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 COLLEGE ATHLETE ADVOCATES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can a public school, college or university discipline a student for speech outside of school grounds or events, merely because the speech is about the school and might provoke other students to disagree?

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BRIEF OF *AMICI CURIAE* AND IDENTITY OF *AMICI CURIAE*[1]

The collective term "College Athlete Advocates" refers to the following individuals and organizations who are signatories to this brief. They share in common a familiarity with, and concern for, the ability of students participating in competitive sports to make themselves heard – safely, without fear of reprisal – on issues of public concern, including issues affecting their own health and safety. The signers are:

The **National College Players Association** ("NCPA") is a 501(c)(3) nonprofit advocacy group launched by UCLA football players in 2001 to serve as an independent voice for college athletes across the nation. Today, the NCPA has more than 20,000 members at more than 150 NCAA Division I campuses nationwide. The NCPA's mission is to protect future, current, and former college athletes.

The **College Athlete Advocacy Initiative** ("CAAI") is a non-profit organization dedicated to the representation of college athletes and college sports reform initiatives. Based at the Urban Justice Center in New York City, CAAI was founded in 2019 by Tim

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been obtained.

Nevius, a lawyer and former investigator for the National Collegiate Athletic Association, who has extensive experience working with high school and college athletes on disciplinary and eligibility matters. As part of its mission, CAAI has worked with several college athletes on sports-related matters, including issues related to reporting abuse and mistreatment by coaches.

Julie Sommer is an attorney in Seattle, with over fifteen years of litigation experience. Julie earned a bachelor's degree from the University of Texas at Austin where she was a member of an NCAA National Championship swim team. She was an individual Southwest Conference champion as a freshman, a four-time NCAA All-American, and competed in the 1992 U.S. Olympic Trials.

Kendall Ware is a senior at the University of Vermont, where she has been a member of the UWM intercollegiate swim team throughout her college career. Ware is among the plaintiffs in an ongoing federal lawsuit against the NCAA pending in the U.S. District Court for the Western District of Michigan, challenging the athletic governance body's failure to protect athletes against sexual assault.

SUMMARY OF ARGUMENT

This case implicates the ability of students playing competitive sports, at all educational levels, to express themselves about the social and political issues they care about – and to engage in safety-motivated whistleblowing about conditions within their own athletic programs – without fear of

retaliation. The stakes for the safety of athletes could scarcely be higher. The standard being urged by the School District in this case would result in "open season" on whistleblowers within high school and college athletics, because the District and its supporting *amici* would have the Court define complaining about the athletic program as a punishable act of "disruption" unprotected by the First Amendment. Although this case involves a high school athlete, when this Court has decided a First Amendment case in the K-12 educational setting, lower courts have applied the same level of control to the speech of adult-aged college students. They will do so here as well.

The District and several of its *amici* would have the Court declare sports and other extracurricular activities to be a "Constitution-free zone" where schools have limitless authority to regulate student expression, so long as they allege that the speech will provoke differences of opinion. This standard leaves no room for students to express even the most well-founded concerns about their educational institutions. It is especially tone-deaf to adopt a rule of "no controversial speech" at this time in history, when athletes' voices about both external political causes (such as race relations) and closer-to-home concerns (such as the rights of college athletes to earn a living) desperately need to be heard. It is also illegal. Requiring people to waive their constitutional rights in exchange for a government benefit, even an entirely discretionary one, contravenes the "unconstitutional conditions" doctrine.

This is, effectively, a college student speech case. The Court should keep the welfare of college students front-and-center in considering where to draw the line of institutional punitive authority, and should not draw any line in B.L.'s case that would not be suitable for the speech of a 21-year-old college student.

ARGUMENT

I. THE COURT WILL BE DETERMINING THE RIGHTS OF COLLEGE STUDENTS AS WELL AS K-12 STUDENTS

Supreme Court decisions diminishing the First Amendment right of K-12 students invariably end up being applied to diminish the rights of college students as well. If the Court accepts the invitation to equate off-campus speech with on-campus speech governed by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that decision will adversely affect the rights of college students, because courts already widely apply *Tinker* at the college level. *See* Meggen Lindsay, *Tinker Goes to College: Why High School Free-Speech Standards Should Not Apply to Post-Secondary Students*, 38 WM. MITCHELL L. REV. 1470, 1485 (2012) (stating that five circuits have relied on *Tinker* in adjudicating First Amendment cases involving college students).

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988), the Court reserved the question of what level of First Amendment protection should apply to speech in the curricular setting when the speaker is a college-aged adult rather than, as in

that case, a minor attending high school. Two things have happened since. First, the Court has never in the ensuing 33 years found occasion to clarify that unanswered question, leaving two generations of college students uncertain in their level of First Amendment protection. And second, in the absence of guidance from this Court, the lower courts have near-unanimously answered the unanswered question adversely to student rights. *Hazelwood* is now widely accepted as the default level of control over student "curricular" speech at every educational level, even graduate and professional school. *See* Frank D. LoMonte, *The Key Word Is Student: Hazelwood Censorship Crashes the Ivy-Covered Gate*s, 11 FIRST AMEND. L. REV. 305, 305 (2013) (stating that four federal circuits have explicitly applied *Hazelwood* to college-level speakers and only one circuit has declined to do so). Indeed, just recently, a federal court in Connecticut – in a case also involving discipline of an athlete – dismissed a college speaker's First Amendment case in reliance on this Court's decision in a high-school speech case, *Bethel Area School District v. Fraser*, 478 U.S. 675 (1986). *See Radwan v. Univ. of Conn.*, 465 F. Supp. 3d 75, 111-12 (D. Conn. 2020) (citing *Fraser* for the proposition that a college could reasonably have believed its punitive authority extended to a college athlete's fleeting use of a middle-finger gesture). *See also Doe v. Alvey*, No. 1:20-CV-410. 2021 WL 1099593 (S.D. Ohio Mar. 23, 2021) (applying high school First Amendment standards to find that a college athlete's Title IX complaint of a hostile environment created by her coach was not constitutionally protected speech, because it involved questioning the coach's judgment). In other words, even though college is obviously different from K-12

school in what should be legally significant ways, courts generally have overlooked those obvious differences and simply imported this Court's K-12 school-speech jurisprudence onto the college campus.

Make no mistake: This is what will happen if the Court diminishes student First Amendment rights in this case. Colleges, universities, and their lawyers did not regard the Court's cautionary reservation in *Hazelwood* as having any consequence, and they will not do so here, either. Less than one year after this Court decided *Hazelwood*, lawyers for the University of Alabama were in court arguing – successfully – that the *Hazelwood* standard applies equally at the postsecondary level, unleashing decades of censorship and retaliation. *Alabama Student Party v. Student Government Ass'n*, 867 F. 2d 1344 (11th Cir. 1989). Higher education institutions have been assertively policing their students' off-campus speech on social media in dubiously legal ways, and an outcome in the District's favor here will be widely perceived as the green light to continue doing so. *See, e.g.*, Anemona Hartocollis, *Students Punished for 'Vulgar' Social Media Posts Are Fighting Back*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html (describing the case of a 27-year-old pharmacy graduate student at the University of Tennessee expelled over "raunchy" social media posts in which she shared sex-themed song lyrics). Unmistakably, the Court is making a decision in this case that will establish – potentially, for decades to come – the level of First Amendment freedom that adult-aged college students can expect.

The declining support for First Amendment principles among America's college students has been widely documented and decried.[2] It is no secret why students fail to see the First Amendment as a meaningful check on government authority: Because, so far as they can tell, it is not.[3] In one especially egregious case, a state university was permitted to discipline a 26-year-old medical student because he used uncivil language in an off-campus Facebook post – which never mentioned the college or anyone attending it – denouncing the abortion-rights movement, an act of core political speech. *Hunt v. Bd. of Regents of Univ. of N.M.*, 792 Fed.Appx. 595 (10th Cir. 2019) (unpublished). If this Court further erodes First Amendment freedoms, the message to students – who learn from observation and experience, not just

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[2] *See* Aleza Lardieri, *Study: College Students' Confidence in 1st Amendment Security Decreases*, U.S. NEWS & WORLD REP. (Mar. 12, 2018), https://www.usnews.com/news/politics/articles/2018-03-12/study-college-students-confidence-in-1st-amendment-security-decreases (summarizing findings of Knight/Gallup survey of college students nationwide, which found eroding confidence in the security of freedom of speech and press, growing acceptance of restrictive campus "speech codes," and widespread agreement that the campus climate causes some students to self-censor their political opinions).

[3] *See* Stephen Sawchuk, *Schools Teach Civics. Do They Model It?*, EDUC. WEEK (May 7, 2019), https://www.usnews.com/news/politics/articles/2018-03-12/study-college-students-confidence-in-1st-amendment-security-decreases ("All but absent from the growing civics education conversation is the recognition that everyday interactions in schools also inform students' civic development, and that often those interactions tell a totally different story about individuals' rights from the government textbooks used in class.").

from textbooks – will be unmistakable. Students can scarcely be expected to honor and cherish a First Amendment that their lived experience teaches them to be a valueless abstraction.

II. ATHLETES HAVE OFTEN USED THEIR VOICES IN THE VANGUARD OF POLITICAL AND SOCIAL MOVEMENTS

It is an especially tone-deaf moment in America's history for educational institutions to be seeking essentially limitless authority to silence speech by athletes. Athletes have long been in the forefront of reform movements, including the movements for racial and gender equality, and they are again in the forefront today. Clouding their ability to speak in their off-campus lives will silence these invaluable voices.

Sports have long been a vehicle for social change, for obvious reasons. Sports command public attention, athletes and coaches are admired role models, and sports bring students of different races and socioeconomic backgrounds together. When a Black college basketball player extended a handshake to a white opposing player during a 1963 NCAA tournament game between Loyola and Mississippi State, the gesture reverberated across the nation and the game (which became known as "The Game of Change") was credited with helping speed the demise of segregation in higher education.[4]

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[4] Dana O'Neil, *A game that should not be forgotten*, ESPN.COM (Dec. 13, 2012), https://www.espn.com/mens-college-basketball/story/_/id/8741183/game-change-mississippi-state-loyola-cannot-forgotten-college-basketball. *See also* Kerry

Today, college athletes are taking the baton from Loyola's Jerry Harkness and continuing to advocate for the rights of the underrepresented, within college sports and beyond. College players have taken leadership in a nationwide movement – known as "Name, Image and Likeness" or NIL – that could transform the century-old notion of college sports as a "vow of poverty" in which players are constrained from earning outside income while their institutions reap billions from their labor. All of this activity is, to put it mildly, "disruptive" to college sports. *See* Brent Schrotenboer, *NCAA moves forward with historic reforms for athletes on name, image and likeness, as well as transfers*, USA TODAY (Oct. 14, 2020), https://www.usatoday.com/story/sports/college/2020/10/14/ncaa-moves-forward-historic-athlete-reforms-name-image-likeness-transfer/3658056001/ (observing that the NIL movement "promises to disrupt the old-fashioned notion of amateurism in college sports"). When Northwestern University football players petitioned the National Labor Relations Board for the right to unionize, the university responded that the move "would create serious disruptions and undermine equality and fairness among the schools participating in intercollegiate athletics."[5] This is why it is so perilous

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Sheridan, *The College Football Game That Put A Dent In Desegregation*, NPR.ORG (Nov. 30, 2019), https://www.npr.org/2019/11/30/783889446/the-college-football-game-that-put-a-dent-in-desegregation (describing how history-making 1969 college football game between University of Tampa and historically Black Florida A&M University "ended an era of segregation in sports by erasing the myth that white players were superior to black athletes").

[5] *In re Northwestern Univ. & College Athletes Players Ass'n*, N.L.R.B. Case No. 13-RC-121359, Northwestern University's

to set the bar – as the School District and Solicitor General urge – at the point of "disruption" of an athletic program. Sometimes, institutions *need* disrupting.

Athletes' activism is not limited to issues of self-interest. At the University of Missouri, when college football players organized in opposition to the university's failings in responding to an uncomfortable climate for Black students, the power of their collective gesture was widely credited with accelerating the ouster and replacement of the university's ineffective chancellor. *See* Philip Bump, *How the Missouri football team took down its university's president*, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/11/09/missouri-football-players-and-the-untapped-political-power-of-the-college-student-athlete/. Forcing the removal of the institution's top executive is perhaps the textbook definition of "disruption."

Starting with the NFL's Colin Kaepernick, but trickling down to colleges and high schools, athletes have used their role-model status and followings to express their outrage over police brutality and of the underlying systemic inequities that produce violent police confrontations in Black communities. *See* Rhiannon Walker, *High school football players following Kaepernick's lead*, THE UNDEFEATED (Sept. 15, 2016), https://theundefeated.com/features/high-school-football-players-following-kaepernicks-lead/.

Reply Brief to the Board on Review of Regional Director's Decision and Direction of Election (July 31, 2014) at 18.

Undoubtedly, the sentiment of the "Black Lives Matter" movement is not shared by everyone in the locker room, and if discord in the locker room is all it takes for an athletic department to impose punishment, then much political advocacy will become grounds for disciplinary action. The trigger point for punishment urged by the School District and the Solicitor General – that speech becomes punishable if it "targets" a school audience – would be fully satisfied by an athlete's Instagram post wearing a Black Lives Matter or Blue Lives Matter T-shirt in which the athlete "tagged" the athletic program for purposes of stimulating debate on campus (for example, "Join me #Bulldogs").

It cannot be overlooked that college sports programs are overwhelmingly run by white administrators, and disproportionately populated by students of color. *See* Shaun R. Harper, *White NCAA Coaches Profit Off Black Players*, HARTFORD COURANT (Mar. 14, 2018), https://www.courant.com/opinion/hc-op-harper-white-coaches-profit-off-black-players-20180313-story.html (citing research on "power five" athletic conferences, which shows 56 percent of college basketball players are Black while 79 percent of head coaches and 71 percent of athletic directors are white males). In other words, a ruling against B.L. and in favor of the School District will equip white college administrators with virtually unreviewable authority to silence the voices of Black and brown speakers.

This racial (and generational) divide is significant for another reason: Social media is uniquely vulnerable to cultural "mistranslation," because posts are so easily taken out of context. When

a student delivers a presentation in the classroom, the context is self-evident. But a student who is enjoying a concert and posts a tweet containing a snippet of rap lyrics might be misperceived as advocating violence or drug use.[6] Simply put, 19-year-old Black students and 50-year-old white administrators do not always share a cultural vocabulary. If a misinterpreted social-media post becomes grounds for unreviewable punitive action impervious to First Amendment challenge, it is no mystery which athletes will suffer most.

III. ATHLETES NEED ASSURANCE THEY CAN ENGAGE IN SAFETY-MOTIVATED WHISTLEBLOWING WITHOUT FEAR OF RETRIBUTION

All students should go to school with the confidence that they can speak out about wrongdoing within their institutions without fear of retaliation, but the right to engage in whistleblowing speech is especially essential for the safety of those playing competitive sports. It has become painfully apparent in recent years that sports are rife with abuse. Young athletes are uniquely vulnerable to exploitation by their coaches exactly because of the code of enforced silence that the Court is being asked to validate in this case. In their zeal to make sure that no one can get away with saying "fuck cheer," Petitioners would leave students equally vulnerable to punishment for saying:

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[6] *See* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1892 (2018) (describing ordeal of 18-year-old Texas teen who was held in jail for four months and charged with felony terroristic threats, because he used violent imagery in a Facebook chat about a video game he was playing).

"Fuck the abusive cheerleading coach." No one has a legally enforceable duty to complain politely about the government. To enforce a "mandatory politeness rule," under threat of punishment, will guarantee that abuse festers undetected.

In recent years, scandals involving the abuse of athletes have become public knowledge at Ohio State University, where a wrestling team physician molested young men for decades, and at Michigan State University, where generations of young gymnasts were criminally sexually abused by team physician Larry Nassar, while university authorities looked the other way.[7] Abusive coaching tactics have surfaced at the University of Iowa (racial slurs by a member of the football coaching staff), at Rutgers University (verbal and physical abuse by the head basketball coach), at Purdue University-Fort Wayne (women's basketball coach accused of "toxic abuse" that drove players to panic attacks and self-harm), and at many other institutions, as *former* team members – no longer vulnerable to retaliation – come forward and speak up

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[7] *See* Scott Raab, *The Wrestler*, ESQUIRE (Feb. 23, 2021), https://www.esquire.com/sports/a35120040/richard-strauss-ohio-state-wrestling-sexual-abuse/#:~:text=Schyck%20graduated%20with%20the%204,sports%20between%201978%20and%201998.; James Dator, *A comprehensive timeline of the Larry Nassar case*, SBNATION (Feb. 26, 2021), https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state.; Dana Huninger Benbow, *Toxic abuse alleged inside Purdue-Fort Wayne women's basketball: 'It was brutal'*, INDIANAPOLIS STAR (Jan. 20, 2021), https://www.indystar.com/story/sports/college/purdue/2021/01/20/purdue-fort-wayne-womens-basketball-program-accused-toxic-abuse/3592918001/.

about the mistreatment they endured.[8] Abuse is an especially acute problem for teen girls like B.L., who may be vulnerable to exploitation by adult authority figures; the world of competitive cheerleading has been rocked by scandal in recent months as it comes to light that dozens of adults continue working in cheer programs despite ostensibly being banned because of past sexual misconduct with minors.[9] Common to these cases, and to dozens more like them across the country, is that misconduct often takes years or even decades to surface, because the victims are too intimidated to complain, fearful of losing a coveted shot at a free college education and a lucrative professional sports career. Now, imagine that colleges are equipped with the judicially sanctioned authority to retaliate against anyone who speaks in the context of sports in a "disruptive" way. This is a recipe for making the already-abusive conditions for athletes

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[8] *See* Barrett Sallee, *Iowa splits with strength coach Chris Doyle after allegations of racial disparity*, CBS SPORTS (Jun. 15, 2020), https://www.cbssports.com/college-football/news/iowa-splits-with-strength-coach-chris-doyle-after-allegations-of-racial-disparity/; Brendan Prunty, *Mike Rice fired at Rutgers after abusive behavior on practice tapes comes to light*, THE STAR LEDGER (Apr. 3, 2013), https://www.nj.com/rutgersbasketball/2013/04/mike_rice_fired_at_rutgers_aft.html.

[9] Marisa Kwiatkowski & Tricia L. Nadolny, *Cheerleading has a list of people banned from the sport. It was missing 74 convicted sex offenders*, USA TODAY (Sept. 18, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/09/18/cheerleading-cheer-investigation-sexual-misconduct-sex-offender-banned-list/3377622001/.

exponentially worse, cutting off the only viable source of rescue.

To borrow the Court's iconic phrase from *NAACP v. Button*, 371 U.S. 415, 433 (1963), whistleblowing needs "breathing space to survive." The Court should not lose sight of the fact that it is dealing with young and vulnerable speakers in a position of extreme power differential.[10] The culture of enforced silence within sports is well-documented, as *Amici* can attest from years of both playing college sports and working on behalf of those who play today. *See, e.g.*, Rick Maese & Keith L. Alexander, *Report on Maryland football culture cites problems but stops short of 'toxic' label*, THE WASHINGTON POST, Oct. 25, 2018 (reporting on external investigation into the

[10] *See* Deborah L. Brake, *Going Outside Title IX to Keep Coach-Athlete Relationships in Bounds*, 22 MARQ. SPORTS L. REV. 395, 396 n.4 (2012) ("The dominant win-at-all cost model of intercollegiate sport is rife with harms to athletes, male and female. The asymmetrical coach-athlete relationship empowers coaches to abuse athletes in sexual and nonsexual ways."); Brianna J. Schroeder, *Power Imbalances in College Athletics and an Exploited Standard: Is Title IX Dead?*, 43 VAL. U. L. REV. 1483, 1484 (2009) (observing that "college athletic teams are marked by power imbalances, with players at the bottom of the power structure. …This power structure makes the athletic team an environment ripe for sexually harassing behavior that goes unreported."); T.F. Charlton, *Why do athletes tolerate abusive coaches?*, SALON (Apr. 6, 2013), https://www.salon.com/2013/04/05/why_do_athletes_tolerate_abusive_coaches/ ("Players recognize the profound imbalance of power that makes challenging abuse dangerous in a hierarchical and authoritarian coaching culture. The person they would be accusing holds power over their athletic scholarships and playing time, and has the backing of even more powerful school officials.").

heat-stroke death of University of Maryland football player Jordan McNair, which concluded that athletic department officials cultivated "a culture where problems festered because too many players feared speaking out," even when coaches subjected them to abusive tactics).

The Solicitor General proposes that student speech should lose the protection of the First Amendment and become punishable when it "intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or programs themselves (such that the speech has the potential to substantially undermine the function or program)" or "when the student's off-campus speech targets an extracurricular athletic program in which the student participates," and then offers as an example of punishable speech a social-media post questioning the coach's play-calling. Brf. for United States at 24, 25. This is roadmap for retaliation. If the triggering event for discipline is that the disciplinarian perceives student speech as contrary to "maintaining team cohesion and respect for the coach's authority" (Brf. for United States at 8), then even the most well-founded criticism – for instance, that the coach is forcing players to practice in unsafe conditions[11] – is grounds for punishment, no matter where and how it is delivered.

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[11] *See* James Bruggers, *'This Was Preventable': Football Heat Deaths and the Rising Temperature*, INSIDE CLIMATE NEWS (July 20, 2018), https://insideclimatenews.org/news/20072018/high-school-football-practice-heat-stroke-exhaustion-deaths-state-rankings-health-safety/ (reporting that an average of three football players per year die of heat stroke).

Just this month, *The Washington Post* featured the story of a Virginia high school football player who used social media to call attention to racial slurs that he and his Black teammates faced from opposing players, fans and coaches during a game.[12] The player, Lukai Hatcher, decried what he argued were biased decisions by referees, and challenged the fairness of punishment imposed on Black players who fought back after an opponent spat on one of them. Because it, quote, "targets an extracurricular athletic program in which the student participates," Hatcher's act of whistleblowing about racism – which, in his case, led to a positive dialogue at the school – is a punishable disciplinary infraction under the Solicitor General's standard.

There is, admittedly, no perfect solution to this case – or any line-drawing case where speech is concerned. There is always a risk that the rule established by the Court will end up "over-punishing" speech or "under-punishing" it. In locating the boundary between what is and is not sanctionable, either some high-value speech may end up being punished, or some low-value speech may go unpunished. The Petitioner and its *amici* supporters are asking the Court to choose "over-punishment" – to

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[12] Theresa Vargas, *A high school football team told adults they were spat on and called the n-word. Nothing changed until a player posted, 'enough is enough!'*, WASH. POST (Mar. 20, 2021), https://www.washingtonpost.com/local/a-high-school-football-team-told-adults-they-were-spit-on-and-called-the-n-word-nothing-changed-until-a-player-posted-enough-is-enough/2021/03/20/fa0c7e78-8918-11eb-bfdf-4d36dab83a6d_story.html

adopt a rule that ensures that some student whistleblowers will end up suffering disciplinary action as "disruptors," without recourse to vindicate themselves, and that as a result of that over-punishment, others will be chilled from engaging in high-value speech. That, the Court is being told, is the price that must be paid to ensure that coaches and school administrators do not have to put up with being insulted. This is wrong as a matter of law, and wrong as a matter of basic human decency.

The "worst-case scenario" that the Solicitor General can conjure is that a player may take to social media to critique a coach's strategy decision. Undoubtedly, that may hurt the coach's feelings. But the hurt feelings of government employees criticized by their constituents do not count for very much in a First Amendment analysis. If something must be risked – that coaches must develop a thicker skin for insults, or that whistleblowers must be silenced by retaliation – the choice is clear. Indeed, the Solicitor General's brief on behalf of the District "says the quiet part out loud." Schools are asking the Court for authority to police off-campus speech because they do not like students second-guessing their decisions, and if given the authority they seek, they will use it to silence dissent. This is not speculation. The agenda is in plain sight.[13]

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[13] In its brief, the District approvingly cites the case of *State ex rel. Dresser v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232 (Wis. 1908). In *Dresser*, the Wisconsin Supreme Court permitted a school to retaliate against students who submitted a humorous poem to their community's weekly newspaper, poking fun at what they considered to be ridiculous disciplinary rules. Once again, the District has "said the quiet part out loud." If successful here,

Any educator will readily attest to the single greatest source of discord among high school students: Dating. Betty may break up with Archie to date Reggie, or Archie and Reggie may become rivals for the affections of Veronica. This off-campus behavior not-infrequently becomes a source of discord within the locker room. Would schools purport to have regulatory authority over off-campus dating behavior, in the name of preserving team harmony? Plainly, they would not. Similarly, tensions may arise between students because of conflicting political or religious beliefs, or because a student was given an extravagant car, outfit, or video game that causes envy. Would schools purport to have regulatory authority over off-campus political or religious activities, or over off-campus purchasing decisions, in the name of preserving team unity? Plainly, they would not. Of *all* of the off-campus behaviors that might spill over and provoke discord in the locker room, schools are interested in regulating only one: Criticism of government employees. And that is the one that the Constitution most fiercely protects.

If the line where free speech ends is to be drawn at "comments that teammates perceive as disloyal to the coach," that encompasses an enormous amount of whistleblowing speech. A student who testifies before an inquest into irregularities in the athletic program will assuredly be a divisive figure in the locker room,

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the District has telegraphed that it will use its newfound authority just as the school did in *Dresser*: To punish students who use off-campus media to express dissent from school policies.

unpopular with players loyal to the coaching staff.[14] But the protection of First Amendment rights does not turn on the outcome of a "popularity contest." Indeed, it is *unpopular* speech that most desperately needs the Constitution's clear protection.

Just within the past month, college basketball players used social media to call public attention to inferior weight-training facilities made available to women during the NCAA basketball tournament as compared with the commodious facilities for male players.[15] Videos shared by Oregon player Sedona Price on the TikTok and Twitter platforms caused a worldwide outcry and impelled the NCAA to rectify the inequity. Price made many media appearances in the ensuing days, including on NBC Nightly News. Now, imagine that the Oregon athletic department is

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[14] The Solicitor General's brief offers the fanciful example of a cheerleader using social media to announce that she plans to drop a fellow cheerleader on the ground rather than catch her while performing a routine. Purposefully injuring someone is assault, and like any crime, announcing plans to commit it is punishable even in the non-student world, just as police may intercept a would-be bank robber who tweets his plans to commit a stickup. This emphasizes an important reality: Schools already have ample constitutional authority to deal with actual dangers to safety. Suppressing student complaints cannot be offered up as the "pro-safety" position. There is absolutely no evidence that student complaints have ever led any student to commit harm, up against the substantial evidence that students have used their voices to sound the alarm about dangerous conditions and people.

[15] Lindsey Wisniewski, *Sedona Prince inspired to lead the change in empowering women in sports*, NBC SPORTS (Mar. 21, 2021), https://www.nbcsports.com/northwest/ducks/sedona-prince-inspired-lead-change-empowering-women-sports.

armed with authority to punish any off-campus expression "disruptive" to the athletic program. Under the standard offered by the Petitioner and the Solicitor General, Prince may be thrown off the team and lose her scholarship, without recourse; her newfound media celebrity could make other players envious, and she and her coach were forced to take time away from game preparations to field interviews (*i.e.*, "disruption").[16] Whatever standard the Court crafts must not merely protect Sedona Prince's activism; it must *unmistakably* protect her, because an athlete playing for the national championship will not speak out and risk being disciplined unless she is *certain* she can do so without retaliation.

IV. THE RULE SET BY THE COURT WILL AFFECT NOT JUST SOCIAL MEDIA SPEECH, BUT ALL OFF-CAMPUS SPEECH, INCLUDING LAWSUITS AND TESTIMONY

The Court is being asked to diminish students' First Amendment rights because of the perceived power of social media to reach a large audience, but it bears emphasizing: There is only one First Amendment. As this Court held in *Reno v. ACLU,* 521 U.S. 844 (1997), online speech is governed by the same First Amendment standards as all other expressive mediums. A rule giving educational institutions 24/7 control over student speech that is about their schools,

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[16] *See Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008) (concluding that a student activist's off-campus speech qualifies as "disruptive" under *Tinker* if it uses coarse language and could cause a large number of people to call and email school administrators with complaints).

or that has the potential to cause a reaction at school, will encompass *all* off-campus expression: Giving an interview to the news media, speaking at the open-mic period to the school board or college trustees, circulating a petition seeking the firing of an abusive school employee, sending a complaint letter to the NCAA – or even giving testimony in a lawsuit. All of this is off-campus expression, all of it has the potential to reach and affect the school – and all of it would become subject to punishment, if the School District prevails. To regard all of this speech as, functionally, on-campus speech merely because it is *about* the school would be a breathtaking expansion of government authority. Testifying in opposition to a school policy should not be an act of martyrdom.

The *Tinker* standard that the School District and its *amici* supporters seek to extend to all student speech was coined specifically for the "captive audience" setting of a K-12 school, where students are compelled by law to attend, unable to leave to avoid unwelcome speech. It is one thing to say that schools may control how students speak to an exclusively in-school audience during the instructional day, but quite another to say that schools and colleges may equally dictate how students talk with the entire outside world, so that *all* speech now must be held to a standard of "suitable for the classroom."

The line that this Court drew in *Tinker* – that speech loses First Amendment protection if it "would materially and substantially disrupt the work and discipline of the school," *Tinker* 393 U.S. at 513 – is insufficiently protective of off-campus expression for several reasons. First, *Tinker* is understood to give

effect to the "heckler's veto," enabling administrators to punish a student solely because of how other students may overreact to the speech – even unreasonably, and even unforeseeably to the speaker. Second, *Tinker* does not require any showing of a *wrongful intent* to cause a disruption; a student who innocently wears a crimson shirt to school unaware that the color is associated with a street gang can still be disciplined, because *Tinker* contemplates no *mens rea*. See *Dariano v. Morgan Hill Unified School District*, 767 F. 3d 764 (9th Cir. 2014) (holding a school can forbid wearing apparel featuring American flags to school, if the symbol is expected to cause disruption by inflaming others). And third, *Tinker* is understood to permit prior restraint of student speech, so that administrators may pre-review a publication to check for potentially disruptive content. *See Sullivan v. Houston Indep. School District*, 475 F. 2d 1071, 1076 (5th Cir. 1973); *Eisner v. Stamford Board of Education*, 440 F. 2d 803, 809 (2d Cir. 1971). Now, imagine applying that level of authority to a student testifying before a school board or a college board of trustees: A speech that a student delivers with benign intent can be grounds for suspension or expulsion from school if people at school might irrationally overreact to it – *and* administrators can insist on pre-approving the speech, under pain of discipline.

It is not idle speculation that, armed with *Tinker* authority, schools and colleges will use it to deter or punish whistleblowing speech – because they do already. The handbooks of several prominent college athletic programs contain explicit "anti-whistleblowing" rules threatening athletes with discipline if they say anything to the press or public

that is perceived as disloyal. *See* Frank D. LoMonte & Virginia Hamrick, *Running the Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media,* 99 NEB. L. REV. 86, 100 (2020) (quoting handbooks gathered from public university athletic departments that include threats such as: "If you do not have anything good to say, do not say anything at all. DO NOT COMPLAIN ABOUT THE COACHES, TEAMMATES OR THE UNIVERSITY."). Because the atmosphere for whistleblowing within schools and colleges is already so oppressive – especially for athletes – a decision by this Court conferring disciplinary discretion over every word spoken or written about the school will inevitably worsen safety conditions for this vulnerable population.

V. BEING DEPRIVED OF PARTICIPATION IN SPORTS OR OTHER EXTRACURRICULAR ACTIVITIES IS A LIFE-CHANGING LOSS, THE RISK OF WHICH WILL INHIBIT SPEECH

The School District would have the Court declare that participation in sports or other extracurricular activities may be freely taken away without meaningful constitutional oversight. This is an attempted revival of the long-discredited "rights/privileges doctrine" that the Court should resoundingly reject. The Court has long recognized that, even if a person has no entitlement to receive a benefit – such as a government job – that benefit still cannot be withdrawn for a retaliatory or speech-punitive reason, because a reasonable speaker will be deterred from speaking regardless of whether the

deprivation is considered the loss of an "entitlement" or of a "privilege."[17] *See Sherbert v. Verner,* 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

More to the point, there is nothing insignificant about the loss of participation in extracurricular activities. When you are a college athlete, the loss of

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[17] The Solicitor General's brief conjures up the "horrible" that, if B.L. were to prevail in this case, courts may be asked to second-guess a coach's decision to bench an insubordinate player. In the first place, the First Amendment has been on the books for quite a long time and public schools have offered sports for quite a long time, and the Solicitor General has not produced a single example of a student ever suing a school over a benching. But, more to the point, that is not what happened in B.L.'s case. She was not "benched." She was given a disciplinary removal from a school activity, and those two things are categorically different. A student who is told "you will not be a starter in the next game" is not removed from the team on disciplinary grounds. If the student is asked on an application for college or employment whether she has ever been the subject of disciplinary action, the student can truthfully answer "no." B.L. cannot. A student who is benched for half of a football game can still truthfully list "member of the team" on a college application. B.L. cannot. There undoubtedly are certain internal team-management decisions – who gets to be quarterback versus who plays defensive line – that are committed to the discretion of the coaching staff and that would not be "material" enough to be grounds for a constitutional challenge. Decisions implicating game strategy that are inherently subjective – for instance, telling a pitcher that he will be pitching in the bullpen rather than starting games – would not cross the line of sufficiently "adverse" to be grounds for a constitutional claim. (Some pitchers like pitching in relief, and some football players prefer defensive line to quarterback.) But once a student incurs disciplinary action, a bright line has been crossed and constitutional protections must adhere.

your eligibility to play sports can mean the loss not just of a paid college education, but of university-provided food, housing, and medical care. "Only" being removed from taking part in athletics would be, for tens of thousands of young Americans, a life-altering punishment.

Even in high school, extracurricular activities are intrinsic to the educational experience, regarded as no longer an "extra" activity but a necessity for any college-aspiring student. *See* Ilana Kowarski, *How Colleges Weigh Applicants' Extracurricular Activities*, U.S. NEWS & WORLD REP. (Oct. 25, 2018), https://www.usnews.com/education/best-colleges/articles/2018-10-25/how-colleges-weigh-applicants-extracurricular-activities (stating that competitive colleges "typically seek students with significant extracurricular accomplishments in addition to strong academic credentials"). As of 2010, the last time the federal government released statistics, 40 percent of high school seniors reported playing on an athletic team. NAT'L CTR. FOR EDUC. STATS., THE CONDITION OF EDUCATION (2012), https://nces.ed.gov/programs/coe/analysis/2012-section3.asp. Researchers have found that taking part in extracurricular school activities correlates with steadier attendance, higher grades, greater ambition to pursue higher education, and avoidance of unhealthy risk-taking behaviors. Nicholas A. Palumbo, *Protecting Access to Extracurricular Activities: The Need to Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 B.Y.U.

EDUC. & L.J. 393, 393 (2004).[18] A recent study in the journal *Preventive Medicine* documented that teens who spend time on extracurricular activities exhibit fewer signs of depression, and that the benefits are "significantly more pronounced" for female students. Eva Oberle *et al.*, *Screen time and extracurricular activities as risk and protective factors for mental health in adolescence: A population-level study*, PREVENTIVE MEDICINE, Dec. 2020 at 106291. Courts have long recognized that sports in particular are an essential part of the offerings that make up a complete public education. For instance, in *Lee v. Macon County Bd. of Educ.*, 283 F. Supp. 194, 197 (M.D. Ala. 1968), the court declined to approve a desegregation plan that contemplated continued racial separation on sports teams, stating, "It is without serious question that athletic programs in the various public high schools throughout Alabama are an integral part of the public school system in Alabama." *See also Hartzell v. Connell*, 679 P.2d 35, 42 (Cal. 1994) (*en banc*) ("It can no longer be denied that extracurricular activities constitute an integral component of public education."). Because extracurricular participation has such enormous educational, psychological and résumé-building value to young people, participation cannot lightly be taken away merely because a public employee feels unfairly criticized – especially when

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[18] Palumbo states that "students who do not participate [in extracurricular activities] are 57 percent more likely to drop out of high school by the time they are seniors, 49 percent more likely to have used drugs, 37 percent more likely to have become teen parents, 35 percent more likely to have smoked cigarettes, and 27 percent more likely to have been arrested." *Id.* at 394.

the criticism takes place outside school time or school functions.

VI. CONDITIONING ELIGIBILITY FOR SPORTS ON WAIVING FIRST AMENDMENT RIGHTS WOULD VIOLATE THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE

The School District's contention that students, in essence, "check their First Amendment rights at the locker-room door" when they try out for sports misses a fundamental constitutional point: People cannot be compelled to surrender their constitutional rights as a condition of receiving a government benefit, even a wholly discretionary one. This Court has "said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)); *see also Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that a public university would violate a professor's First Amendment rights if it refused to renew his contract because he criticized the college's administration, even if the professor had no vested entitlement to a renewal).

This Court made the principle of "unconstitutional conditions" abundantly clear in the First Amendment case of *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205 (2013) (hereinafter, "*Open Society*"). There, the Court struck down as an "unconstitutional condition" a federal policy conditioning receipt of federal AIDS-

education grants on an agreement to adopt the federal "party line" condemning prostitution, which the Court found unrelated to the purpose of the grant program. While the federal government had a legitimate interest in advancing its policy agenda, the Court found that the government could not use a coerced waiver in exchange for a discretionary benefit to indirectly restrict speech that the government could not restrict directly. *See id.* at 215. The critical fact in *Open Society* was that the government tried to extend its authority over grantee "affiliates" into conduct "outside the scope" of the government program, so that the "affiliate" was not free to express views contrary to the government's, even "on its own time and dime." *Id.* at 218 (*citing Rust v. Sullivan*, 500 U.S. 173, 197 (1991)). The same is equally true here.

The good-conduct policy that the School District is asking the Court to bless in this case is a poster-child case of an unconstitutionally overbroad condition, in no way limited to the scope or context of school athletic programs. As interpreted by the School District, the policy literally makes it a punishable offense to use profanity anywhere and anytime. Just as in *Open Society*, a policy against swearing is insufficiently related to the purposes of a high school athletic program to be sustainable as a mandatory condition. Surely, the District would acknowledge that it could not enforce a "no swearing off campus" rule directly, so it cannot be imposed indirectly in the guise of a condition. Even more offensive to the First Amendment, the policy requires that students must, during every waking hour, behave "in such a way that the image of the Mahanoy School District would not be tarnished in any manner." C.A. App. 486; *see* Pet. App.

6a. Even public *employees* cannot be compelled to refrain from saying unfavorable things about the employer during their off-hours. *See, e.g.*, *Liverman v. City of Petersburg*, 844 F. 3d 400, 408 (4th Cir. 2016) (invalidating city policy forbidding police officers from using social media to disseminate any information "that would tend to discredit or reflect unfavorably upon" the police department, which the court characterized as a policy of "astonishing breadth"). And athletes are assuredly *not* the employees of their institutions – as the institutions will eagerly agree, when athletes seek the benefits of employment.

Suppose the Court were to take the invitation of the District and its *amici*, and declare that team sports are a "First Amendment-free zone" where students can be excluded from participating unless they sign away their rights. Suppose that a high school coach requires players to sign a pledge to come to Sunday services at the coach's church as a team-building activity. The coach may be able to support the waiver with all sorts of "reasonable" bases. Perhaps the coach has experienced disharmony when players with dissonant religious beliefs are thrown together as teammates, and the coach rationally believes the team will perform better if everyone practices the same faith. Could team cohesion justify this incursion into students' off-campus lives, just because the coach attests that religious disagreements have spilled over into the locker room? The answer is obvious. *Nobody* believes that students can be forced to waive their First Amendment rights to take part in programs offered by a public school.

A ruling in favor of B.L. would still leave schools with ample authority to enforce reasonable standards necessary for the functioning of school programs, as this Court held in *Open Society*. For example, while it would not be permissible under *Open Society* to enforce a "don't criticize the government" rule, it would be permissible to enforce a more tailored prohibition, such as "do not give away confidential strategies for the upcoming game." Moreover, schools retain authority to enforce reasonable and content-neutral "time, place and manner" restrictions and, under *United States v. O'Brien*, 391 U.S. 367 (1968), to enforce reasonable restrictions on expressive conduct that incidentally affect speech. So a directive for players to stay off their smartphones during practice sessions to maintain concentration would implicate no First Amendment freedoms. This is all the authority that schools *legitimately* need.

The First Amendment specifically exists to make it harder for the government to operate. As the Silicon Valley saying goes, this is a feature and not a bug. Would it be easier for school authorities to get through the day in peace and quiet if students had no right to speak? Undoubtedly. For that matter, it would be easier for school authorities to get through the day in peace and quiet if *parents* had no right to speak, either. But our constitutional system does not prioritize peace and quiet. As this Court so memorably said in *Tinker*, 393 U.S. at 509, governance is meant to be messy and disputatious. That, said the Court, "is the basis of our national strength(.)"

CONCLUSION

For all of the aforesaid reasons, the decision of the Third Circuit should be AFFIRMED.

Respectfully submitted,

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