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 LAW AND EDUCATION PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are a diverse group of professors concerned with the rights of parents to raise their children, and the interference with that right by public schools. As faculty members at law schools and schools of education, they are experts in various aspects of constitutional law, including parental rights, the relationship between the state and families, and freedom of expression, as well as in education law and policy.

Amici have elsewhere addressed the contours of parental control over their children in a variety of contexts, and have varying views on the boundaries of parental authority in instances where the rights of children and parents may conflict. Those questions, however, have no bearing on the focus of this brief: the boundary between the authority of parents and school administrators over children outside of school.

Professor Catherine J. Ross is Fred C. Stevenson Research Professor of Law at the George Washington University Law School. She is the author of *Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights* (Harvard University Press, 2015), which she began writing as a Member of the School of Social Science at the Institute for Advanced Study in Princeton. She has published widely on education and on the rights of parents and children, and has been a visiting scholar at the Harvard Graduate School of Education. A coauthor of Abrams et al., *Contemporary Family Law* (West Academic 5th Ed. 2019), Professor Ross is the primary author of the chapters on

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No one other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and consented to this filing.

child custody and the sections on the parental liberty interest.

Professor Barbara Bennett Woodhouse is currently L.Q.C. Lamar Professor of Law at Emory University in Atlanta, Georgia. She was previously Professor of Law at University of Pennsylvania, where she co-founded the Field Center for Children's Policy Practice and Research. She is also David H. Levin Chair in Family Law Emerita at University of Florida, where she co-founded the Center on Children and Families in 2001. A member of the International Society of Family Law, she served for a seventeen years on its Executive Council.

Professor Sigal Ben-Porath is professor of Education, Philosophy and Political Science at the University of Pennsylvania, where she is also an affiliate of the Institute of Law and Philosophy. Currently a fellow at the Edmond J. Safra Center for Ethics at Harvard University, she previously spent three years at Princeton's Center for Human Values. An expert on democratic theory and education policy, Professor Ben-Porath's most recent books are *Free Speech on Campus* (Penn Press, 2017) and (with Michael Johanek) *Making Up Our Mind: What School Choice is Really About* (University of Chicago Press, 2019).

Professor Martin Guggenheim is the Fiorello LaGuardia Professor of Clinical Law at New York University School of Law, where he has taught for many decades. He is the author of six books in the field of children and the law including *What's Wrong with Children's Rights* (Harvard University Press, 2007) as well as more than sixty law review articles. At the law school he teaches, among other courses, an advanced seminar entitled Child, Parent & State. He also serves as an advisor to the American Law Institute's Restatement on Children and the Law.

Professor David L. Hudson Jr. is assistant professor of law at Belmont University College of Law in Nashville, Tennessee. He has focused on First Amendment issues for

most of his career. Professor Hudson is the author of *First Amendment: Freedom of Speech* (Thomson Reuters, 2012), *Let the Students Speak!: A History of the Fight for Freedom of Expression in American Schools* (Beacon Press, 2011), and a co-editor of *The Encyclopedia of the First Amendment* (CQ Press, 2008).

Professor Meira Levinson is Professor of Education at Harvard Graduate School of Education. She is the author, co-author, or co-editor of six books, including *The Demands of Liberal Education*, *Dilemmas of Educational Ethics*, *No Citizen Left Behind*, and *Democratic Discord in Schools*, each of which addresses parents' rights with respect to children's upbringing and civic participation, including civic speech. Professor Levinson delivers keynote addresses and professional development trainings about student civic learning to state-level policy makers, superintendents, principals, teachers, students, and parents across the United States and around the globe. She is a former public middle school teacher.

Professor Catherine Smith is the Chauncey G. Wilson Memorial Research Chair at the University of Denver Sturm College of Law. Her courses include Children and the Law and Torts. She has published in the *Wisconsin Law Review*, *Washington University Law Review*, and other law journals, and contributed to books. Her current research analyzes the constitutional rights of parents and children.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2017, B.L., a teenage girl, took to social media to vent—in the sometimes profane vernacular of teens—that she didn't make the varsity cheerleading squad. B.L.'s father publicly stated that "kids do foolish things. But when my daughter is on her own time and out of school, it's my role as a parent to address her behavior. In this situation, I did that . . . ."[2] That should have been the end of the matter. Yet school officials found the speech "disruptive" and punished B.L. nonetheless.

Respondents' brief explains why the First Amendment prevents schools from punishing students for their speech outside of school. But students are not the only ones with constitutional rights at stake in this case. Parents, too, are invested in how schools treat their children, not least because parents and school administrators do not always see eye to eye about how children should act—or what they can say.

Fit parents have the right to raise their children as they choose. Of course this right isn't absolute. When children are at school, for instance, they remain under the watchful eye of administrators, who have an obligation to ensure an appropriate educational environment. So when children say things at school that disrupt learning or otherwise interfere with the school's legitimate mission, schools can punish them for it, and neither the First Amendment nor the wishes of a child's parents stand in the way. *See Tinker* v. *Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

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[2] "U.S. Supreme Court Will Hear Mahanoy Area Student's Free Speech Case," Skook News (January 10, 2021), https://www.skooknews.com/2021/01/us-supreme-court-will-hear-mahanoy-area.html

But when children are not at school—when they are at home, or church, or a friend's basement, or anywhere else children go on their own time—it is parents, not school administrators, who get to regulate their children's speech. At home, *parents* get to decide whether their children are allowed to use profanity. And *parents* get to decide whether their children should be disciplined for what they say on social media, whether that speech is protesting an injustice or venting about not making the cheerleading squad.

Importantly, this work of setting boundaries for children's speech is not just the parents' job, it is their constitutional right. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). Accordingly, absent abuse or neglect, the law generally prohibits the state from intruding upon parents' constitutional right to raise their children. "[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel* v. *Granville*, 530 U.S. 57, 68-69 (2000) (plurality op.).

Yet in this case, petitioner seeks to extend the power of public schools to freely punish children for "disruptive" things they say away from school and outside the school day, stripping parents of their traditional and constitutionally protected role. In this case, as in other off-campus speech cases, the rights of parents and their children are fully aligned. And where that is so, the state has no business interfering.

Petitioner's proposed expansion of government power over student speech is especially troubling in light of young people's extensive use of social media. Social media is the modern public square; parents have just as strong an interest in teaching their children how to behave on social media as they do in teaching their children how to behave in any public space. Indeed, in the 21st century, the job of being a parent increasingly focuses on regulating what your children say online. But unlike behavior on a sidewalk or in a park, social media leaves behind at least a fleeting record of what is said, making it more susceptible to school punishment than the off-campus speech of earlier eras. Thus, the position advocated by petitioner would empower schools, not parents, to decide how children ought to behave in a vast and growing swathe of public life.

Schools and parents, however, often stand at odds about what is appropriate for children. While schools must apply one-size-fits-all policies to hundreds of children at once, parents are better able to gauge their own child's mental and emotional maturity to determine what is appropriate for that child. *See generally* Sigal Ben-Porath and Michael Johanek, *Making Up Our Mind: What School Choice Is Really About* (University of Chicago Press, 2019).

Moreover, granting schools unprecedented power to punish off-campus speech risks stifling the immense cultural impact that children have on society. Thanks to supportive parents, teenagers have contributed substantially to society in areas that some schools might choose to prohibit, if they gained that power. Some of this country's leading musical artists began their careers as school-aged teenagers, singing about issues that many schools would find inappropriate. Other school-aged kids engage in religious evangelism or political speech on TikTok. Allowing schools to police off-campus speech could prevent

children from expressing themselves in ways that their parents enthusiastically endorse but that the school disfavors. This concern is exacerbated by the extreme deference courts typically afford to school administrators in reviewing decisions to punish student expression even in cases that lack any hint that the school had reason to anticipate a material disruption as required under *Tinker*.

All this is not to say that there can be no limits. Applying strict scrutiny to off-campus speech allows schools to address their compelling interest in responding to violent threats or bullying. But as B.L.'s case reflects, applying the less-demanding *Tinker* standard of anticipated disruption to the speech at issue here would allow educators too much control over students' out-of-school lives. And it would do so at the expense of the rights of parents to raise and discipline their children consistent with their families' values.

ARGUMENT

I. Extending the *Tinker* Standard to Students' Off-Campus Speech Is Inconsistent With Parents' Constitutional Rights To Raise Their Children

A. Parents Have the Right To Regulate Their Children's Speech Outside the School Setting

"[T]he interest of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (plurality op.). As the Court has long observed, "the institution of the family is deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (citations omitted) (plurality op.). "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* And importantly here, "the Constitution protects the sanctity of the family," *id.* at 503, by ensuring a "private realm of family life which the state

cannot enter," *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

This Court recognized the fundamental constitutional rights of parents in the seminal cases of *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Pierce* v. *Society of the Sisters*, 268 U.S. 510 (1925), and many times since. *See Troxel*, 530 U.S. at 65-66 (plurality op.) (collecting cases). Indeed, it "cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children," including the right "to direct the upbringing and education of [their] children." *Id.* at 65; *accord id.* at 80 (Thomas, J., concurring in the judgment) (agreeing that "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them").

Perhaps the most important feature of parents' constitutional right to rear children is the critical role of guiding their children's public expression to ensure that they are free to think and say things that state officials might disfavor. As the Court declared nearly 100 years ago, a "child is not the mere creature of the state," and it is crucial that we remain vigilant when the state takes any steps "to standardize its children." *Pierce*, 268 U.S. at 535.

The parental role thus encompasses "the right, coupled with the high duty, to recognize and prepare [their child] for additional obligations" and life paths not necessarily contemplated by school administrators. *Pierce*, 268 U.S. at 535. Parents make choices every day that reflect the "moral and cultural" values they hope to instill in their children. *Moore*, 431 U.S. at 503-04. And they need not align those choices with the state's "desire . . . to foster a homogenous people with American ideals." *Meyer*, 262 U.S. at 402. Our Constitution protect parents' choice in their own homes to buck a vice principal's or school board's values;

the government may not "hinder" those choices. *Troxel*, 530 U.S. at 66 (internal citation omitted).

The principle that the state cannot require a homogenous approach to childrearing applies fully in the context of restrictions on students' speech in the world at large. That is the import of this Court's decision in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), striking down California's law banning the sale of violent video games to unaccompanied minors. A critical defect in the California law, the Court held, was that it *usurped* parental authority by imposing a ban that many parents would oppose. *Id.* at 804. "Not all of the children who are forbidden to purchase violent video games on their own have parents who *care* whether they purchase violent video games," the Court explained. *Id.* The law unconstitutionally "abridge[d] the First Amendment rights of young people whose parents . . . think violent video games are a harmless pastime." *Id.* In pushing "what the State thinks parents ought to want," the state also infringed on constitutionally-protected parental rights. *Id.* In short, it is well-established by now that the government violates the Constitution when it prevents minors from engaging in speech their parents choose to permit.

B. Empowering Schools Broadly To Punish Students' Off-Campus Speech Infringes Parents' Constitutional Rights

This Court has recognized a critical divide between the constitutional rights of parents and the authority of school officials and has been careful to prevent encroachment by the school into the parental sphere. "[S]chool officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim" the same authority that parents have over their children. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). When it comes to schooling, "a State, having the high responsibility for education of its citizens, [may] impose reasonable regulations

for the control and duration of basic education," but school officials may *not* "interfere[] with the interest of parents in directing the rearing of their off-spring." *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972).

Under well-established principles of law, parents do not forfeit this fundamental liberty interest by sending their children to public school. Education in this country is, of course, "compulsory." *T.L.O.*, 469 U.S. at 336. And although parents are not required to avail themselves of a free and public education for their children, a very large number of parents either cannot or choose not to make use of alternatives to public schools. Most parents lack the means, time, and capacity to homeschool their children or to send them to private school. The government cannot require parents to send their children to public school and then bootstrap onto that requirement a mandatory usurpation of parental rights *outside of school* too.

Parents who send their children to public school retain the right to inculcate their children with their own family's values. That right must be protected lest we run the risk of unintentionally creating two different categories of parents with different levels of constitutional freedom to raise their children.

Most schools ban profane or violent speech in school and regulate use of social media at school, but extending *Tinker*'s relatively lax standard to permit schools to regulate *off-campus* speech, and in particular speech on social media, is irreconcilable with fundamental parental rights. *See generally* Catherine J. Ross, *Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights*, Chapter 7 (2015). In our "Cyber Age," the "modern public square" is social media. *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1732, 1736 (2017). After all, on the internet, "users can debate religion and politics with their friends and neighbors, . . . share vacation photos[,]. . .

petition their elected representatives[,] and otherwise engage with them in a direct manner." *Id*. at 1735.

The internet is where children now live their lives and learn to engage with the world. It is an essential platform for young people, just as for adults, to discuss important topics including religion and politics. And while excessive screen time has its downsides for children, the internet has been a lifeline in this era of pandemic-related lockdowns.[3] Many parents actively help their children find spaces for online expression in order to support their social, emotional, and academic development. Granting schools a roving commission to police speech on social media would effectively strip parents of their ability to teach their children how to behave in a vast and growing swathe of public life.

Outside of school, parents have the right to choose what they want to teach their children about how to interact on social media. To take just one example, TikTok, a video-sharing social media service, has given millions of school-aged children an outlet for their creativity. Lip-syncing along to songs, a fair number of which have profane or violent lyrics, is one of the most popular activities on TikTok. *See, e.g.*, Elias Leight, "Did You Notice When TikTok Banned Explicit Lyrics?," Rolling Stone (Oct. 18, 2019) (describing a brief effort by TikTok to ban profanity). Some parents favor exposing their children to such music on TikTok; many others do not. But an extension of *Tinker* to off-campus speech would empower schools to punish a teenager for making a video of herself on the weekend lip-syncing to a profane or violent song—effectively overruling her parents' permission—on the theory that the video might foreseeably reach the school and cause "disruption." Indeed, that is not so different than what happened to B.L.,

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[3] *See, e.g.*, Karen Goldschmidt, *The COVID-19 Pandemic: Technology Use to Support the Wellbeing of Children*, 53 J. Pediatric Nursing 88, 90 (July-Aug. 2020).

whom the school punished for what was in essence a moment of profane venting. Parents who choose to must be allowed to encourage this sort of core self-expression without exposing their children to repercussions at school.

Many of America's most successful artists got their start in high school, often with their parents supporting speech that schools may well disfavor. Taylor Swift, whose parents moved the family to Nashville to encourage her career, regularly wrote and performed songs about her high school experience. Taylor's blockbuster "Fifteen," for example, describes her real freshman classmate "Abigail," who "gave everything she had to a boy/ Who changed his mind." Abigail consented to being named in the song,[4] but given the subject matter it is easy to imagine a school official regarding such a song as "disruptive." (Indeed, schools have punished speech as disruptive when it merely implies a reference to another student. *See Norris on behalf of A.M.* v. *Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 15 (1st Cir. 2020)). Swift's parents' decision to allow and indeed encourage her to sing about more real-life content was essential to her success as a songwriter. And the same is true of breakout pop star Billie Eilish, who, with her parents' encouragement,[5] cultivated a massive following as a teen by giving her fans the material for content like the YouTube video "billie eilish swearing for two minutes." [6]

These examples are hardly unique. For every Swift or Eilish, there are millions of school-aged teens sharing their

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[4] Courtney Fox, "Taylor Swift's 'Fifteen' Is About Her Longtime Bestie Abigail Anderson," Wide Open Country (January, 2021), https://www.wideopencountry.com/taylor-swifts-fifteen-is-about-her-longtime-bestie-abigail-anderson/

[5] Alessa Dominguez, "Is Billie Eilish Really That Weird?," Buzzfeed (Aug. 17, 2019), https://www.buzzfeednews.com/article/alessadominguez/is-billie-eilish-really-that-weird.

[6] Available at https://www.youtube.com/watch?v=XXRXODvobMQ.

visual art,[7] fiction,[8] political writing,[9] and music online.[10] The widespread ability to create and broadcast their creations on the internet has occasioned an explosion of youth creativity that contributes immeasurably to public life. Petitioner proposes that all this speech should be subject to regulation by public school administrators, a dramatic expansion of the government's power to punish speech in ways that would impoverish the public square.

What's more, parents' constitutional right to raise their children in a particular religious tradition often involves online speech as well. Religion, like every other feature of public life, exists online. *See, e.g.*, @pontifex, Twitter.com (the Pope's Twitter account). Many parents encourage their children to post about religious views on Instagram or Facebook or Twitter or Snapchat. Teenager Elijah Lamb, for example, preaches the gospel to Gen Z'ers on TikTok, where he has amassed over 600,000 followers and millions of viewers for his videos.[11]

Schools, however, too often mistakenly target students' personal religious expression as a source of alleged disruption. *See, e.g.*, *K.A. ex rel. Ayers* v. *Pocono Mountain Sch. Dist.*, 710 F.3d 99 (3d Cir. 2013). Religious expression is often controversial, such as when it addresses gender identity, sexual behavior, or non-believers. A ruling for

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[7] *E.g.*, @artinstituteteens, Instagram.com available at https://www.instagram.com/artinstituteteens/?hl=en.

[8] *E.g.,* Teen-author stories, Wattpad.com available at https://www.wattpad.com/stories/teen-author (a website for sharing short stories).

[9] *E.g.*, @kylekashuv, Twitter.com (a conservative activist who rose to prominence as a high school student).

[10] *E.g.*, Lil Tecca, SoundCloud.com (a teen rapper who became popular sharing his music online).

[11] Vice News, Meet a Child Preacher Using TikTok to Help Gen Z Find Jesus, YouTube (Aug. 22, 2020), available at https://www.youtube.com/watch?v=-MyaWgujjCc.

petitioner in this case could plausibly allow a school to punish a student for a religious Facebook post created and published from the privacy of her own bedroom that becomes the subject of a heated discussion in the classroom or lunchroom the next day. Allowing school officials to punish students for engaging in controversial religious speech online would intolerably intrude on parental prerogatives.

Other parents may wish to encourage their children to explore controversial political philosophies, like anarchy or libertarianism, or to criticize school rules or school officials. Many parents view this sort of exploration as essential to allow children to grow into adults with the critical-thinking skills necessary to participate in our democracy. In years past, students might have engaged in person; today, these discussions often happen online. But they are exactly the kinds of discussions that history indicates some school officials may attempt to suppress given the chance. One school suspended a twelve-year-old girl for posting on Facebook that a school official was "mean to me." Ross, *Lessons in Censorship* at 219. Students have even been suspended for "liking" or "faving" social media posts by others. *Id.* at 220. School officials should not have this Orwellian control over students when they are away from school, on their own time. Outside the school setting, parents, not school officials, are entitled to guide their children's intellectual engagement or penchant for dissent as they see fit.

Outside of the "schoolhouse gate" that proved central to *Tinker*'s reasoning, schools must respect the "oldest of the fundamental liberty interests"—the right of parents in raising their children. *Tinker*, 393 U.S. at 506; *Troxel*, 530 U.S. at 65.

C. Applying *Tinker* Off-Campus Is Especially Problematic Given the Deference Courts Give Schools in Forecasting Possible "Disruption"

Courts generally grant significant deference to school administrators who assert that particular student speech might cause material disruption under *Tinker*. This Court's decision in *Tinker* did not mandate or even suggest such deference, but it has nonetheless permeated decisions applying the *Tinker* standard over the past several decades. *See* Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 First Am. L. Rev. 291, 292 (2013); David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. Pa. J. Const. L. 1113, 1118-1120 (2020). The Second Circuit has explained that the judiciary's "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Thomas* v. *Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044-45 (2d Cir. 1979).

Whether or not courts' deference to school administrators is justifiable when it comes to policing potentially disruptive speech *in school*, it exacerbates the constitutional problems with extending *Tinker* to *off-campus* speech. David L. Hudson, Jr., *Time for the Supreme Court to Address Off-Campus, Online Student Speech*, 91 Or. L. Rev. 621, 624-25 (2012). In *Troxel*, this Court recognized a constitutionally required "presumption" that parents are best equipped to rear their children. 530 U.S. at 68 (plurality op.). But that constitutional requirement would be rendered toothless if courts must instead defer to a school official's statement that off-campus speech a student's parents encourage or permit might cause some disruption at school.

Examples abound of extreme judicial deference to schools' unsubstantiated forecasts about possible

disruption. In *S.G.* ex rel. *A.G.* v. *Sayreville Bd. Of Educ.*, 333 F.3d 417 (3d Cir. 2003), for example, the court upheld a school's three-day suspension of a kindergartner for saying "I'm going to shoot you" during a game of "cops and robbers" at recess. In *Governor Wentworth Regional School District.* v. *Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006), *vacated on mootness grounds*, 201 F. App'x 7 (1st Cir. 2006), a court upheld a school's suspension of a student for refusing to take an "anti-Nazi" patch off his clothing. The school's concern arose because the suspended student and his friends had been harassed by other students, who "would occasionally accost [them] in the school's hallways with renditions of the Nazi salute, 'Seig Heil.'" *Id.* at 414.

In *Phillips* v. *Oxford Separate Municipal School District*, 314 F. Supp. 2d 643 (N.D. Miss. 2003), the court held that the school could lawfully prohibit a student from hanging a student-council campaign poster in the hallways. The poster read "He chose Mary . . . You should, too. Mary August for Student Council!" and featured a picture of the Renaissance painting "Madonna and Child." *Id.* at 645. The school claimed that the poster caused confusion: people were unsure if the poster "was allowing the election process to be used to establish a religion" or "was allowing religion to be ridiculed or demeaned." *Id.* Otherwise, the poster was largely a non-event for the school's students. Indeed, the court noted that "[i]t is likely the children of the Oxford Middle School would have handled these issues with admirable aplomb had not adults voiced their opinions." *Id*. at 648. Nonetheless, the court upheld the school's ability to ban the poster from school hallways. *Id*.

Doninger v. Niehoff presents a similar and all too common misapplication of the *Tinker* standard. There, a student named Avery had been disqualified from running in a class election based on statements she made about school officials. The school then prohibited students from wearing t-shirts to an election-related assembly that read

"Team Avery" and "Support LSM Freedom of Speech," citing a risk of a "deluge of phone calls and emails" from students and the fact that students were gathering in the hallway to speak with the principal about the disqualification. 642 F.3d 334, 349 (2d Cir. 2011). The court accepted the school's assertion about disruption even though there was no evidence that the students planned to do anything at the assembly other than sit silently while wearing their t-shirts. *Id.* at 343. The court then upheld the school's decision.

And courts have applied this extreme deference to permit schools to punish students who engage in speech that their own parents enthusiastically supported and endorsed. A Maryland district court, for example, upheld a school's decision to prevent a student from wearing a headwrap that celebrated the student's culture. *Isaacs ex rel. Isaacs* v. *Bd. of Educ. of Howard Cty., Md.*, 40 F. Supp. 2d 335 (D. Md. 1999). The student wore the headwrap outside of school and considered it "an African cultural symbol" that she, her mother, aunt, and grandmother all wore. *Id.* at 336. The school stated that its no-hat policy applied to the headwrap, and that the no-hat policy in general helped prevent "horseplay and conflict in the hallways." *Id.* at 338. The school did not dispute that the headwrap caused no notable disturbances in the few hours that [the student] wore it at school." *Id.* Nonetheless, the court upheld the ban, noting the school's prediction that the headwrap might cause disruption because *other students* were "relatively likely to attempt to pull off or unwrap the headwrap and use it as a toy." *Id.* at 340.

In *Walker-Serrano by Walker* v. *Leonard*, 168 F. Supp. 2d 332 (M.D. Pa. 2001), the court upheld a school's decision to stop a third-grader from circulating a petition that read "[w]e 3rd grade kids don't want to go to the circus because they hurt animals. We want a better feild [sic] trip." *Id.* at 335. Although she was not allowed to circulate her

petition, the student, accompanied by her mother, protested the circus during the school trip. *Id.* at 337. Similarly, in *Smith ex rel. Lanham* v. *Green County School District*, a court upheld a school's decision to suspend a student for three days in part for wearing a t-shirt that read "KIDS HAVE CIVIL RIGHTS TOO" and "EVEN ADULTS LIE." 100 F. Supp. 2d 1354, 1357 (M.D. Ga. 2000). The student's mother had made the t-shirt for him. *Id.*

As these cases illustrate, when confronted with speech or topics they disfavor, it is not difficult for schools to "forecast" some substantial disruption. If a school can prevail in court by arguing that it punished the headwrap wearer because it anticipated disruption based on the possibility that *other kids* might steal her headwrap, anything goes. If this Court adopts the position advocated by petitioner, a school official's mere speculation about potential disruption would suffice to subordinate a parent's constitutional right to the "care, custody and control" of children outside the school setting. *Troxel*, 530 U.S. at 65 (plurality op.). Deference to school officials is problematic enough when applied to speech in-school; it certainly should not be extended to speech outside of school.

Case in point: The school district here has variously asserted that B.L.'s speech satisfied the *Tinker* "disruption" standard because students were discussing the snapchats in algebra class, because the snapchats could purportedly create "chaos," because B.L. "questioned her coaches' decisionmaking," and because her speech would undermine "morale and chemistry." Pet. Br. 6-7. If all it takes to satisfy *Tinker* is a *different* student who discussed the speaker's off-campus speech at school and a vague and unsubstantiated concern about "chaos," schools would have the power to regulate the entirety of students' social media profiles. Such power would significantly undermine parent's long-recognized constitutional prerogatives.

Furthermore, the long-term repercussions of parental discipline are far less consequential than penalties imposed by a school—penalties over which a parent has no control. Many parents (including some of the *amici* here) would disapprove of B.L.'s language and would seriously reprimand their own children for using such terms. That is the parent's prerogative. But discipline by a "fit" parent does not risk imposing life-long harms in the way that a school suspension or expulsion can derail a child's future. Any period of forced absence from school is consequential, even if a court subsequently overturns the penalty. Even smaller disciplinary actions, such as being removed from a sports team for a period of time, can implicate playing time, restrict students' social and physical development, and impede college scholarship opportunities. While schools have the right to sanction speech violations that occur in school or during school-sponsored activities, school districts should not be able to overrule parents' judgments about or discipline for their children's out-of-school speech.

II. Applying *Tinker* Off-Campus Is Unnecessary

In light of the significant incursion that petitioner seeks into constitutionally protected parental rights, the Court should not extend *Tinker* to students' off-campus speech. Instead, the Court should apply the familiar, long-established doctrine of strict scrutiny. Under strict scrutiny, schools would be able to regulate students' off-campus speech when they have a compelling interest in doing so, and when the punishment is narrowly tailored to serve that compelling interest.

The parade of horribles advanced by the petitioner and its *amici* does not require the intrusion into parental rights they seek. Normal First Amendment standards apply to public universities, yet no one doubts that they could punish a college student who posted exam answers online. *Cf.* Pet. Br. 3. And students have no more First Amendment

right to "crank-call" their gymnastics teacher all night, *id.*, than grown-ups have a right to harass their neighbors by calling them at all hours of the night. Likewise, in many instances schools will have a compelling government interest in preventing bullying. *See, e.g.*, *Citizens for Quality Educ. San Diego* v. *Barrera*, 333 F. Supp. 3d 1003, 1036–37 (S.D. Cal. 2018) (prevention of Islamophobic bullying a compelling interest for a school district).

Applying strict scrutiny to evaluate regulation of students' off-campus speech would allow schools to keep students and staff safe by responding to true threats of violence, bullying that puts other students at risk, and the like, none of which were remotely present in this case. There are no allegations that B.L. was bullying, or even insulting, any individual from her school. Instead, the record shows that after she didn't make varsity cheer she wanted to blow off some steam. Students have been complaining about not making varsity since the dawn of high school athletics. And venting—rather than keeping grievances bottled up inside—is actually a good thing, something that many parents would want to encourage.

Outside of school, children are under the guidance and care of their parents; they do not need another authority surveilling their off-campus personal expression or online presence. The Court should reject the dramatic expansion of school authority petitioner proposes.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

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