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 *AMICUS CURIAE* FIRST LIBERTY INSTITUTE IN SUPPORT OF RESPONDENTS

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March 31, 2021

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

First Liberty Institute is a nonprofit, public interest law firm and 501(c)(3) organization. It does not issue stock, and no other entity or person has an ownership interest of 10 percent or more in the organization.

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First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans. Through *pro bono* legal representation of both individuals and institutions, First Liberty's clients include people of diverse religious beliefs, including individuals and institutions of the Catholic, Protestant, Islamic, Jewish, Falun Gong, and Native American faiths.

Preserving student free speech is critical given the widespread hostility many government school officials exhibit towards students who express their religious beliefs. *See* Statement of Hiram S. Sasser, U.S. Comm'n on Civil Rights (May 13, 2011), http://www.eusccr.com/11.%20Hiram%20S.%20Sasser,%20III,%20Liberty%20Institute.pdf (last visited Mar. 29, 2021). From year to year, First Liberty represents many students who face discrimination because of their faith at the hands of government school officials. These cases often involve blatant violations of law, such as the Equal Access Act, 20 U.S.C. §§ 4071–74, but even more frequently First Liberty's student clients face school officials who completely disregard this Court's precedent in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). Through its experience countering rampant

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[1] The parties consented to the filing of this brief as amicus curiae. Rule 37.3(a). No counsel for any party authored this brief in whole or in part. No person or entity, aside from amicus and its counsel, made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

faithlessness to *Tinker*, First Liberty provides a useful perspective on how extending *Tinker*'s reach to off campus speech will impact religious students in classrooms throughout the nation every day. While it is typical for the student speech cases that reach the Court to involve speech of questionable taste (e.g., *Bethel* and *Morse*),[2] eroding *Tinker* and extending it beyond the schoolhouse gates poses a grave threat to students of faith. Amicus therefore urges the Court to reinforce *Tinker*'s strong standard and reject the invitation to extend its reach off campus.

SUMMARY OF ARGUMENT

Government schools are generally hostile to student religious speech for two core reasons: (1) an overabundance of caution in avoiding Establishment Clause concerns, and (2) genuine hostility towards students of faith. While government schools may advance any number of views or ideas that are contrary to or demonstrably hostile toward the faith of millions of Americans, often courts stand ready to enjoin government schools from engaging in speech that advances any ideas that derive from the faith of those millions. As a result, some government schools translate that tension onto student religious speech, showing it hostility because they mistakenly think it necessary to avoid a lawsuit. However, many government schools demonstrate hostility to student religious speech because of school officials who are

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[2] *Bethel Sch. Dist. No. 403 v. Fraser*, 578 U.S. 675 (1986) (vulgar speech); *Morse v. Frederick*, 551 U.S 393 (2007) (speech promoting drug use).

themselves hostile to expression that runs contrary to contemporary elite culture.

Tinker's material and substantial disruption standard, and its limitation to speech occurring within the school environment, provides the only saving grace for student religious speech. Petitioner's arguments would erode this indispensable protection. First, Petitioner's argument simply recasts the educational mission justification the Court rejected in *Morse*. Second, the prohibition on viewpoint discrimination alone is not enough to protect free speech. Third, allowing government school officials to punish student speech that occurs outside of school is not legally justified and will do significant harm to student religious speech. Government officials cannot misuse the concept of *in loco parentis* to justify extending their authority and jurisdiction beyond the schoolhouse gate. Holding to the contrary opens the door for school officials to suppress student religious expression anytime and anywhere it occurs, especially expression of religious beliefs that touch on controversial issues.

ARGUMENT

B.L. is a teenage girl rejected from the varsity cheerleading team at her high school, who vented to her friends on social media with provocative and tasteless language. Yet such utterances from teenagers are ubiquitous. Prior to the internet age, such utterances conveyed via telephone would not provide a handy transcript for busybody government officials. But as social media now provides a written record of teenage rashness to school administrators, government

schools ask the Court to cede them a heavy regulatory hand. The Court should refrain from so doing.

I. Government Schools Are Hostile to Student Religious Speech that Disagrees with Contemporary Elite Views on Social Issues.

No school may advance religion as part of its mission. *See*, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985). This principle leads many government school officials to conclude that any student religious speech is inherently inconsistent with the school's educational mission and, therefore, belongs elsewhere. As a result, even school officials not openly hostile to religious speech are often hesitant to tolerate student religious expression. This burden does not fall equally on all students. For example, school officials do not generally censure students who bring a book to school promoting certain lifestyles that many believe the Bible or Koran questions. In fact, the school is free to, and often does, promote those lifestyles. The government school may fly flags bearing the symbol of that advocacy without concern for constitutional recrimination but cannot fly a flag conveying religious support.

Government schools may convey messages diametrically opposed to many students' faiths but cannot convey their religious counterparts, and this reality defines the landscape in which student religious expression occurs. Thus, government school officials naturally tend to be wary of religious speech as a matter of course, which tends to prejudice officials toward a censorious instinct whether they are intentionally hostile to faith or not.

Even though no Establishment Clause concern arises from student religious expression, *see*, *e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001), many government school officials will take advantage of whatever leeway the Court provides to engage in discrimination against student religious speech, especially when that speech contradicts popular social values. These concerns are not hypothetical. Amicus knows from experience that if the Court permits government school officials to censure a student for speech made off campus and outside of the physical control of the government school officials, such officials will take the opportunity to censor religious speech.

For decades, many schools have sought persistently to suppress student religious speech in violation of the Court's decisions. *See*, *e.g.*, *Good News Club*, 533 U.S. 98; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). A litany of cases in every circuit enforces these decisions against resistant government schools. Amicus has handled a legion of matters where schools ban student religious speech in a manner that can only be stopped by *Tinker*. Some of those cases include: *Matthews v. Kountze Independent School District*, 484 S.W.3d 416 (Tex. 2016) (considering claims against a school district that prohibited cheerleaders from incorporating Bible verses into student-created banners at football games); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc) (finding school officials violated the First Amendment by prohibiting a student from giving "Legend of the Candy Cane" pens to his

classmates during the school winter break party while other students could distribute goody bags containing nonreligious items); *Pounds v. Katy Independent School District*, 730 F.Supp.2d 636 (S.D. Tex. July 30, 2010) (finding school officials who blacked out a scripture quotation on a student-personalized holiday card order form containing secular options engaged in viewpoint discrimination not justified by the Establishment Clause); *Schultz v. Medina Valley Independent School District*, No. 11-50486, at *1-2 (5th Cir. June 3, 2011) (unpublished) (dissolving temporary restraining order protecting high school valedictorian who was prohibited from praying during her graduation speech)[3]; Michael Vasquez, *Broward schools' Runcie says Bible controversy "should've been handled differently*," Miami Herald (Sept. 12, 2014), https://www.miamiherald.com/news/local/education/article1964003.html (student prohibited from reading his Bible during free reading time). Counsel for Amicus also participated extensively in *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S.D. Tex. 1997) (invalidating school dress code prohibiting students from wearing rosaries) (discussed favorably in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211–12 (3rd Cir. 2001) (Alito, J.)). Given the natural hostility to student religious expression in government schools, the Court should not abandon *Tinker* or extend it beyond the school environment.

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[3] Available at https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0005.pdf; *see also Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2011 WL 13234770, *1 (W.D. Tex. June 1, 2011).

II. *Tinker* Provides the Appropriate Balance Between Government Power and Student Religious Speech.

Tinker's standard provides an objective measure to balance the school's need to maintain order and discipline with protecting student speech. *See* 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). This standard allows narrow regulation based on a concrete and substantial disruption to the learning environment, but it does not allow broad regulation based merely on offense, hurt feelings, or discomfort with the subject matter. Under *Tinker*, the Court properly rejects speech regulations based on overbroad rationales such as the "'educational mission' of the public schools." *Morse*, 551 U.S. at 423 (Alito, J., concurring) (controlling opinion). Such a rationale, after all, would effectively eviscerate *Tinker*, as it is difficult to imagine any censorship, however draconian, that could not be justified in some way as part of a school's "educational mission."

Petitioner's argument reconstitutes this same "educational mission" argument that the Court rejected in *Morse*. Petitioner seeks broad authority to punish a student for posting "negative information" on a social media platform away from school on her own time in order to prevent unspecified "chaos." *See* Petitioner's Br. 7. Petitioner contends that this "negative information" "could impact students at school." *Id.* But Petitioner points to no evidence that there was any impact beyond the potential for hurt feelings. Such

broadly generalized justifications do not pass the objective *Tinker* standard, and the Court should not lose sight of what these vague claims seek to justify—a prohibition on students communicating "negative information" on personal social media outside of school. The school likely believes that "negative information" interferes with its educational mission. But *Tinker* requires more, and for good reason—a prohibition on "negative information" enables school officials to prohibit any student expressions they dislike or disagree with, even if the expressions do not undermine the school's good order and discipline. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society [or school officials] finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Court rightly rejected such arguments before, and it should do so again.

In addition, Petitioner erroneously suggests that the constitutional prohibition on viewpoint discrimination adequately protects student speech from an eminently abuseable ban on communicating negative information. However, viewpoint neutral rules can still violate the First Amendment by suppressing speech on all sides to eliminate controversy. For example, the Los Angeles International Airport imposed the infamous resolution banning all "First Amendment activities" precisely because of its viewpoint neutrality, but the Court struck down the resolution as overbroad nonetheless. *See Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Without *Tinker*'s strong standard, government schools may adopt rules banning entire

categories of discussion, creating subject matter blacklists for students both at school and at home. Such blacklists could, for example, try to ban the discussion of controversial topics altogether—many of which are particularly controversial because of differences in opinion that often derive from religious convictions.[4] *Cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). But *Tinker* subjects even viewpoint neutral rules to the material and substantial disruption standard, because viewpoint discrimination is only one of the ways that speech restrictions may violate the First Amendment. *See Tinker*, 393 U.S. at 513 (noting that it is "obvious" that a viewpoint neutral speech regulation is subject to the material and substantial disruption test). The Court should not abandon or alter the *Tinker* standard in favor of one that permanently tips the constitutional scales in favor of a government school's educational mission.

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[4] Importantly, avoiding controversial speech is not even a proper educational goal—"[f]ar better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views . . . The school's proper response is to educate the audience rather than squelch the speaker." *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299–1300 (7th Cir.1993) (alterations in original)).

III. Expanding the State's Power to Punish Student Speech that Occurs Outside the School Environment Will Open the Door for School Officials to Punish Speech with which They Disagree.

A. The school's effort to punish off-campus speech exceeds its authority.

Teenagers use social media. Everyone knows this and everyone understands what it means—that people wear their opinions on their digital sleeves. While a school can take appropriate action if a student threatens violence against the school, another student, or a teacher, a school is not a law enforcement agency or, when the student is not at a school function, acting *in loco parentis* and therefore responsible for punishing all children's transgressions. Petitioner predicts a parade of horribles if this Court does not empower the government school to punish students who engage in arguably inappropriate online behavior when not under the authority of the school. But that prediction simply is not true, because students are subject to the jurisdiction of other governmental entities and their parents. For example, the solution to one of Petitioner's hypotheticals is simple—if a student crank calls a teacher at 3 a.m., call the police. Likewise, none of Petitioner's hypotheticals require giving schools extraterritorial power. If the off-campus speech is sufficiently inappropriate that it commands no constitutional protection, then the police, the town, the county, the state, and any other governmental entities with jurisdiction are capable of handling the situation. However, the speech at issue in this case did not rise to

that level—it was neither illegal nor otherwise punishable by another governmental entity for obvious reasons. While the speech was inappropriate and tasteless, it was, nevertheless, a disciplinary issue for parents to resolve, not the school.

Petitioner incorrectly invokes the doctrine of *in loco parentis* to justify school officials punishing students for off-campus behavior. The legal doctrine of *in loco parentis* enables schools to discipline students and is defined as follows: "[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." *Morse*, 551 U.S. at 413 (Thomas, J., concurring) (quoting 1 W. Blackstone, Commentaries on the Laws of England 441 (1765)). This well-developed common law doctrine recognizes that *in loco parentis* status is "temporary by definition and ceases on the withdrawal of consent by the legal parent." *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 168 (Wash. 2005); *Harmon v. Dep't of Soc. & Health Servs.*, 951 P.2d 770, 775 (Wash. 1998) ("At common law the status of one standing *in loco parentis* is voluntary and temporary and may be abrogated at will by either the person standing in loco parentis or . . . the child."); *In re Agnes P.*, 800 P.2d 202, 205 (N.M. Ct. App. 1990) ("Furthermore, an *in loco parentis* status is temporary and may be abrogated at will by either the child or the surrogate parent"); *McDonald v. Tex. Employers' Ins. Ass'n*, 267 S.W. 1074, 1076 (Tex. App.—Dallas 1924) (same); *Babb v. Matlock*, 9 S.W.3d

508, 510 (Ark. 2000) (discussing the principle that the *in loco parentis* "relationship may be abrogated at will by either the person assuming the parental duties or the child"); *State v. Randall S. (In re Interest of Destiny S.)*, 639 N.W. 2d 400, 406 (Neb. 2002) ("Once the person alleged to be *in loco parentis* no longer discharges all duties incident to the parental relationship, the person is no longer *in loco parentis*.").

Thus, any *in loco parentis* status a government school enjoys is temporary and ends once the parent is in control of the child. Invoking *in loco parentis* to justify punishing a student for off-campus speech stretches the doctrine beyond its common law reach and undermines parental authority and responsibility in the home. If a student engages in off-campus conduct so inappropriate that the school feels compelled to address it, then the government school has two options. First, the school can contact the parents and refer the issue to them to address within parental discretion. Alternatively, if the issue is so grave that it requires law enforcement, then the school can contact the police.

B. The speech at issue did not rise to the level of a material and substantial disruption.

Although the speech at issue in this case was certainly crude and tasteless, it did not rise to the level of material and substantial disruption. To demonstrate, two Fifth Circuit cases decided on the same day provide helpful contrast. In both cases, the court considered First Amendment challenges to school regulations prohibiting students from wearing "Freedom Buttons," circular pins one and a half inches in diameter

inscribed with the words "One Man One Vote." *Blackwell v. Issaquena Cty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966). In *Burnside*, the Fifth Circuit invalidated the school's restriction on students wearing the Freedom Buttons, because the record demonstrated that wearing the buttons did not substantially disrupt the school environment. 363 F.2d at 748. Rather, other students showed only "mild curiosity," and the students wearing buttons were sent home for violating the regulation, not for causing a disruption. *Id.* In contrast, in *Blackwell*, the students did substantially disrupt the school environment by distributing Freedom Buttons, pinning buttons on other students without their consent, throwing buttons through windows, and encouraging other students to walk out of class in protest. 363 F.2d at 753. Through both opinions, the Fifth Circuit emphasized that although school officials may limit student speech with rules "necessary for the orderly presentation of classroom activities," "school officials cannot ignore expressions of feelings with which they do not wish to contend." *Burnside*, 363 F.2d at 749; *see Blackwell*, 363 F.2d at 754. The speech in the present case, which allegedly conveyed "negative information" and caused hurt feelings and some unspecified chaos, does not demonstrate a material and substantial disruption to the school environment.

* * *

The instant case provides an important opportunity for government schools to honor the principles of the First Amendment not only by their words, but by their

deeds. As the *Tinker* Court explained, school officials have

> important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they 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 the important principles of our government* as mere platitudes.

393 U.S. at 507 (quoting *W. Va. St. Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943) (emphasis added)). When schools overregulate student speech, they "strangle the free mind at its source," and this strangulation teaches students that their rights are "mere platitudes." *Id.* Petitioner's disciplinary action today against a hot-headed social media post will become numerous disciplinary actions in the future against students who make unpopular but valuable statements on social media accounts—or anywhere members of the school community can hear their speech.[5] Schools must stay within the First

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[5] Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. of Legal Educ. 739, 744 (2017) ("Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms—respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of

Amendment's limits, and *Tinker*'s standard will hold them there.

CONCLUSION

The Court should protect B.L.'s speech and affirm the judgment below.

Respectfully submitted.

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others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.").