hermitage School District*, 650 F.3d 205, 209 (3d Cir. 2011). *See also* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 Duke L.J. 855, 886 (2018) ("Defamation law has a civilizing influence on public discourse: it gives society a means for announcing that certain speech has crossed the

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[5] After C.G. recognized his error, removed the photo, and apologized, he met with members of the Jewish community to become more educated, for which the court commended him. *Id.* at 1210. The court seemed to question the need for the school to pile on additional consequences but held that, under *Tinker*, it had the authority to do so. *Id.*

bounds of propriety.") (citation omitted). In *J.C. ex rel. R.C. v. Beverly Hills Unified School District*, 711 F. Supp. 2d 1094, 1108, 1111 (C.D. Cal. 2010), a student made defamatory comments about another student, but the school lacked authority to punish under *Tinker* because there was no substantial disruption. The court noted, however, that the student may be liable in tort for cyber-bullying, which consists of defamatory, derogatory, or threatening statements made about a classmate and published over the Internet. *Id*. at 1122. While some schools have imposed punishment for defamatory speech, *see, e.g.*, *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 576 (4th Cir. 2011) (court upheld school punishment of student for vulgar and defamatory photographs of another student), other defamed students have pursued their claims in court. *See D.C.*, 182 Cal. App. 4th at 1199 (high school student subjected to threats posted on website sued for defamation, intentional infliction of emotional distress, and violation of hate crime statute). Thus, remedies exist outside the school disciplinary system and schools need not respond to every slight and offense their students or staff might suffer.

C. Schools must not discipline students for speech based solely on listeners' reactions; disruptive reactions are themselves subject to discipline.

"Within the universe of the First Amendment, listener disapproval seldom provides a valid basis for restricting speech." Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 Wm. & Mary L. Rev. 1985, 2018 (2012) (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992))

("Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be . . . punished or banned, simply because it might offend a hostile mob." (citations omitted)); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality opinion) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.").

Speakers are free to choose their words to enhance an emotive impact. Words that provoke or "alarm" others can convey a powerful message. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (band name containing a racial slur intended to "'reclaim' the term and drain its denigrating force"). Students, like adults, often turn to speech as a way of venting frustration and protesting life's indignities and injustices. *See J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring) (even speech that "may appear to be worthless" may enable the speaker to vent frustration, a valuable safety valve). Frustration and anger vented through speech serves as a "safety valve," that is, a "passive outlet . . . for anger and rage," surely preferable to actual acts of violence. Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. Sci. & Tech. L. 243, 282 (2001).

Stripped of her overuse of vulgarity, B.L.'s outburst boils down to: "I hate school. I hate softball. I hate cheer. I hate everything."[6] This is the language

[6] *See Sandul v. Larion*, 119 F.3d 1250, 1254–56 (6th Cir.) (it is "clearly established" that "the mere words and gesture 'f—k you'

of angry juvenile protest—in this case, a protest against what B.L. perceived to be an unjust personal affront. Vulgar, ill-considered, and provocative speech is nonetheless protected under the First Amendment unless it rises to the level of obscenity, true threats, or some other First Amendment exception. *See Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) ("The First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us.").

Outside of the school context, this Court has been emphatically clear that a listener's reaction to speech, standing alone, cannot transform otherwise protected speech into unprotected speech. *See* Daniel Ortner, *The Terrorist's Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad*, 12 Nw. J.L. & Soc. Pol'y 1, 26–33 (2016) (discussing the ways in which this Court has scrupulously avoided taking listeners' reactions into account). For instance, this Court has held that speech qualifies as a true threat only if "the speaker means to communicate a serious expression of an intent to

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are constitutionally protected speech."), *cert. dismissed*, 522 U.S. 979 (1997); *People v. Hogan*, 664 N.Y.S.2d 204, 207 (Crim. Ct. Kings Cty. 1997) ("[M]any people seem hardly able to speak an English sentence without the use of at least one four letter word."). A raised middle finger similarly is protected expression. *See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 91 (2d Cir. 1998) ("[T]he gesture generally known as 'giving the finger' . . . is widely regarded as an offensive insult . . . ."). *See also K.Y.E. v. Florida*, 557 So. 2d 956, 957 (Fla. App. 1990) (child who continually sang, "F--k the police" in the presences of two police officers and could be heard across the street by a crowd of adults and children could not be charged with breaching the peace or obstructing or opposing an officer without violating her First Amendment rights).

commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The First Amendment protects even speech that is "distastefully violent" but, objectively, not a true threat. *Washington v. D.R.C.*, 13 Wash. App. 2d 818, 824, 828 (2020) (ruling that a teenager who, in the midst of a mother-daughter fight, texted friends saying that she wanted to kill her mother could not be prosecuted for harassment because, when looked at objectively and in context, she was just "venting and expressing her emotions"); *see also People v. Dietz*, 75 N.Y.2d 47, 51 (1989) (First Amendment protects "earnest expression of personal opinion or emotion" even when it is "abusive" or "intended to annoy" unless it "presents a clear and present danger of some serious substantive evil"). Subjective feelings of fear and discomfort have never been enough.

Vulgar and offensive speech upsets both the targets of the speech and school staff who expect better of student expression. But the First Amendment requires schools to permit the expression of ideas even if they "may start an argument or cause a disturbance." *Tinker*, 393 U.S. at 508 (noting that the Constitution protects "this sort of hazardous freedom").[7]

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[7] The *Tinker* case itself generated anger, harassment, and death threats in response to the Tinkers' protest of the Vietnam War. Iowa PBS, *John Tinker Describes the First Day Wearing a Black Armband to School to Protest the Vietnam War*, YouTube (Sept. 23, 2019), https://bit.ly/3eddCFT; Iowa PBS, *Mary Beth and John Tinker Describe Receiving Threats After Protesting the Vietnam War* (Feb. 21, 2019), https://bit.ly/30fPc6i.

Some courts correctly recognize this important truth. For instance, in *Beussink v. Woodland R–IV School District*, the court held that a school principal's disciplinary measure was based on his emotional reaction to a student's speech, rather than the likelihood that the student's speech would itself create a disruption. The discipline thus violated the student's First Amendment rights. 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). *See also Killion v. Franklin Regional Sch. Dist.*, 136 F. Supp. 2d 446, 456, 458 (W.D. Pa. 2001) (distress of staff members—one "almost in tears"—by a student's "childish and boorish antics" in circulating a rude top-ten list cannot justify discipline of student in the absence of any disruption). And the Seventh Circuit refused to bar a student from wearing a t-shirt which read "Be Happy, Not Gay" even though it offended and provoked many students because "[s]tatements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011).

Unfortunately, some courts have allowed schools to shut down student speech based solely on the reaction of the listener. Most egregiously, the Ninth Circuit allowed a school to ban students from wearing t-shirts with the American flag on them on Cinco de Mayo because other students at the school were offended by the wearing of the American flag and threatened violence against the students who wore the shirts. As Judge O'Scannlain explained in his dissent from the denial of rehearing en banc, this decision "permits the will of the mob to rule our schools" by "condoning the suppression of free speech

by some students because *other students* might have reacted violently." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 766 (9th Cir. 2014) (O'Scannlain, J., dissenting) (emphasis in original).

This Court should clarify that the most easily outraged students and parents do not have a heckler's veto over other students' speech. In the world of distance learning and constant social media usage by teenagers, this clarification is urgently needed.

II

FIRST AMENDMENT VALUES CANNOT FLOURISH IN AN INFORMANT SOCIETY

The speech police are out in full force these days. Every day brings another report of someone saying—or having once said long ago—something that offends someone else. Even worse than being offended on the spot by a contemporaneous statement, some speech monitors are deliberately searching for statements—or even individual words—that, in their minds, justify condemnation. The real-world consequences of these call-outs can include social shunning, being disciplined at school or work, or even losing college acceptances[8] or employment. *See* Glenn Greenwald, *The Journalistic Tattletale and Censorship Industry Suffers Several Well-Deserved Blows* (Feb. 7, 2021), https://bit.ly/30f9jBB (describing "half adolescent and half malevolent" demands for censorship done "partly for ideology and out of hubris" and "from petty vindictiveness" with the aim "to control, to coerce, to

[8] WVLT, *UT: Incoming student accused of using racial slurs not attending university* (June 3, 2020), https://bit.ly/3rpTtjy (vindictive student held on to three-year-old Snapchat video of a classmate, then timed its release to cause her the most damage).

dominate, to repress"); Scott Skinner-Thompson, *Recording as Heckling*, 108 Geo. L.J. 125, 139 (2019) ("Watching isn't always about gathering information for future use or understanding. Sometimes watching expresses and even exerts control."); *McAdams v. Marquette University*, 383 Wis. 2d 358, 429 (2018) (Bradley, J., concurring) (noting, in the university context, the "dominant academic culture of micro-aggressions, trigger warnings and safe spaces that seeks to silence unpopular speech by deceptively recasting it as violence") (citation omitted).

Alarmingly, these calculated attempts to create a culture of suppressed speech are succeeding. In the past few years, people across all political ideologies have increasingly felt as though the current climate prevents them from sharing their beliefs. *See* Cato Institute & YouGov, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share* (2020), https://bit.ly/3sYjk2H. And while universities were once a bastion of free speech, a growing number of students believe that the freedom of speech is threatened. *See* Gallup, Inc. & Knight Foundation, *Free Expression on Campus: What College Students Think About First Amendment Issues* (2018), https://kng.ht/3ehgQIq.

A disturbing number of student speech cases arise when another student anonymously informs a school staff member about speech that the informant found offensive—but which causes no disruption to the learning environment. Petty disagreements or sniping among teen or tween students, whether they share classes or activities or are teammates, is "utterly routine" and may descend to "crass foolishness." *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*,

807 F. Supp. 2d 767, 783–84 (N.D. Ind. 2011). Yet students increasingly know that they can bring down their school's wrath on any classmate who has spoken, at any time and in any place, in a way that some may deem offensive. This dynamic creates an un-American incentive to inform on each other.

It is not only students who are prone to tattling; some parents are all too willing to sic school disciplinarians on other people's children. *See T.V. ex rel. B.V.*, 807 F. Supp. 2d at 782 n.4 ("busybody" parent whose child was not on the volleyball team brought photos posted online to school's attention, alleging they were "causing issues" with her daughter and the team); *Burge*, 100 F. Supp. 3d at 1065 (parent anonymously informed school principal about a Facebook post by someone else's child).

As many judges have explained, legal policies that encourage petty snitching are quite simply un-American. As Justice Black noted, the American government was built upon a sufficiently strong foundation to endure without "a system of laws [that] gives to the perpetuation and encouragement of the practice of informing which most of us think of as being associated only with totalitarian governments." *Noto v. United States*, 367 U.S. 290, 301–02 (1961) (Black, J., concurring). *See also Roberts v. United States*, 445 U.S. 552, 570 (1980) (Marshall, J., dissenting) ("[The] social values of loyalty and personal privacy have prevented us from imposing on the citizenry at large a duty to join in the business of crime detection."); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 291 (4th Cir. 2015) (en banc) (Wilkinson, J., concurring in part and dissenting in part) (asking, in a hostile work environment case, "If

every co-worker becomes a potential informant, does this environment not in time come to resemble societies other than our own?"). Moreover, rewarding snitching encourages false tales. *See Cash v. Maxwell*, 565 U.S. 1138, 132 S. Ct. 611, 612 (2012) (Sotomayor, J., respecting the denial of certiorari) (recounting a prison snitch who "repeatedly falsely implicated other defendants, and fabricated other material facts").

Students faced with often anonymous snitching of their private communications will learn to self-censor, engaging in what former Soviet refusenik Natan Sharanky describes as "that constant checking of what you are going to say to make sure it's not what you want to say." Natan Sharansky & Gil Troy, *The Doublethinkers*, Tablet (Feb. 20, 2021), https://bit.ly/2OsyvBY. No theory of First Amendment protection for free speech can permit this perversion of American values. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (rejecting a rule that "would invite timidity and self-censorship").

CONCLUSION

The Court should affirm the decision below.

DATED: March 2021.

Respectfully submitted,

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