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 ALLIANCE DEFENDING FREEDOM AND CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Alliance Defending Freedom (ADF) is a not-for-profit, public-interest legal organization that protects speech, religious liberty, and the right to life. ADF regularly defends students, adults, and organizations in cases involving the right to free speech. *E.g.*, *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792 (2021); *Thompson* v. *Hebdon*, 140 S. Ct. 348 (2019) (per curiam); *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018); *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015).

Christian Legal Society (CLS) is an association of attorneys, law students, and law professors with chapters meeting in 30 states and at approximately 115 law schools. For 45 years, CLS's Center for Law and Religious Freedom has worked to protect students' religious expression from discriminatory treatment by public school officials. The Center advised on the drafting of the Equal Access Act, 20 U.S.C. 4071–74, in which Congress protected public secondary students' right to meet for "religious, political, philosophical, or other" speech at their schools. *Bd. of Educ. of the Westside Cmty. Schs.* v. *Mergens,* 496 U.S. 226, 239 (1990) ("[T]he Act, which was passed by wide, bipartisan majorities in both the House and the Senate . . . was intended to address perceived widespread discrimination against religious speech in public schools.").

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, all parties consented to this brief's filing.

In 1993, CLS joined a diverse coalition of organizations in drafting *Religion in the Public Schools: A Joint Statement of Current Law*, which became the basis for the Clinton Administration's Department of Education *Religious Expression in Public Schools*, guidance issued to the Nation's school administrators in 1995, 1998, and 1999. *Memorandum on Religious Expression in Public Schools*, 2 Pub. Papers 1083 (July 12, 1995). The Clinton Administration guidance became the framework for the Bush Administration's Department of Education *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003), and the Trump Administration's Department of Education *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257 (Jan. 21, 2020). For 35 years, the bipartisan consensus has been that students' religious speech needs protection in the public-school context.

ADF and CLS rely on the Free Speech Clause to protect individuals and organizations whose speech is restricted by laws and errant government officials. ADF and CLS have a strong interest in ensuring that laws and regulations discriminating based on content and viewpoint undergo the strictest scrutiny.

BACKGROUND

ADF and CLS know firsthand the perils of schools regulating off-campus speech. Religious speech, in particular, provokes debate and inflames passions. But that is precisely why it deserves equal First Amendment protection. It expresses the deeply held beliefs of the speaker and contributes to our marketplace of ideas. As the training ground for our young citizens, schools should be even more ready to entertain dialogue for the betterment of all. Yet today, schools are all too quick to clamp down on speech that might cause subjective offense—regardless of where that speech occurs.

Take Jack Denton.[2] A devout Catholic, Jack was heavily involved in religious groups and student government at Florida State University. *See* Am. Compl., *Denton* v. *Thrasher*, No. 4:20-cv-00425-AW-MAF (N.D. Fla. Feb. 11, 2021), ECF No. 69. The student body elected Jack to the student senate. And after seeing Jack's collegial work ethic, his fellow senators elected him president of the senate. During the summer after his election as president, Jack sent messages in a private group chat for members of the Catholic Student Union. In response to another student sharing a video raising money for various

[2] ADF and CLS represent both university and k-12 students. The following examples of ADF clients focus on university campuses, but concerns regarding regulation of off-campus speech apply just as equally to claims by B.L. and students like her. These examples also show the problems of applying *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), to the university environment generally. See *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 667 (1999) (Kennedy, J., dissenting).

organizations, Jack expressed that some of those groups advocate for causes that contravene the Catholic Church's beliefs, such as "queer-affirming networks," transgenderism, and abortion. Jack told his fellow students that he knew he was speaking on an "emotional topic" and did not want to anger anyone. But out of love for them and the Church, he knew he could not stay silent about unknowing support for organizations acting contrary to shared religious beliefs.

Another student took a screenshot of the private messages and shared them publicly on various social media platforms. As a result, a fellow senator made a motion of no confidence against Jack. The initial motion failed but triggered a massive public campaign. A petition calling for his removal garnered over 6,000 signatures in less than two days. In response, Jack convened a special session of the senate to entertain a second no-confidence motion. Fellow senators called Jack's well-intended remarks "abhorrent," "demeaning," and "disgraceful." Other senators said they needed to remove Jack to "do right by the LGBTQ+ community" and not "enabl[e] bigotry." The second no-confidence vote passed, removing Jack from office based solely on his thoughtful religious speech.

Jack's initial appeals to the university's vice president for student affairs and the student supreme court fell on deaf ears. The student affairs official informed the senate that she believed it followed appropriate procedure. For its part, the student senate initially prevented the supreme court from reaching a quorum. Their actions and inaction forced Jack to file a lawsuit to vindicate his first freedoms.

Or consider Owen Stevens. Owen, a history major in the school of education at the State University of New York-Geneseo, has a 3.6 GPA and is a member of the history honors society. He is also a Christian, whose faith teaches him that all people are created in the image of God with inherent dignity and value. When he shares his religious beliefs, he strives never to denigrate other people, even if he disagrees with their views.

But his university sought to regulate Owen's off-campus speech regardless of its importance. Owen posted four videos on his private social media accounts, on his own time, while off campus. The posts discussed his religious and political views. In one of them, he asserts that, as a biological matter, "a man is a man" and "a woman is a woman," and a man cannot become a woman and a woman cannot become a man. In another post, Owen criticized identity-based extracurricular groups for dividing people, rather than uniting them. Owen made no mention of his university.

After learning of the videos, the education department's interim director summoned Owen into his (virtual) office to convince him that his views were unacceptable. Owen was happy to discuss his beliefs and listen to others', but he was unpersuaded. The director then accused Owen of being unwilling to treat all people with respect. Based solely on the four videos, the university banned Owen from student teaching and field work—areas necessary for him to complete his degree—and required his future private social media posts to show respect for diverse personal and cultural values. After Owen appealed the punishment, the Provost removed the suspension

but continued to impose other sanctions, including a requirement to self-monitor his social media posts. Owen is currently considering his next steps.

Jack's and Owen's cases show the risks inherent in a test for speech that looks to the effect speech has. Both Jack and Owen shared messages off campus based on their deeply held religious convictions. Jack spoke from a genuine desire to share the Catholic Church's teachings. Owen, too, shared his beliefs on matters of public import. Nonetheless, because some on campus disagreed with the content and viewpoint of their speech, both students were the target of state-sponsored sanctions. In places that are supposed to serve as marketplaces of ideas, hecklers drowned out their speech on matters of religious and social concern. The First Amendment does not allow public school officials to reach far beyond the schoolhouse gate and censor speech with which they disagree, wherever it may occur.

SUMMARY OF THE ARGUMENT

ADF and CLS agree with Respondents that confining *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), to campus gives appropriate respect to speech and parental rights while allowing schools sufficient leeway to regulate harmful behavior.

As Jack's and Owen's cases show, religious students both on and off campus often find themselves persecuted because of their speech. This is contrary to the First Amendment, which "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States* v. *Stevens*, 559 U.S. 460, 470 (2010). This Court should make clear that schools cannot regulate speech based on the effects that speech has on its listeners.

That this case involves a minor's speech highlights the need to prevent schools from invading parents' proper sphere. This Court has repeatedly affirmed that minors have significant First Amendment rights, particularly outside the schoolhouse gate. *Tinker*, 393 U.S. at 506. And that makes sense, because the reasons *Tinker* gave for limiting speech on campus—a school's custodial and tutelary interests—do not apply off campus. Once school ends, the child's parents resume full custodial and educational control, pursuant to their fundamental right to raise their children as they see fit.

Applying *Tinker* off campus circumscribes parental rights and creates an unconstitutional effects-based test for non-school speech. When schools regulate speech according to whether it causes a substantial disruption, they necessarily do so based on the effect speech has on its listeners. Such a heckler's veto licenses content and viewpoint discrimination abhorrent to the First Amendment. And it poses a grave risk to those whose religious faith compels them to speak potentially unpopular ideas.

The First Amendment has already struck the proper balance. Because *Tinker* does not apply off campus, and minors generally have full speech rights, schools and other state actors must meet the time-tested categorical First Amendment approach to regulating off-campus speech. That approach gives officials sufficient leeway to address problematic speech; under this Court's carefully calibrated standards governing true threats, tortious speech, and harassment, state actors can regulate off-campus speech within reasonable limits.

What's more, all states already have relevant laws on the books that have been effective at reaching truly problematic speech. The rule the Third Circuit applied here properly upholds the First Amendment without tying the hands of state actors. This Court should affirm—while reinforcing the First Amendment's equal protection for religious speech.

ARGUMENT

I. By its own reasoning, *Tinker* does not apply to off-campus student speech.

This Court's precedents make clear that minors have significant First Amendment rights. Only in narrow and well-defined circumstances may government restrict those freedoms. *Tinker* provided one such restriction to deal with the uniquely important educational environment, one where schools take a *parens patriae* custodial and tutelary responsibility over students and must address situations where rights clash.

But, by definition, schools' twin responsibilities of custody and tutelage do not apply to off-campus speech. Moreover, by restricting speech outside of class, after custodial and tutelary responsibilities end, schools violate the First Amendment and interfere with parents' fundamental right to rear their children.

Effects-based tests give schools *carte blanche* to restrict the content and viewpoint of speech, two areas sacred to our First Amendment. Making clear that *Tinker* does not apply off campus will provide consistency with this Court's precedents and prevent the cheapening of speech and parental rights.

A. Minors have significant First Amendment rights that *Tinker* modified only because schools have custodial and tutelary roles.

For decades, this Court has held that "minors are entitled to a significant measure of First Amendment protection." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212 (1975); accord, *e.g.*, *W.Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (striking down a state statute that required school students to salute the flag and recite the pledge of allegiance because that action "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."). It is "only in relatively narrow and well-defined circumstances" that governments may impinge on those rights. *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011); accord *id.* at 795 n.3 (no authority supports the contention that minors lack free-speech protections). For example, the state has a legitimate interest in protecting children from harm, but it cannot suppress otherwise constitutionally protected speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 795.

Tinker itself teaches that students do not "shed" their free speech protections "at the schoolhouse gate." 393 U.S. at 506; accord *K.A. ex rel. Ayers* v. *Pocono Mountain Sch. Dist.*, 710 F.3d 99, 110–11 (3d Cir. 2013) (recognizing speech protections for elementary school students); *Morgan* v. *Swanson*, 659 F.3d 359, 407–09 (5th Cir. 2011) (en banc) (same). The logical antecedent is that students, of course, have *significant* free speech rights outside that gate.

Indeed, students "out of school are 'persons' under our Constitution." *Tinker*, 393 U.S. at 511. Thus, this Court has struck down overbroad laws micro-managing what movies can be shown at drive-in movie theaters, *Erznoznik*, 422 U.S. at 217–18, and what video games minors can purchase, *Brown*, 564 U.S. at 795. And the Court has affirmed that the government does not have "free-floating power to restrict the ideas to which children may be exposed." *Id.* at 794.

The school environment's unique context is one of the few "precisely delineated areas," where a state has somewhat greater authority to regulate a minor's speech. *Erznoznik*, 422 U.S. at 214 n.11. The justifications for speech restrictions come from the "schools' custodial and tutelary responsibility for children." *Morse* v. *Frederick*, 551 U.S. 393, 406 (2007). These justifications flow from the "special characteristics of the school environment": (1) the need to promote the school's educational work and protect the "rights of other students to be secure and to be let alone," *Tinker*, 393 U.S. at 506, 508; (2) the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system," such as civility; and (3) the *in loco parentis* authority of schools to protect children, especially in a captive school audience, *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681, 684 (1986). But none of those "narrow and well-defined circumstances," *Brown*, 564 U.S. at 794, apply off campus, foreclosing the ability of schools to police constitutionally protected speech.

Once school ends and students leave campus, parents exercise care, custody, and control of their children, rendering *Tinker* inapposite. What's more, school officials' interference in students' off-campus speech interferes with the parent-child relationship and violates the fundamental rights of parents.

1. The extraterritorial extension of schools' custodial role abridges the fundamental rights of minors and of their parents.

After classes end and students return home, a school loses its custodial interest. That rule stands as a matter of logic and impressive common law pedigree. *Thomas* v. *Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979); *Pratt* v. *Robinson*, 349 N.E.2d 849, 852 (N.Y. 1976); *Hobbs* v. *Germany*, 49 So. 515, 517 (Miss. 1909); *State ex rel. Clark* v. *Osborne*, 24 Mo. App. 309, 314–15 (1887). During school hours, parents cannot "provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted." *Morse*, 551 U.S. at 424 (Alito, J., concurring). Accordingly, a school takes on those responsibilities.

But it makes no sense to extend that responsibility to students speaking off-campus. It is unfair to the school, whose liability is extended even while its practical ability to exercise oversight is severely circumscribed. It violates the constitutional rights of the student, who is subject to government officials' scrutiny even when not in those officials' care. And it impinges parental rights and duties.

Respondents spend considerable space addressing Mahanoy Area School District's violation of B.L.'s constitutional rights. Resps.Br.11–24. It is equally important to consider the School District's conduct in the context of B.L.'s parents.

Extending *Tinker* off-campus collides head-on with parental rights. Public school officials are always bound by the Constitution; they are government employees and thus automatically state actors. But the degree of their authority while the children are at school is greater than what government actors can generally exercise because of their *in loco parentis* authority. When children are off campus, school officials no longer have enhanced authority. So, they cannot regulate student speech any more than the mayor or city council may regulate the speech of an adult resident of the community.

At this point, the right of parents to direct the "care, custody, and control of their children" is at its apex. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (plurality). Parents have the rights to "establish a home and bring up children" and "to control the education of their own." *Ibid.* (quoting *Meyer* v. *Nebraska*, 262 U.S. 390, 399, 401 (1923)). For "[t]he 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 the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925). When a school no longer has custody over a child, its authority naturally terminates. Policing what a student can say outside of school impinges on the constitutionally protected ability of parents to decide what is best for their child.

Parents' fundamental rights take on special significance in the religious context. This Court has "long recognized" the "enduring American tradition" upholding the "rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 213–14, 232 (1972)). Parents have the "primary role" to "inculcat[e] moral standards" and "religious beliefs." *Yoder*, 406 U.S. at 233. "[I]ntrusion by a State into family decisions in the area of religious training" implicates "grave questions of religious freedom." *Id.* at 231.

This principle is why the Court has repeatedly and emphatically rejected arguments that public schools have the authority to interfere in parents' upbringing of their children, especially in matters of religion and faith. For example, in *Yoder*, the state argued that invalidating its compulsory education law for Amish teenagers would undermine "the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents." 406 U.S. at 229. But, the Court said, if the state has the power "to 'save' a child from himself or his Amish parents by requiring an additional two years of compulsory formal high school education, the State will in large measure influence, if not determine, the religious future of the child." *Id.* at 232. And that cannot be squared with a parent's fundamental right to guide the upbringing of her child. *Id.* at 233; cf. *Emp. Div.* v. *Smith*, 494 U.S. 872, 881–82 (1990) (heightened scrutiny applies to "hybrid" claims involving Free Exercise and parental rights).

Nor can schools justify controlling off-campus speech as a mere aid to parents in exercising their parental rights and responsibilities. The laws that this Court has upheld based on that interest dealt with state restrictions on material received by minors but that their parents, in their judgment, could show to them. See*, e.g.*, *FCC* v. *Pacifica Found.*, 438 U.S. 726, 749–50 & n.28 (1978); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). But many school policies, like the one at issue here, punish speech regardless of what the students' parents think. Here, B.L. was suspended from the cheerleading squad even if her parents had no problem with what she said in her Snap. Such policies are "vastly overinclusive." *Brown*, 564 U.S. at 804. And they interfere with the parent-child relationship. See *Reno* v. *ACLU*, 521 U.S. 844, 878 (1997).

In sum, schools' custodial interest does not extend off campus and cannot justify speech restrictions.

2. Schools' tutelary interest does not extend off-campus either.

In *Tinker* and its progeny, the Court examined what tutelary and educational interests justify speech restrictions, *Morse*, 551 U.S. at 403–07, but none of those interests apply off campus. Off-campus speech does not cause "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Such speech is separate from school activities. Vulgar, off-campus speech does not constitute inappropriate "speech in the classroom or in school assembly." *Fraser*, 478 U.S. at 683.

Indeed, as this Court explained, had the student in *Fraser* "delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405. Nor does off-campus speech subject a captive audience of minors to "sexually explicit, indecent, or lewd speech." *Fraser*, 478 U.S. at 684. Minors, depending on their parents' rules, are free to speak however and to whomever they please.

The general function of schools to promote democratic values similarly does not justify off-campus regulation. As discussed above, parents have exclusive domain over that duty at home. In that setting, parents have the "primary role" in educating their children on the "elements of good citizenship." *Yoder*, 406 U.S. at 232–33. And the school's inculcation of those values ends, logically, when school does.

Similarly, schools also lose their interest in protecting the educational rights of other students once the school day ends. A school may be able to restrict speech during school hours that "colli[des] with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508; accord *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.). But off campus, a school has no need (or even practical ability) to maintain educational order. To be sure, the state has an interest in protecting minors, either on campus or off. *Erznoznik*, 422 U.S. at 212. But that general interest is not sufficient to censor students' off-campus speech. See *id.* at 214. The "special characteristics of the school environment" do not extend off campus, i.e., outside the school environment. *Tinker*, 393 U.S. at 506.

Allowing schools to use their governmental authority to restrain off-campus speech is dangerous. "[S]ome public schools have defined their educational missions as including the inculcation of whatever political and social views" are held by school boards and administrators. *Morse*, 551 U.S. at 423 (Alito, J., concurring). This premise is dangerous, as it empowers school officials "to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Ibid.* Consider the policies for a Wisconsin public-school district, which calls for all to use language that "disrupts the gender binary." Madison Metropolitan School District, *Guidance & Policies to Support Transgender, Non-Binary & Gender-Expansive Students* 24 (Apr. 2018). No doubt Jack and Owen's speech runs afoul of this policy, allowing government officials to impose their orthodoxy. Expanding a "manipula[ble]" definition of a school's educational reach "strikes at the very heart of the First Amendment." *Morse*, 551 U.S. at 423 (Alito, J., concurring).

B. Applying *Tinker* off-campus would constitutionalize the heckler's veto and an effects-based test for speech that the First Amendment abhors.

Applying *Tinker* to off-campus speech necessarily requires government officials to regulate based on the speech's *effect*. Take B.L's speech. The school only noticed it because "visibly upset" students brought it to their coaches' attention. Pet.App.5a. Similarly, Jack's private speech in a religious group chat could be considered an "on-campus" disruption to the extent that other students disliked and publicized his

messages. Jack certainly did not bring his speech to campus; other students' reactions did. The same goes for Owen. He made personal, off-campus social media posts, on his own time, without mentioning his school. It was the response of others that made Owen's speech a government issue.

Unsurprisingly, the School District and the United States both look to the on-campus effects of off-campus speech to determine the protection that speech deserves. Pet.Br.23; U.S.Br.24. Petitioner advocates for just that rule: "schools can regulate off-campus speech *based on its on-campus effects*." Pet.Br.23 (emphasis added, cleaned up). Because B.L. referenced her school and cheer team, Petitioner claims, the school can restrict her speech. *Id.* at 30. Similarly, the United States would allow for the regulation of a social-media post by a football player criticizing his coach's play-calling because that would "undermine respect for the coach's authority and team cohesion." U.S.Br.25.

But this Court has repeatedly affirmed that "[l]isteners' reactions to speech" do not give a constitutional basis to regulate speech. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 394 (1992). Quite the opposite, laws protecting people offended by speech are presumptively unconstitutional, content-based regulations subject to strict scrutiny. *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992).

Going further, the School District and the United States advocate for viewpoint discrimination, a "more blatant and egregious form of content discrimination" that regulates speech "based on the specific motivating ideology or the opinion or perspective of the speaker." *Reed*, 576 U.S. at 168 (cleaned up). Contra Pet.Br.29. If B.L. had Snapped "go cheer!", there would have been no consequences. If the football player praised his coach's play-calling, he would not be benched. Similarly, if Jack and Owen had contradicted their religious beliefs, they would not have been censored.

Elevating listeners' objections over speech would constitutionalize the heckler's veto, something the First Amendment does not allow. *Reno*, 521 U.S. at 880. B.L.'s Snapchat can only be said to have caused a "disruption" on campus because other students reacted to it on campus. Under the School District's view, that authorizes the District to punish B.L., just as Florida State took the position that it could punish Jack's private, respectful message in a religious group chat only because other students took subjective offense to it. Consistent with the First Amendment, schools cannot punish speech simply because some may have taken offense. See *Tinker*, 393 U.S. at 508–09.

There is no justification for content and viewpoint discrimination toward off-campus speech. *Tinker* identified characteristics of the educational environment that are not present off campus. In regulating off-campus speech based on content and viewpoint, schools go well beyond the "narrow and well-defined circumstances" when governments may impinge on minors' speech rights. *Brown*, 564 U.S. at 794.

The School District's position would extend schools' oversight into all areas of a student's life. Perhaps a student remains free to create speech for himself, not shared with anyone. Pet.Br.29. But the student lacks the ability to discuss sensitive matters with peers without worrying about the School District censor looking over his shoulder. And speech not shared with anyone is not really speech at all. See *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995).

* * *

Given the limits of *Tinker*'s justifications, the Court should apply its standard First Amendment rules to off-campus student speech.

The Court is rightly "reluctant to mark off new categories of speech for diminished *constitutional* protection." *NIFLA*, 138 S. Ct. at 2372 (emphasis added). Speech is only unprotected if a "long (if heretofore unrecognized) tradition" of its regulation exists. *Ibid.* Here, the School District has not shown that off-campus speech in the age of compulsory public school is the subject of a long regulatory tradition. This Court's precedents recognize the significant First Amendment rights of minors. *Brown*, 564 U.S. at 795. Nor is there any evidence that off-campus speech is "narrow and well-defined," justifying its restriction. *Id.* at 794.

For one, off-campus speech is certainly not a "narrow" category. Under the School District's view, it has the power to control student speech no matter where or how it occurs, provided that speech somehow is directed at the school. If a student tweets "Black Lives Matter" and school officials think that message could be disruptive to the educational environment, the School District could punish the student. That is an astonishingly broad authority to censor, even before the necessary discussion over the line-drawing problems inherent in measuring the potential on-campus disruption from off-campus speech. *See* Pet.Br.20.

Given the substantial constitutional concerns implicated by "the prevention and punishment of" off-campus speech, the Court's standard First Amendment rules apply. *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72 (1942); accord *Brown*, 564 U.S. at 799 (applying traditional First Amendment rules to a minor-speech claim). The Court should emphatically reject the School District's invitation to extend *Tinker* to off-campus speech.

II. The time-tested, categorical First Amendment approach allows government actors sufficient latitude to regulate problematic student speech.

Despite *Tinker*'s inapplicability to off-campus speech, the First Amendment does not leave school officials with an empty toolbox. Like any state actor, schools may regulate unprotected speech consistent with due process. States and schools can, and do, police true threats, traditionally unprotected tortious speech, and harassment no matter where it occurs. All states have relevant laws on the books, and numerous convictions and civil suits attest to their efficacy. Moreover, this Court has provided a standard for harassment that allows governments to address it while respecting our first freedoms. See *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645, 650 (1999).

In sum, schools have the tools they need to address school violence, tortious conduct, and harassment without restricting off-campus speech. But in making that point in the context of the opinion in this case, the Court should pointedly caution government officials and lower courts that such tools do not give government officials *carte blanche* to punish and censor religious speakers when they communicate beliefs that sharply divided public opinion, such as beliefs on marriage or human sexuality.

A. State actors can respond to true off-campus threats.

True threats do not receive First Amendment protection. That means schools can regulate them.

"'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003). Undoubtedly, violence in schools remains a troubling problem. But the true-threats doctrine allows schools sufficient leeway to address it while respecting speech our Constitution protects.

Schools have banned true threats successfully. Contra StatesBr.25–26. For example, the Eighth Circuit sitting *en banc* rejected a student's First Amendment challenge to his expulsion for true threats written in letters at his home. *Doe* v. *Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 619 (8th Cir. 2002) (en banc); accord *Haughwout* v. *Tordenti*, 211 A.3d 1, 3 (Conn. 2019). And the Fourth Circuit has concluded a school can be liable under Title IX when it fails to respond to true threats not entitled to constitutional protection. *Feminist Majority Found.* v. *Hurley*, 911 F.3d 674, 691 (4th Cir. 2018).

Indeed, a raft of student criminal convictions stemming from true threats both on and off campus shows conclusively that state actors can effectively protect themselves and their students within existing First Amendment parameters. *E.g.*, *Interest of J.J.M.*, 219 A.3d 174, 186 (Pa. 2019); *In re J.M.*, 249 Cal. Rptr. 3d 83, 86 (Cal. Ct. App. 2019); *People* v. *Khan*, 127 N.E.3d 592, 594 (Ill. App. Ct. 2018); *State* v. *Trey*

M., 383 P.3d 474, 476 (Wash. 2016); *Andrews* v. *State*, 930 A.2d 846, 847–48 (Del. 2007); *In re Ernesto H.*, 24 Cal. Rptr. 3d 561, 573 (Cal. Ct. App. 2004); *In re A.S.*, 626 N.W.2d 712, 715 (Wis. 2001); *Commonwealth* v. *Milo M.*, 740 N.E.2d 967, 975 (Mass. 2001); accord, *e.g.*, *United States* v. *C.S.*, 968 F.3d 237, 240 (3d Cir. 2020); *B.B.* v. *State*, 141 N.E.3d 856, 862 (Ind. Ct. App. 2020). And the courts have put an exclamation point on that fact by allowing states to recover costs from responding to juveniles who threaten schools. *In re J.U.*, 384 P.3d 839, 845 (Ariz. Ct. App. 2016).

Given well-established, existing laws on true threats, expanding *Tinker* off-campus is unnecessary to deal with problems of school violence. Conversely, such an expansion will do great violence to students' constitutional rights.

B. State actors and victims can and have successfully regulated tortious speech.

In addition to criminal laws, tort law provides another avenue for students, their parents, and educators to redress unprotected speech. This Court has recognized diminished constitutional protection for speech rising to the level of defamation, invasion of privacy, or intentional infliction of emotional distress. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 348–49 (1974). State actors thus have leeway to regulate truly tortious speech by students, whether on or off campus.

Unsurprisingly, states already police this type of speech. Numerous states have laws concerning false communications. *E.g.*, Va. Code Ann. § 18.2-417; La. Stat. Ann. § 14:47; Utah Code Ann. § 76-9-404. Arkansas specifically identifies student defamation in a statutory prohibition. Ark. Code Ann. § 6-18-514(b)(2)(A). And, of course, the victims of tortious conduct can file civil actions to vindicate their rights.

Tort claims are a remarkably efficient (and constitutional) tool. For example, a Louisiana court recently affirmed the defamation conviction of a juvenile who falsely claimed on Snapchat that he had sex with his high school teacher. *State in Interest of G.J.G.*, 297 So. 3d 120, 122 (La. Ct. App. 2020). And teachers have received large verdicts—including one of $3 million—against students who defamed them. *Wagner* v. *Miskin*, 660 N.W.2d 593, 595 (N.D. 2003). Accord, *e.g.*, Tracey Kaplan, *Jury finds girls, parents liable for calling teacher 'perv'*, THE MERCURY NEWS (Nov. 15, 2013), https://bayareane.ws/310ellV (teacher recovered $362,653 in defamation suit against students and their parents); *Huxen* v. *Villasenor*, 798 So. 2d 209, 211–12 (La. Ct. App. 2001); cf. *Barnett ex rel. Barnett* v. *Tipton Cnty. Bd. of Educ.*, 601 F. Supp. 2d 980, 984 (W.D. Tenn. 2009). For example, in one of the cases on which the School District itself relies, Pet.Br.43, the teacher received a $500,000 verdict against the student who harassed her. Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 Va. L. Rev. 139, 185 (2003) (discussing off-campus speech involved in the case *J.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002)).

Allowing true torts to proceed as torts—rather than unfettered government censorship authority—strikes the proper balance between state authority and protected speech. Speech that is false or tortious on matters of purely private concern is appropriately regulable. To the extent that states believe existing torts may not adequately address harassment, they retain the power to create new ones that do (within First Amendment parameters). But mere expressions of opinion, such as B.L.'s distaste for the cheer team, or the communication of Jack and Owen's deeply held religious beliefs, convey the ideas and viewpoints of their speakers. And the First Amendment surely prohibits the state from restricting them. In our "permissive, often disputatious, society," the First Amendment's "hazardous freedom" provides "the basis of our national strength and of the independence and vigor of Americans." *Tinker*, 393 U.S. at 508–09.

C. State actors can also successfully regulate true student harassment. But this Court should make clear what is—and is not—harassment in the context of our cancel culture.

State criminal harassment laws and this Court's precedents give governments adequate tools to combat student harassment. No doubt harassment in schools is a problem. StatesBr.4–14. But in an age where many teach that "words wound" and "silence is violence," educators cross a constitutional line when they use their authority to prohibit students—particularly those of faith—from expressing their beliefs on subjects including marriage and sexuality.

To begin, all states have general anti-harassment laws that apply to juveniles. Pet.Br.41 n.8. While these laws may raise First Amendment concerns in some applications, they generally provide constitutional tools to address harassment, in or out of school. *E.g.*, *State* v. *Asmussen*, 668 N.W.2d 725, 734 (S.D. 2003); *Galloway* v. *State*, 781 A.2d 851, 857 (Md. 2001). There is no shortage of convictions under these laws for juveniles who harass others on or off campus. *E.g.*, *State in Interest of D.J.S.*, 255 So. 3d 1177, 1189 (La. Ct. App. 2018); *In re P.T.*, 995 N.E.2d 279, 286 (Ohio Ct. App. 2013); *In re Alex C.*, 13 A.3d 347, 348 (N.H. 2010); *T.B.* v. *State*, 990 So.2d 651, 655 (Fla. Dist. Ct. App. 2008); *In re Interest of Jeffrey K.*, 728 N.W.2d 606, 608 (Neb. 2007); *In re Pedro H.*, 764 N.Y.S.2d 274, 275 (N.Y. App. Div. 2003); *In re B.R.*, 732 A.2d 633, 639 (Pa. 1999); *In re Junior B.*, 78 Cal. Rptr. 436, 438 (Cal. Ct. App. 1969); accord, *e.g.*, *People* v. *Choi*, 274 Cal. Rptr. 3d 6, 10 (Cal. Ct. App. 2021). Expanding *Tinker* off campus would burden the First Amendment unnecessarily, given these extant laws.

Second, this Court has provided a roadmap that schools can use to address harassment. In *Davis*, the plaintiff alleged that a male classmate of her fifth-grade daughter sexually harassed her daughter over many months. 526 U.S. at 633. On multiple occasions, the harasser attempted to touch the victim sexually, made vulgar statements, and acted in a sexually suggestive manner. *Id.* at 633–34. Each time, the victim reported the incident to her teachers and parent, and her parent would follow up with school authorities. *Ibid.* The harassment caused the victim's grades to drop and led her to consider suicide. *Id.* at 634.

This Court acknowledged that students and their parents have an implied right of action under Title IX against schools that receive federal funds and do not adequately address harassment. *Davis*, 526 U.S. at 633. A school can be liable if it is deliberately indifferent to sexual harassment and "exercises substantial control over both the harasser and the context in which the known harassment occurs," and the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Id.* at 645, 650. Whether conduct rises to the level of harassment "depends on a constellation of surrounding circumstances, expectations, and relationships." *Id.* at 651. Relevant circumstances in the school context include "the ages of the harasser and the victim," "the number of individuals involved," and the normal interactions of children "that would be unacceptable among adults." *Ibid.*

While the Court used the *Davis* standard to articulate the scope of schools' civil liability, it is equally useful as a guide to educational institutions for regulating student harassment. Matching the standard for a school's civil liability to its policing of off-campus speech makes eminent sense. To the extent schools have concerns about liability for off-campus speech, they can regulate it according to the standard to which they would be held accountable.

The *Davis* standard would not upset expectations because existing state laws generally fall in line with it. Every state already has its own school anti-harassment laws. StatesBr.15. Many of them track *Davis*'s standards for the severity or educational consequences of harassment. *E.g.*, Tex. Educ. Code

Ann. § 37.0832(a)(1)(A)(ii); Fla. Stat. Ann. § 1006.147(2)(d); Cal. Educ. Code § 48900(r)(1)(D); N.Y. Educ. Law § 11(7)(a); Ind. Code Ann. § 20-33-8-0.2(a)(4).

State amici point out that many state laws also use the *Tinker* standard to determine whether a student should be disciplined for on or off-campus actions. StatesBr.17–18. But the rule proposed here does not render these laws unconstitutional in all or even most respects. The *Tinker* standard could still apply to regulate off-campus *conduct* or harassment that meets the *Davis* definition. Further, *Tinker* can govern those hecklers who bring substantial disruptions to campus because of off-campus speech. The hecklers, not the speaker, disrupt the educational environment, justifying a school's response. See *Dariano* v. *Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 770–71 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc). And though *Davis* also required schools to have control over the harassment to trigger liability, that requirement does not implicate the First Amendment. States remain free to modify the control element, depending on the degree of responsibility they desire to give their schools.

The *Davis* standard also appropriately protects speech while respecting governmental interests. The Court crafted the standard to fit with First Amendment protections, explaining that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Davis*, 526 U.S. at 649. Lower courts have similarly held that the *Davis* standard can withstand First Amendment scrutiny.

E.g., *Feminist Majority Found.*, 911 F.3d at 691; *Rowles* v. *Curators of the Univ. of Mo.*, 983 F.3d 345, 358–59 (8th Cir. 2020).

In sum, the *Davis* standard strikes the right balance between preventing harassment and protecting the right of religious students to live out their faith. But as Jack's and Owen's cases show, school officials too often have a problem dealing with religious speech when they disagree with it. It is imperative that this Court make clear for schools, students, families, and lower courts the line between harassment and constitutionally protected speech. Here are but a few examples.

Jack provides a paradigm case of speech that is *no*t harassment. He sent a message in a private, religious group chat out of concern for a discrete set of his fellow students unknowingly contravening their shared Catholic faith. Nothing about Jack's speech was severe, pervasive, and objectively offensive. He merely expressed his deeply held convictions. He did not target the purported "victims" of his respectful words but rather expressed them privately to co-religionists. No students were denied any educational opportunity. (Quite the contrary, Jack's fellow senators denied Jack his opportunities in retaliation for his religious speech.) If school officials act to punish such speech, they violate the First Amendment.

Owen's speech presents another straightforward example of protected speech. He publicly shared videos regarding the Bible: "male and female He created them." Genesis 1:27. These words capture the essence of the "life-giving relationship between men and women, which brings them into intimate union with God." Congregation for Catholic Education, *"Male and Female He Created Them": Towards a Path of Dialogue on the Question of Gender Theory in Education* ¶ 31 (2019). In pointing toward the language of Genesis—and a Church teaching intended to enable human flourishing and to protect the dignity of every human person—Owen spoke about his beliefs and did not target any individual. In no way could Owen's videos rise to the level of pervasive and severe harassment that denied anyone an educational opportunity. Again, punishing Owen for his speech violates the First Amendment.

Private conversations—either on or off campus—are also not harassment where a student advocates for her religious beliefs or encourages others to follow religious principles. Consider a student who shows the courage to communicate God's plan of salvation. In several respectful conversations with a fellow student, who voluntarily engages in the conversations, she discusses her faith and how its teaching enables human flourishing. No governmental official should be allowed to characterize such conversations as severe, pervasive, and objectively offensive conduct. One student's speech exemplifies concern for the welfare of the other student.

A student who repeatedly and aggressively confronts another student, on campus or off, might present a closer case. For example, a Christian student may be friends with someone considering an abortion. The student—who believes life begins at conception and that abortion not only kills an innocent person but harms the mother—would want to tell her friend. But the situation changes if that student repeatedly insults and denigrates the other for considering abortion, or publicly shames the student in front of peers. The school should then assess the circumstances and expectations: whether the student's actions were pervasive and severe, whether the pregnant student or her parents told the speaker to stop, and what the circumstances of each interaction were.

If the student's speech and actions interfere with another student's educational opportunities—like in *Davis*, where the victim's grades dropped and she contemplated suicide—then the school likely has some authority to act. But the analysis must still consider all the relevant circumstances. And school officials must recognize that younger students "often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it," yet that is not harassment. *Davis*, 526 U.S. at 651–52. For younger students, a note or call informing parents of the circumstances may be a more appropriate first step than disapprobation or punishment.

In sum, existing anti-harassment laws and the *Davis* standard provide schools all the tools necessary to address true student harassment. But at a time when popular culture—and many government officials, including teachers—have exhibited systemic discrimination against and hostility toward people of faith and their attempts to communicate their faith's teachings in the public square, it is crucial that this Court make clear that schools may not assert their anti-harassment powers to censor speech they dislike or even that which might make other students uncomfortable. This case requires the Court to make abundantly clear the line between harassment and protected speech.

* * *

School officials have numerous options to address serious problems of school violence and harassment. But none of those issues are implicated in this case or cases like Jack's or Owen's. In each case, the problem wasn't a physical threat or aggressive bullying. The problem was that school officials acted to punish (or in Jack's case, allowed a student to be punished) merely because they disliked the *content* or *viewpoint* of what the student said.

If B.L. had praised the cheer team, there would have been no repercussions. The same would be true had Jack or Owen communicated the "right" message. Conflicting outcomes based on content and viewpoint prove that government officials have targeted speech based on its communicative content. The First Amendment flatly prohibits that. Listeners' subjective offense to speech, including a minor's speech, never justifies state censorship and control.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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