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 OF *AMICI CURIAE* MARY BETH TINKER AND JOHN TINKER IN SUPPORT OF RESPONDENTS

Robert Corn-Revere*
Caesar Kalinowski IV
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
bobcornrevere@dwt.com
caesarkalinowski@dwt.com
Counsel for *Amici Curiae*

*Counsel of Record

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

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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INTERESTS OF *AMICI CURIAE* [1]

A little over a half-century ago, John and Mary Beth Tinker, along with Christopher Eckhardt, were petitioners in the landmark case that established "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

That case arose at the end of 1965 as the Vietnam War was becoming increasingly controversial. Although American involvement was still in its early stages, almost 2,000 U.S. soldiers had already died in the conflict, and another 6,000 would perish in the coming year. *See* Ronald K.L. Collins & Sam Chaltain, WE MUST NOT BE AFRAID TO BE FREE 270 (2011). John Tinker, then fifteen years old, and his thirteen-year-old sister Mary Beth, an eighth-grader, decided to express their grief over the loss of life and to show support for a proposed Christmas truce by wearing black armbands to school.

Approximately ten students in Des Moines participated in the silent protest despite the fact that the School Board in an emergency meeting had adopted a policy prohibiting the armbands. Five students who violated the policy were suspended from school, including John and Mary Beth Tinker.

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[1] All parties have consented to this *amici curiae* brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel made a monetary contribution to the preparation or submission of this brief.

As a result, this Court was asked to decide how to apply First Amendment principles "in light of the special characteristics of the school environment" and it concluded "[i]n our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 506, 511. In striking a balance between fundamental constitutional safeguards and the authority of school officials to "prescribe and control conduct in the schools," this Court held that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 507-08.

That decision, and the personal experiences that led to it, forged *amici*'s lifelong commitment to promoting First Amendment values. John Tinker is the general manager of KPIP, a low-power community FM radio station in Fayette, Missouri. Each year, he corresponds with dozens of students who are working on school projects related to *Tinker v. Des Moines,* and several times each year, he speaks publicly in academic settings about the case. Mary Beth Tinker, a retired Registered Nurse, has also been active promoting student rights and civics education as part of the "Tinker Tour." *See* http://tinkertourusa.org/about/tinkertour/. The armband she wore in 1965 had been on permanent display at the Newseum in Washington, D.C. *See* https://newseumed.org/tools/artifact/mary-beth-tinker-podcast.

INTRODUCTION

Cases involving student speech can sometimes seem insignificant because they occasionally involve trivial expression. In *Tinker*, however, this Court

recognized that young people can contribute to the marketplace of ideas, that students "in school as well as out of school are 'persons' under our Constitution," and that "[s]chool officials do not possess absolute authority over [them]." 393 U.S. at 511. Since then, the Court has been less inclined to recognize First Amendment protection in cases where the students seemed to lack a serious message. It held school authorities can punish a student for making school assembly speech laced with double entendre, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986), or sanction an absurdist banner at a school-sponsored event that the Court interpreted as a pro-drug message with no political content. *Morse v. Frederick*, 551 U.S. 393, 406 n.2 (2007).

This case risks being lumped in with such controversies because it arose from a dispute involving a cheerleader cursing her school and cheerleading on social media. But while this "may seem at first blush too inconsequential" to arouse this Court's concern, "the issue it presents is of no small constitutional significance." *Cohen v. California*, 403 U.S. 15 (1971). The First Amendment does not grade on a curve; this Court has long recognized that the Constitution protects freedom of expression even though "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value)." *United States v. Stevens*, 559 U.S. 460, 479 (2010); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 826 (2000); *Winters v. New York*, 333 U.S. 507, 510 (1948).

Like all important First Amendment cases, this one is about power, and the authority Petitioner asks

this Court to approve is by any measure extraordinary. Even petty officials have the ability to crush individual rights, and for that reason the Court has held that the Bill of Rights limits boards of education and teachers who "may feel less sense of responsibility to the Constitution." Such matters may seem "relatively trivial to the welfare of the nation," but the Court has recognized "[t]here are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943).

In *Tinker*, this Court allowed a narrow exception to the usual constitutional rule prohibiting speech regulation "in light of the special characteristics of the school environment." 393 U.S. at 506. Now, however, Petitioner asks this Court to make the exception the rule, and to extend government control over speech far beyond the schoolhouse gate and even into the home.

SUMMARY OF ARGUMENT

Although this Court in *Tinker* affirmed that students "are possessed of fundamental rights which the State must respect," *id.* at 511, and that the government's ability to restrict speech is limited and exceptional, *id.* at 513, the Petitioner seeks to make the exception the rule and substantially enlarge schools' censorial authority. The Third Circuit accurately perceived *Tinker*'s narrow accommodation regarding student speech in the school environment, and issued a carefully focused ruling that addressed the interest presented here – school discipline – while leaving for future cases questions about how schools may protect against invasions of others' rights.

Petitioner ignores the Third Circuit's focus, and bases its argument to expand school authority to reach off-campus speech almost entirely on an interest in preventing violence, bullying, or harassment, issues the Third Circuit expressly reserved and that are not presented on these facts. It seeks to make school supervision over student speech the expected norm, not the exception, thus standing *Tinker* on its head.

Petitioner's proposed rule for governing off-campus student speech includes no articulable constitutional limits. The proposed rule would give school officials the ability to regulate virtually any speech communicated by students. Although Petitioner claims this is necessary because of pervasive reach of the Internet, it makes government control of student speech "pervasive and omnipresent." Pet. Br. 38 (quoting *Bell v. Itawamba Cty. Sch. Dist.*, 799 F.3d 379, 395-96 (5th Cir. 2015) (*en banc*)). The Third Circuit correctly warned that such an approach expands "*Tinker*'s schoolhouse gate to encompass the public square." App. 29a. Petitioner's assurance that this will only affect substantially disruptive speech rings hollow in light of its efforts to use this authority to enforce a universal civility code for student speech.

The expansive authority Petitioner advocates would stifle far more than the use of offensive words. It would empower school authorities to ban a wide swath of speech on matters that concern young people, including politics, religion, school administration, or anything else that might cause controversy. It would effectively overrule *Tinker*, and would peel away the

limits on governmental authority set forth in this Court's other school speech cases.

ARGUMENT

I. PETITIONER SEEKS TO MAKE SCHOOL SPEECH RESTRICTIONS THE NORM

In *Tinker*, this Court laid down the constitutional rule that students "are possessed of fundamental rights which the State must respect" and, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." 393 U.S. at 511. It stressed that the First Amendment "means what it says," and permits reasonable regulation of speech-connected activities only in "carefully restricted circumstances." *Id*. at 513. It described those circumstances as involving conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id*. at 513-14.

Tinker built on earlier holdings that the free speech rights of minors are subject to "scrupulous protection," and that school authorities are constrained by "the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637. A key factor in this line of cases is recognition that school officials may not exceed their limited sphere of authority: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). *See Meyer v. Nebraska*, 262 U.S.

390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

A. The Third Circuit Properly Read *Tinker* as a Narrow Exception That Allows Only Limited Speech Restrictions

The Third Circuit correctly read *Tinker* as affirming broad rights and permitting only narrowly-crafted exceptions. In light of the commands of the First Amendment and the "special characteristics of the school environment," the Court struck a balance designed to preserve the function of the schools while recognizing "a limited zone of heightened governmental authority." App. 9a. *See id*. at 32a ("From the outset, *Tinker* has been a narrow accommodation."). Under the *Tinker* formulation, the authority to restrict student speech "remains the exception, not the rule." *Id*. 9a.

Tinker held that schools may constitutionally restrict student speech in roughly two categories. First, they can regulate speech that invades or impinges on "the rights of other students to be secure and to be let alone." *Id*. 9a. (quoting *Tinker*, 393 U.S. at 508). *See also Tinker*, 393 U.S. at 508-09, 512-14.[2] Second, as part of their obligation to prescribe and control conduct in the schools, school officials may regulate speech that "would 'materially and

[2] This "invasion of the rights of others" prong of the *Tinker* test has been referred to as the "forgotten part" of the *Tinker* case. *See*, *e.g*., David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1121 (2020).

substantially interfere with the requirements of appropriate discipline in the operation of the school.'" App. 9a (quoting *Tinker*, 393 U.S. at 509). This is the "substantial disruption" prong of *Tinker*. In either instance, however, the authority to regulate speech requires more than an "undifferentiated fear or apprehension of disturbance." *Id.* (quoting *Tinker*, 393 U.S. at 508-09).

The Third Circuit applied the *Tinker* standard to the facts before it – a social media posting that evidently perturbed some of B.L.'s cheerleading squad members and coaches (they were "visibly upset" we are told) – and sought to determine whether such a communication could be proscribed as something that might materially interfere with the school's operation. It held that, under *Tinker*, a communication that takes place entirely off school grounds, is not part of a school sponsored or sanctioned activity, and does not bear the imprimatur of the school, does not fall into the *Tinker* exception for "substantially disruptive" speech. *Id.* 11a-15a.

The Third Circuit was careful to confine its analysis to the "substantial disruption" prong of *Tinker* and not the exception for "invading the rights of others." In holding that the "substantial disruption" exception does not apply to off-campus speech, it expressly reserved for another day "the First Amendment implications of off-campus student speech that threatens violence or harasses others." *Id.* 25a. It stressed that its holding does not affect the line of cases that involve off-campus student speech threatening violence or harassing particular students or teachers, and that instances of such speech "would

no doubt raise different concerns and require consideration of other lines of First Amendment law." *Id*. 34a-35a.[3]

There will obviously be some overlap between the categories. A credible threat of serious violence necessarily would be "substantially disruptive." But that is not the type of speech (or *Tinker* exception) implicated by this case. The rules at issue here were designed to enforce school discipline – to make sure B.L. and others showed proper "respect for [their] school, coaches, teachers, other cheerleaders and teams," and not use "foul language and inappropriate gestures," or otherwise "tarnish" the school's image. *Id*. 39a-41a.

The Third Circuit thus addressed whether the Mahanoy Area School District could apply what amounted to a civility code to off-campus student speech that was not sponsored or endorsed by the school, and it appropriately held that it would give school administrators too much power "to quash student expression deemed crude or offensive." The court warned that such authority "far too easily metastasizes into the power to censor valuable speech and legitimate criticism," and that "the primary responsibility for teaching civility rests with parents and other members of the community." *Id*. 42a.

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[3] Among other considerations, speech in these categories may not qualify for First Amendment protection in the first place, and may be subject to civil or criminal laws. App. 35a ("After all, student speech falling into one of the well-recognized exceptions to the First Amendment is not protected.").

B. Petitioner Treats Protections for Student Speech as the Exception, Not the Rule

In seeking to reverse the decision below, Petitioner proposes precisely what the Third Circuit cautioned against: "a broad rule reducing the free speech rights of all young people who happen to be enrolled in public school." *Id.* 12a.

It is evident from the way Petitioner framed the question before the Court that it seeks to make school administrators' control over student speech the constitutional default. The question presented here characterizes *Tinker* as holding "public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school," and asks the Court to extend the rule to apply "to student speech that occurs off campus." Petitioner's Brief ("Pet. Br.") I. This transposition of exception as rule is telling. It presents regulation of student speech as the norm and any limitations of that authority as an aberration.

Petitioner goes so far as to suggest that the rule of *Tinker* has *always* allowed school authorities to reach out into the community at large to regulate student speech, and wonders how the Third Circuit could have been so wrongheaded to suggest any limits to that power. *See* Pet. Br. 4, 16-22. Petitioner's brief waxes nostalgic for a period in history, as described in Justice Thomas's concurrence in *Morse*, when the First Amendment did not protect public school students at all, and when schools enforced "absolute obedience" and "teachers managed classrooms with an iron hand." In those good old days, "[t]eachers

commanded, and students obeyed." *Morse*, 551 U.S. at 411-16 (Thomas, J., concurring). *See* Pet. Br. 13-16.

Tinker substantially loosened the grip of the schoolmaster's "iron hand" by establishing the constitutional rule that public schools are not "enclaves of totalitarianism" where "school officials … possess absolute authority over their students." 393 U.S. at 511. Petitioner tries to dispute that *Tinker* only narrowly accommodated the state's power to restrict student speech, Pet. Br. 21, but *Tinker* is widely acknowledged as the landmark case in this area and the high water mark for student First Amendment rights.[4] Rote reaffirmations of the rule of *in loco parentis* – as Petitioner reimagines *Tinker* – are not the stuff of which landmark decisions are made.

Not content just to transmogrify *Tinker* into a charter for school censors, Petitioner seeks support from what it calls "related doctrinal contexts." Pet. Br. 23-26. It compares public school students to public employees, who "by necessity must accept certain limitations on [their] freedom [of speech]," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), or military enlistees, who voluntarily relinquish some of their rights (including the right to speak freely) during their time of service. Pet. Br. 23-26. Petitioner also

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[4] *See*, *e.g.*, Hudson, *supra* note 2, at 1114-15; Stephen Wermiel, *Tinkering With Circuit Conflicts Beyond the Schoolhouse Gate*, 22 U. PA. J. CONST. L. 1135, 1138 (2020); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L. J. 111, 124 (2004).

argues that schools can require "suspicionless drug testing as a condition of participating in extracurricular activities," so (the reasoning goes) why not allow universal speech supervision as a condition of attending public school? *Id*. 24.

Petitioner's efforts are, again, an attempt to shift the constitutional poles and to make speech restrictions the expected norm. But the constitutional balance was struck in favor of free speech in *Tinker*, and the government cannot whittle away student rights by layering on false analogies. Like teachers, students attend schools, but they did not enter an employment relationship in which certain speech lacks any First Amendment protection. *Garcetti*, 547 U.S. at 421 ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes"). Unlike soldiers, public school students are not part of "a specialized society separate from civilian society" without the same level of free speech "that is protected in the civil population." *Brown v. Glines,* 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. 733, 743, 759 (1974)).

Surely the state cannot demand, as a condition of attending public school, the wholesale surrender of the right to speak freely any time there is a chance it might get back to the school community and cause a stir. Petitioner made such a claim in the court below, and both the district court and the Third Circuit properly rejected it as violating the doctrine against unconstitutional conditions. App. 37a-38a. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a basis that

infringes his constitutionally protected interests – especially, his interest in freedom of speech"). This Court should leave the constitutional presumption where it is; freedom of speech is the rule, and the government's ability to restrict speech is a limited exception.

Petitioner breathlessly warns of dire consequences if this Court fails to give school officials broad license to regulate off-campus student speech. Without such authority, the district claims, school officials will be powerless to combat threats of violence, bullying, extreme harassment, identity theft, defamation, crank phone calls, and a host of other misdeeds. Pet. Br. 3, 11-12, 22, 31-37, 41. But all of these ills (and virtually all of Petitioner's proffered hypotheticals) relate to the prong of *Tinker* that deals with invasions of the rights of others, which is not at issue here. App. 25a, 31a. The same is true of the cases from other circuits Petitioner cites to support the claim that courts (other than the Third Circuit) permit the regulation of off-campus speech.[5] But as Petitioner

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[5] *See* Pet. Br. 20 & n.1. Petitioner cites *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 758 (8th Cir. 2011) (threatened school shooting); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 567, 573 (4th Cir. 2011) (defamatory allegations about a named student); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1065-66 (9th Cir. 2013) (threatened school shooting); and *Bell*, 799 F.3d at 396-97 (threats of violence). Petitioner also cites *Doninger v. Niehoff*, 527 F.3d 41, 45, 53 (2d Cir. 2008), which involved efforts to disrupt a school system's administration. Other cases involving threats of violence include *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007) (death threat); *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 625 (8th Cir. 2002) (*en banc*) (threats of sexual

acknowledges, the types of speech courts considered in those cases are the subject of generally applicable laws, including criminal laws. Pet. Br. 41.

Such concerns are far afield from the speech Petitioner seeks to regulate here – a crude Snapchat post directed to no individual in particular that upset a couple of fellow students. The power to reach expression of this type entails a broad grant of authority indeed.

II. PETITIONER'S PROPOSED RULE WOULD EVISCERATE STUDENT SPEECH RIGHTS SET FORTH IN *TINKER*

Petitioner asks the Court to reverse the Third Circuit and to empower school authorities to punish student speech whenever (1) a student intentionally directs off-campus speech at the school environment that foreseeably reaches that environment, Pet. Br. 27, and (2) the student's speech threatens to substantially disrupt school activities or interfere with other students' rights. *Id.* 9-10. The proposed rule is so broadly conceived it would give authorities virtually limitless ability to regulate student speech.

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violence and death); and *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 984, 990 (9th Cir. 2001) (threat of school shooting).

A. Petitioner's Test for Regulating Off-Campus Speech Has No Limiting Principles

Petitioner claims student speech rights will not be diminished because *Tinker* remains as the "backstop," and maintains "[s]chools can *never* punish speech solely because of disagreement with the student's message, no matter where that speech happens." Pet. Br. 4. Nor may schools "suppress speech they consider inappropriate, uncouth, or provocative" because the substantial disruption test will "ensure that schools cannot misuse their authority and stifle students' private expression." *Id*. 26. It is a fine promise, but utterly empty.

1. The proposed rule would give school officials the ability to regulate virtually any speech communicated by students. Petitioner maintains "much off-campus speech is beyond the school's purview" under its proposed test, but it is hard to imagine what might be excluded.[6] According to the school district, speech is "intentionally directed to the school community" if it "refer[s] to school affairs or [is sent] directly to classmates." *Id.* 28. In short, this encompasses anything students might talk about. It absolutely includes *any* social media post, for as Petitioner acknowledges, "classmates are all but certain to access or recirculate online messages within the school community." *Id*. 38.

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[6] "Be thankful I don't take it all." The Beatles, *Taxman*, REVOLVER (Apple Records, 1966).

The only safe way to avoid the school speech police is to keep your thoughts to yourself. Or, as Petitioner explains it, speech or other sentiments "will not foreseeably reach the school environment if the student *does not share them with anyone* and saves the images on his home computer." *Id.* 28-29 (emphasis added). This is the very definition of the chilling effect: keep your mouth shut, and nobody will bother you.

Petitioner claims the school's expansive reach is necessary because "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Id.* 38 (quoting *Bell*, 799 F.3d at 395-96). The solution, then, is to make government supervision of student speech "pervasive and omnipresent." But as the Third Circuit correctly found, this approach assumes "that the internet and social media have expanded *Tinker*'s schoolhouse gate to encompass the public square," which "subverts the longstanding principle that heightened authority over student speech is the exception rather than the rule." App. 29a. Petitioner claims that "[o]rdinary conversations with family or neighbors are not intentionally directed at the school," Pet. Br. 28-29, but even this is not guaranteed. *Tinker* arose from a conversation between a group of adults and students in a meeting at the home of Christopher Eckhardt, a friend of the Tinkers who helped organize the effort (and who was the third plaintiff in *Tinker*). Word of their plan to wear black armbands got to the school board, which held an emergency meeting to prohibit the silent protest. *Tinker*, 393 U.S. at 504. Such speech was clearly "directed at the school environment," under Petitioner's proposed test, and

would fall within the school's purview even if no armbands had ever been worn; the plan to wear them resulted from a discussion that included students, and the mere word it might happen at school upset some people.

Petitioner pretends its approach is consistent with *Tinker*, but it is its polar opposite. This Court stressed that "free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact," and the Constitution permits only "reasonable regulation of speech-connected activities in carefully restricted circumstances." *Id.* at 513. Such deference to individuals' right to free speech is hardly consistent with what Petitioner is proposing.

2. Nor is the "substantial disruption" requirement the "backstop" for student rights that Petitioner imagines. Although Petitioner parrots the language from *Tinker* that the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" cannot justify censorship, Pet. Br. 30 (quoting *Tinker*, 393 U.S. at 509), it identifies a wide range of school interests that would permit suppression of student speech. Such potential disruptions go far beyond the examples of violent threats, bullying, harassment, defamation, and other personal attacks that fuel Petitioner's argument, but, as explained above, are not implicated by the Third Circuit's decision.

Petitioner asserts that under its proposed approach schools cannot "suppress speech they consider inappropriate, uncouth, or provocative," *id.* 26, yet that is precisely what this case is about. As Petitioner explains things, the school district can

regulate the speech at issue here because "B.L. intentionally sent a vulgar message regarding her cheer team and criticizing her coaches to classmates and teammates." *Id.* 11. Although it maintains the lower courts on remand will need to decide whether the ensuing "disruption" was sufficiently substantial to warrant punishment in this case, *id.*, Petitioner nevertheless urges that the state's censorship machinery may be set in motion when members of the school community feel offended by a Snapchat post or *any* social media post.

This problem arises whenever the assessment of disruptiveness turns on the listeners' reactions, *see*, *e.g.*, *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 768-69 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing *en banc*), and it is what distinguishes this case from ones involving violent threats, bullying, or other invasions of "the rights of others." Yet Petitioner maintains that off-campus student speech may be regulated or prohibited whenever doing so is tethered to "legitimate pedagogical needs," Pet. Br. 19, which could be pretty much anything.[7]

This means schools would be able to enforce general civility codes, not just when students are in school, but when they are out in the world (and

[7] In this case, the "legitimate pedagogical needs" purportedly involved school rules requiring cheerleaders to "have respect for [their] school, coaches, teachers, other cheerleaders and teams"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches ... on the internet." App. 5a-6a.

certainly on the Internet). As Petitioner explains things, schools have a "discrete interest in 'teaching students the boundaries of socially appropriate behavior'" and therefore "can dictate rules of decorum for speech in the school setting, just as Congress prescribes rules for legislative debate." *Id.* (citation omitted).

However, such speech regulations raise profound First Amendment questions even when applied only to on-campus speech. *E.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.) ("[W]e have found no categorical rule that divests 'harassing' speech … of First Amendment protection."). They are even more threatening to freedom of speech if extended beyond the school grounds. In *Saxe*, for example, the Third Circuit invalidated a school anti-discrimination policy as unconstitutionally overbroad, in part because "the Policy could even be read to cover conduct occurring outside of school premises." *Id.* at 214-18 & n.11.

Petitioner's insistence that "schools cannot misuse their authority and stifle students' private expression" because the Constitution prohibits "viewpoint discrimination" is no answer. Pet. Br. 26, 29-30. Even neutral policies can violate the right to free expression; and the school's policy in *Tinker*, would have been equally unconstitutional if the school had banned all political expression by students, and not just Vietnam War protests. Of course, a viewpoint-based policy is even more constitutionally infirm, but the government cannot turn the schools into "First Amendment Free Zone[s]." *Cf. Bd. of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S.

569, 574-75 (1987); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885-88 (2018) (citing *Tinker*).

B. Petitioner's Proposed Rule Would Effectively Overturn *Tinker* and Broadly Undermine Student Speech Rights

Reversing the decision below would have a far broader effect than just sanitizing the social media posts of disaffected cheerleaders. It would empower school authorities to ban a wide swath of speech on matters that concern young people, including politics, religion, school administration, or anything else that might cause controversy and lead officials to anticipate "disruption." Under Petitioner's proposed rule, any speech by students that might reach the school is fair game.

Adopting Petitioner's view of the law would effectively overrule *Tinker*. If John and Mary Beth Tinker were in school today, they most certainly would have shared their anti-war views on social media, and would have used such platforms to organize the wearing of black armbands. Today, their armbands may have been digital ones displayed over the school's logo in a social media post, combined with a message to fellow students and friends petitioning them to do them same. Even if the campaign were to suggest student action only in the real world and outside the schools, Petitioner's proposed rule would still reach them because their communication would be "intentionally directed … at the school environment," would be sent "directly to classmates," and undoubtedly would be accessed or recirculated "within the school community." Pet. Br. 27-28, 38. If

such communications were considered sufficiently "disruptive," the student speech could be banned entirely.

Petitioner takes comfort in *Tinker*'s substantial disruption requirement, and claims it would prevent school administrators from abusing their power, *id.* 26, but it is far from certain *Tinker* would have been decided the same way under this updated scenario. To begin with, John and Mary Beth's peaceful protest caused a significant controversy in their community at the time, and a court today might well consider the potential disruption substantial, particularly as administrators extend their gaze beyond the schoolhouse gate.[8] Perhaps we were all made of hardier stuff back then, but this Court had no difficulty in concluding "the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school

[8] In his *Tinker* dissent, Justice Black wrote that "a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker," some students poked fun or shouted warnings at the students, and the protest "took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war." 393 U.S. at 517-18 (Black, J., dissenting). Outside of school, a person telephoned the Tinkers' home on Christmas Eve and said "the house would be blown up by morning." Collins & Chaltain, *supra*, at 277. A woman called for Mary Beth, and when the young teen got on the line, said, "Is this Mary Beth? . . . I'm going to kill you." Kelly Shackelford, *Mary Beth and John Tinker and Tinker v. Des Moines: Opening the Schoolhouse Gates to First Amendment Freedom*, 39 J. SUP. CT. HISTORY 372, 378 (2014). The Tinkers also received hate mail, and their house was vandalized with red paint.

activities, and no disturbances or disorders on the school premises in fact occurred." *Tinker*, 393 U.S. at 514.

Today, we live in a world of trigger warnings, safe spaces, speech codes, and "free speech zones."[9] Some have even made the argument that speech is the same thing as violence.[10] Others have argued it actually *harms* students if they have to "invest time and energy in rebutting … speakers' arguments" whose views differ from their own.[11] In this environment, it is no surprise high schools have punished students "for online postings that a hall monitor is 'mean' and that a teacher is the 'worst,' sarcastic tweets referring to teachers, off-campus performances, uncoerced sexts, and online riffs poking fun at school personnel and attacking fellow students that reflect poor judgement and are disturbing and hurtful but not illegal." Catherine J. Ross, LESSONS IN CENSORSHIP 207 (Cambridge: Harvard Univ. Press, 2015). "Schools all over the country have prevented and

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[9] Greg Lukianoff & Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND 6-7, 26-31, 202-03, 206-09 (New York: Penguin Press, 2018).

[10] *E.g.*, Lisa Feldman Barrett, *When is Speech Violence?*, N.Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html. *See also* Lukianoff & Haidt, *supra* note 9, at 84-98.

[11] Alex Morley & Samantha Harris, *In anti-intellectual email, Wellesley profs call engaging with controversial arguments an imposition on students*, FIRE (thefire.org), Mar. 21, 2017.

penalized students' symbolic, nondisruptive political expression." *Id.* 138.

It requires no stretch of the imagination to foresee that reversing the decision below would further lower the threshold for what types of disruptions might be considered "substantial." The facts of this case well illustrate the point with respect to off-color or disrespectful speech, but the same concern extends to political speech as well. When the Tinkers were in school, Vietnam was a central controversy dividing the nation, but today, students are speaking out on a wide variety of issues that can arouse passions, including gun violence, racial justice, the environment, gay and transgender rights, religious freedom, and our polarized political system.[12]

Under *Tinker*, school officials have the authority to regulate behavior on campus to prevent such disputes from causing disruptions that distract from the educational mission. But under Petitioner's proposed rule, the government could reach outside campus to quell contentious speech about controversial political issues at the outset. Accepting this standard would overturn existing precedent that has protected off-

[12] A wide range of topics may cause controversy and potential disruption. The Sixth Circuit recently noted "a Texas high school generated controversy when it permitted its students to display preferred gender pronouns on their online profiles." *Meriwether v. Hartop*, No. 20-3289, 2021 WL 1149377, at *10 (6th Cir. Mar. 26, 2021) ("the use of gender-specific titles and pronouns has produced a passionate political and social debate"). Under Petitioner's proposed test, student commentary on such a contentious issue, even on their personal social media accounts, could become the subject of school discipline.

campus student publications that are separate from the school, *see*, *e.g.*, *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1045 (2d Cir. 1979); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972), as well as students' personal blogs and webpages, *e.g.*, *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 921 (3d Cir. 2011); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 215 (3d Cir. 2011).

Equally significant, Petitioner's proposed rule removes the limits to government authority this Court articulated in prior decisions upholding speech restrictions. In *Fraser*, for example, the Court held that a school could sanction a student for making a lewd speech at a school assembly because it was a school-sanctioned event. 478 U.S. at 683 (school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate"). But this Court has made equally clear that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405. Such protection would no longer exist under Petitioner's proposed test. Fraser could be punished if he posted his bawdy campaign speech online, or even if he delivered it at a party attended by classmates and word got back to the school.

The limits to school authority would likewise be lifted from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), since control over student publications would no longer require the official connections to the school. There, the Court held, for school-sponsored publications, educators can "set high

standards for the student speech that is disseminated under [the school's] auspices." *Id*. at 271-72. But under Petitioner's test, any speech by or about students that foreseeably could reach the school is subject to governmental supervision. Likewise, Joseph Frederick's silly "Bong Hits for Jesus" banner previously could be sanctioned only because it was displayed at a school-sponsored event. *Morse*, 551 U.S. at 400-01. But here, if Petitioner prevails, Frederick could be punished if he displayed the banner anywhere, even as just an image on Facebook.

In short, there would be no limits – not even the ones this Court has previously recognized. Petitioner's argument ignores the fact that "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Thomas*, 607 F.2d at 1052. Extending authority beyond those limits is "an unconstitutional usurpation of the First Amendment." *Shanley*, 462 F.2d at 964.

CONCLUSION

This case may have started with a student expressing strong emotion in a manner that was offensive to some in a seemingly trivial social media post. But the question now before the Court could not be more important to the First Amendment rights of young Americans. As one court explained when it drew the line against extending *Tinker*'s exceptions to off-campus speech, "freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us." *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986).

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 468 (1928). This is a particularly important concept in our educational institutions. Public schools are vital institutions in preparing individuals for participation as United States citizens and in preserving the values of our democratic system. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637.

Respectfully submitted,

Robert Corn-Revere*
Caesar Kalinowski IV
Davis Wright Tremaine LLP
1301 K Street, NW
Suite 500 East
Washington, DC 20005
(202) 973-4200
bobcornrevere@dwt.com
caesarkalinowski@dwt.com
Counsel for *Amici Curiae*

*Counsel of Record