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 TEACHERS, SCHOOL ADMINISTRATORS, AND THE NATIONAL COUNCIL OF TEACHERS OF ENGLISH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), applies to speech by young people outside of the school environment.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Public schools prepare our nation's youth for citizenship by instilling in them the "fundamental values necessary to the maintenance of [a] democratic political system." *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1963) (plurality opinion) (quotation marks omitted). Freedom of expression is an essential element of citizenship. This brief offers the perspective of school teachers and administrators on the need for boundaries on a school's authority over students' speech, so that young people can learn to exercise freedom of expression responsibly.

Amici include twelve former school teachers and administrators from a wide range of school districts nationwide. Collectively, *amici* have decades of experience in teaching and administration, and most still work in education today. *Amici* are thus well placed to explain why expanding *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to any off-campus speech that may concern the school or its programs would undermine, not promote, schools' pedagogical mission. In *amici*'s experience, students need freedom outside of school to fully develop as citizens. At the same time, school officials need to concentrate their limited resources on the school environment and cannot feasibly regulate all off-campus expression by young people that might concern the school. These considerations lead to the conclusion that *Tinker*'s exception to ordinary First

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[1] *Amici* affirm that no counsel for a party authored this brief, in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Amendment standards for on-campus student speech should not be extended to speech by young people outside of the school environment.

The individual *amici* are joined by the National Council of Teachers of English (NCTE), a 21,000-member–strong organization of pre-K through graduate school literacy educators. NCTE promotes the development of literacy—the use of language to construct personal and public worlds and to achieve full participation in society—through the learning and teaching of English and the related arts and sciences of language. NCTE also aims to further the expertise and voice of educators as advocates for their students, and is devoted to improving the learning and teaching of English and the language arts at all levels of education. NCTE joins this brief because it believes that extending *Tinker*'s reach beyond the school environment would impair educators' ability to teach students to find and use their authentic voices, thereby hindering their growth into full participants in their communities.

A complete list of the individual teacher and school administrator *amici* is included as Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like all citizens, students have a fundamental right to freedom of speech. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). And public schools have a particular obligation to honor and encourage the exercise of young peoples' free speech rights. Because schools "educat[e] the young for citizenship," they must "scrupulous[ly] protect[]" students' "Constitutional freedoms" so as to "teach

youth" the "important principles of our government," not merely in principle, but in practice. *Id.*; *see also Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (public schools exist to inculcate students with "the values on which our society rests"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation … is the very foundation of good citizenship."). The constitutional presumption, then, is that young people, like adults, may say what they want, when they want, free from government intervention. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) ("[M]inors are entitled to a significant measure of First Amendment protection." (quotation marks omitted)).

At the same time, this Court's four school-speech cases recognize that the special nature of the school environment justifies affording school officials a freer hand in regulating on-campus student speech than in addressing speech by young people outside of the school setting. The need for that authority exists when students are on school grounds, traveling to and from school, at school-sponsored activities, speaking as school representatives, or under school supervision. Even then, however, students still retain significant free speech rights.

The Court accommodated these interests in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Although the First Amendment generally prohibits content- and viewpoint-based regulation of speech, *Tinker* carved out an exception in schools, holding that public school officials may regulate on-campus student speech whenever the speech substantially disrupts the school environment or interferes with the rights of others in the school community. But *Tinker*'s permissive

standard is ill-suited to youth speech outside the school environment, even when the content of the speech concerns other students or school programs and may affect the school.

Important First Amendment values and practical concerns limit the authority that teachers and school administrators should have to regulate speech under *Tinker*'s more lenient standard. The educational mission of our nation's public schools includes fostering students' ability to freely express themselves. And to promote that goal, schools must encourage students to use their voices in self-expression and public debate, particularly outside the confines of the school environment. Extending *Tinker* to off-campus speech would directly undermine that aim. Doing so would also hinder school officials' ability to focus on addressing truly harmful student speech and thereby undermine the important pedagogical interests that *Tinker* deemed vital to protect. And *Tinker*'s extension would run headlong into parents' presumptive authority outside the school environment to raise their children according to their own values, leading to untenable conflicts between parents and schools.

Of course, teachers and school administrators need appropriate latitude to address student speech that harms the school environment. That means that schools must be able to protect both students and staff from harassment, bullying, and threats of school violence, regardless of its geographic origin. But, as respondents' brief explains, traditional First Amendment standards, calibrated for youth and context, already permit schools to address the harmful consequences of such speech. Respondents

therefore correctly urge the Court to cabin *Tinker*'s application to the school environment, while acknowledging that school officials can regulate off-campus speech consistent with ordinary First Amendment rules. And respondents' approach will allow schools to address student speech of primary school concern—*e.g.*, bullying, harassment, and threats of violence—while protecting students' important First Amendment rights and accounting for other practical considerations.

Petitioner's test, by contrast, takes an unduly narrow view of young peoples' free speech rights. Petitioner seeks to apply *Tinker* to any and all off-campus speech that is (i) "directed at" or "involve[s]" the school community and (ii) "foreseeably reach[es] that environment." Pet. Br. 4, 27, 46. That broad conception of school officials' authority would undermine schools' goal of fostering students' development of free-expression skills. It also would impose unnecessary administrative burdens on school officials. And it would interfere with parents' right to raise their children as they see fit. Petitioner's standard for when *Tinker* applies to off-campus speech would also be far harder for teachers and administrators to apply than respondents' easily administrable line. In fact, under this Court's existing school-speech jurisprudence and the anti-bullying laws of many states, school officials already must decide which speech occurs within the school environment and which does not. And, in *amici*'s experience, educators and administrators have been able to make that determination in the vast majority of circumstances without any apparent difficulty.

For all these reasons as elaborated below, the Third Circuit's judgment for B.L. should be affirmed.

ARGUMENT

I. EXTENDING *TINKER* TO YOUTH SPEECH OUTSIDE THE SCHOOL ENVIRONMENT WOULD THWART SCHOOLS' SCHOLASTIC AIMS.

A critical function of educators is to teach students that we live in an open society that protects the rights of all to speak freely. And a vital purpose of public education is to encourage students to find and use their voices responsibly in self-expression and public debate. Thus, even within the school environment, public schools "may not be enclaves of totalitarianism" and school officials "do not possess absolute authority over their students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

But whatever accommodations are necessary within the school environment, applying *Tinker* outside the school environment would undermine essential educational goals without a countervailing justification. *Tinker* created a rare exception to the general First Amendment rule that government actors may not engage in content- or viewpoint-based censorship of speech. This doctrine responds to unique concerns and responsibilities inherent in the school environment. But that exception has no place outside of the school environment. As teachers and administrators with significant public school experience, *amici* know that students must have significant breathing space to express themselves, particularly outside of school. And *amici* believe that

respondents' approach cabining *Tinker* to the school environment honors this important pedagogical interest.

Petitioner's broad standard threatens significant real-world harms. It would curtail schools' ability to help students grow into responsible citizens. Further, it would create an expectation that schools are responsible for policing all off-campus speech by young people, and that obligation, in turn, would impede officials from performing their primary responsibilities in school. And extending *Tinker* to all speech in the community would impair parents' authority to raise their children in the manner they deem appropriate, leading to untenable conflicts between school officials and parents. No First Amendment values or practical considerations require that destructive result.

A. Projecting *Tinker* Off Campus Will Impede Schools' Ability To Encourage Students' Self-Expression, A Core Pedagogical Goal.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1944). Our "political system and cultural life rest upon this ideal." *Id.*

Fostering the right to free expression among students is particularly critical: young people must be prepared "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Bd. of Educ. v. Pico*, 457

U.S. 853, 868 (1982). And public schools are the primary vehicle through which children learn how to practice that precept. As this Court has recognized, the way schools interact with students "influence[s] the attitudes of students toward government, the political process, and a citizen's social responsibility." *Ambach v. Norwick*, 441 U.S. 68, 79 (1979). Public schools are thus "vitally important," *Morse v. Frederick*, 551 U.S. 393, 409 (2007), for teaching "fundamental values necessary to the maintenance of a democratic political system," *Ambach*, 441 U.S. at 76-77.

Schools accordingly must foster students' exercise of their right to free speech by encouraging them to use their voices in self-expression and public debate. *See* Erwin Chemerinsky, *Teaching that Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. Davis L. Rev. 825, 835 (2009). To fulfill that mission, though, schools must not merely teach students lofty academic theories of free speech. They must also model such First Amendment values in practice. "At the very least, there is dissonance, if not hypocrisy, in teaching students that free speech matters when school officials themselves provide virtually no protection for student speech." *Id.* at 826.

But applying *Tinker*'s lenient standard to youth speech off campus would send the opposite message: that students are not free to use their voices in self-expression and public debate, even when they are on their own time, outside of school hours, and off school grounds. Throughout our nation's history, students have played an important role in various social movements. *See* Zachary Jason, *Student Activism 2.0*, Harvard Ed. Magazine (2018),

https://tinyurl.com/36u95meu. And more recent examples of student activism underscore the importance of young peoples' free exercise of First Amendment rights.

Consider, for example, the flurry of social media accounts that emerged from high school students following the murder of George Floyd. *See* Taylor Lorenz & Katherine Rosman, *High School Students and Alumni Are Using Social Media to Expose Racism*, N.Y. Times (June 16, 2020), https://tinyurl.com/s9enmyns. Using social media platforms "to call out their peers for racist behavior," students have taken to Instagram, Snapchat, and Twitter "to hold friends and classmates accountable for behavior they deem unacceptable." *Id.* Many of these accounts invite other students "to submit screen shots of problematic behavior, which are in turn shared to an audience of sometimes thousands online." *Id.*

These types of campaigns "give voices" to students to urge accountability for harmful behavior. *Id.* They may also deter people from engaging in racist behavior in the first place—people typically do not want to go viral for expressions of bigotry. And most fundamentally, they encapsulate the "active and effective participation" in our "pluralistic, often contentious society" that the First Amendment safeguards. *Pico*, 457 U.S. at 868.

Yet the broad standard petitioner advances would allow schools to regulate and punish exactly this sort of valuable speech: a campaign calling out racism at a particular school is surely "directed" at and would "foreseeably reach" the school environment, and would (if successful) substantially affect the school

community. Pet. Br. 4, 27. Indeed, that is the whole point of these types of campaigns: to disrupt the status quo by identifying and stamping out racist behavior.

An anti-racism campaign likewise undoubtedly "involves the school community." Pet. Br. 46. How else could a student effectively inspire change at her school without "involving" the school's community itself? It defies logic to think that she could. Yet petitioner's proposed standard would subject this speech to school regulation and likely punishment under *Tinker*. Again, the raison d'étre of social movements is to substantially disrupt norms.

In *amici*'s view, allowing schools to punish any student expression that is "directed at" or "involves" and foreseeably reaches the school community would effectively squelch students' abilities to effect change at all. Pet. Br. 46. Myriad social issues would become taboo topics that students would be unable to address even off-campus: racial and gender equality, LGBTQ rights, religious liberty, Second Amendment freedoms, and COVID-19-related restrictions are just a few examples. And it is not hard to imagine how and why students might criticize their schools' handling of any one of these issues. But if participating in this sort of off-campus speech could result in suspension or expulsion, many students would refrain from speaking at all. And that would undermine exactly what *Tinker* is meant to ensure: that schools provide a productive learning environment in which students gain the tools—including their own voices—to meaningfully participate in society as adults.

Petitioner's expansive standard would even chill student speech that simply criticizes the school—even when that criticism is not linked to a bigger or more important issue. Consider, for instance, a student who takes a picture of a school lunch and posts it over the weekend on Facebook, editorialized with the caption: "if you don't like dog food for lunch, you should choose another school!" Both common sense and ordinary conceptions of free speech suggest that students should learn to question and criticize the world around them, including their schools. But petitioner's standard would *at least* land this speech on a teacher or administrator's desk, and depending on other students' responses, might even lead to a suspension permissible under *Tinker*. That outcome cannot be reconciled with the fundamental First Amendment precepts students are supposed to learn in school.

Contrary to petitioner's suggestion, "familiar concepts" of "due process" and "notice" would not provide a sufficient constitutional backstop. Pet. Br. 4. In essence, petitioner suggests that if this Court extends *Tinker* to any off-campus speech that is "directed at" or "involves" the school community, young people would be on notice that they could be punished for that speech and that such notice would make a punishment fair. It would not. Simply putting someone on notice that a law allows punishment does not mean that the punishment itself is consistent with young peoples' First Amendment rights.

B. Expanding *Tinker*'s Reach Would Undermine School Officials' Ability To Fulfill Their Core Educational Mission.

Tinker's application to young peoples' off-campus speech would also undermine schools' pedagogical goals in other ways. This Court has long recognized that school administrators "have a difficult job, and a vitally important one." *Morse*, 551 U.S. at 409. Yet applying *Tinker* to off-campus speech, even if it is "directed at" or "involves" the school community, as petitioner suggests, Pet. Br. 4, 46, would only make that job harder. To be sure, extending *Tinker* to off-campus speech would not *require* school officials to regulate and punish all such speech that comes to their attention. But in *amici*'s experience, the extension of *Tinker*'s realm would create an expectation that schools will at least *consider* whether and how to address that speech for fear of being sued for inaction. And that would impose an untenable burden on school officials, thus hindering teachers' and administrators' ability to carry out their primary educational responsibilities and, in turn, undermining the vital school interests *Tinker* was meant to protect.

School officials justifiably face significant financial liability for failing to intervene against student bullying, harassment, and violence. *See Jury Verdicts and Settlements in Bullying Cases*, Public Justice (Apr. 2019), https://tinyurl.com/3rue4cec. For instance, Novi Community School District in Michigan was understandably required to pay a 13-year-old autistic student and his family $695,000 after the school allegedly failed to respond appropriately to "bullying, harassment and sexual

touching," including when another student touched the victim's groin area for over four minutes during English class. *See* Matt Jachman, *Novi school district settles sexual abuse suit for $695,000*, Hometown Life (Feb. 5, 2018), https://tinyurl.com/4nx4sw5m.

But saddling teachers and administrators with responsibility for monitoring all off-campus speech that "targets" or "involves" the school environment, Pet. Br. 4, 46, would detract from their ability to focus school resources on redressing truly harmful speech and otherwise operating their schools. That is because even where teachers and administrators decide not to *punish* off-campus speech, the mere potential for *Tinker*'s application would create an expectation that school officials will take time away from their daily responsibilities to evaluate nearly any instance of off-campus speech that comes across their desks. In other words, if schools are deemed to have "authority over online speech created at home, then parents might expect that schools are policing the Internet and, in turn, hold schools responsible for not acting to prevent or punish online threats or harassment." Harriet A. Hoder, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. Rev. 1563, 1598 (2009). After all, if a school has authority to act and chooses not to do so, it very well could anticipate being held liable for that inaction down the road.

Yet, in *amici*'s experience, schools often lack sufficient time and resources to address even students' most basic needs. If schools were expected to monitor all off-campus speech that is "directed at" or "concerns" the school community, Pet. Br. 4, 46,

they would have neither the time nor resources to focus on the most egregious student speech, let alone other important issues at school. Moreover, *amici* anticipate that petitioner's approach would embroil schools in inter-parent disputes about young peoples' speech outside of school. For instance, one parent may think her daughter's public Facebook post criticizing another student's anti-abortion views is appropriate, while the other student's parent does not. And if those parents understand schools to have authority over off-campus speech, then they are likely to take their differences to school officials, rendering teachers and administrators the arbiters of off-campus activities over which they properly have no authority. It is not unreasonable to think that some parents might prefer to delegate their dispute-resolution responsibilities to schools if they thought they could.

These enormous administrative burdens would undermine *Tinker*'s overriding concern that schools be able to provide a learning environment that is both educationally productive and safe, for all of the students in the school community. 393 U.S. at 508, 512. No justification exists for draining school resources in the way that petitioner's broad proposal would inevitably do.

C. *Tinker*'s Extension Off Campus Would Usurp Parents' Prerogative To Raise Their Children As They See Fit.

This Court should decline to extend *Tinker* off campus for the additional reason that parents, not teachers or administrators, are responsible for raising their children outside of school. It is "beyond debate"

that parents play a "primary role … in the upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). And parents have a "fundamental right" to "make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Accordingly, our Constitution presumes that there is "no reason for the State to inject itself into the private realm of the family to … question the ability of [a] parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69; *see also Ginsberg v. State of N.Y.*, 390 U.S. 629, 639 (1968) ("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." (quotation marks omitted)).

Parental decisions about what type of speech is appropriate outside of school and what punishment is warranted for off-campus speech that pushes the boundaries typically fall within that private realm. Common sense tells us that this is true because, for example, different words are off-limits in different homes. *See* Jaclyn Youhana Garver, *Should You Let Your Kids Curse?*, LifeHacker (Jan. 8, 2019), https://tinyurl.com/w5zew74 ("From one extreme to the other, parents handle four-letter words in myriad ways."). While some parents may ground their children for even the mildest of curse words ("What the heck!"), others allow their kids to "say whatever they want at home" ("Fuck!"). *Id.*

That some words may evoke discipline in some households but not others affirms that the regulation of off-campus speech typically falls to parents—not

schools. Otherwise, students would presumably face the same punishments for the same off-campus speech, regardless of parental preferences.

That interference with parental choice is unjustifiable: "few rights" are "more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate." *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (quotation marks omitted). Thus, while school officials may be "caretakers" at school, parents shoulder that responsibility at home: their "most important duty" is to educate and guide their children and thereby prepare them "physically, mentally, spiritually, morally and culturally for adult life." Patience Ignatia Mphomotseng Moloi, *The role of parents in discipline as an aspect of school safety*, Dissertation 35 (2002), https://tinyurl.com/6hxtz85c. And that includes taking "disciplinary measures against a child," if but only if the parent deems it appropriate to do so. *Id.*

Under petitioner's conception of *Tinker*, by contrast, school officials would become "roving inspectors of decency, encroaching on familial and individual prerogatives to determine what type of lewd, vulgar, or offensive language is appropriate in non-school settings." Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 Wm. & Mary Bill Rts. J. 591, 654 (2011). And that, in turn, would not only hamper parents' right to raise their children in the manner they deem appropriate, but also violate students' "familial right to be raised and nurtured by their parents." *D.B.*, 826 F.3d at 740

(quotation marks omitted). Schools have no warrant to interfere with such a "parental prerogative." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 815 (2011) (Alito, J., concurring in the judgment); *accord id.* at 804 (majority op.) (First Amendment does not allow government to impose on children "what the State thinks parents *ought* to want").

Indeed, creating such a nebulous realm of dual parent-school authority would almost certainly lead to regular skirmishes between parents and schools, in much the same way that it would make school officials the reluctant umpires of inter-parent disputes about young peoples' speech outside of school. *See supra* at 14. One parent may think her son's off-campus speech should be punished, while his school does not. And another parent may think the same speech is entirely appropriate, while her school disagrees. Such conflicts can arise no matter *Tinker*'s scope, but surely far more conflicts will flare up if a school's authority to regulate young peoples' speech is projected off campus. Respondents' approach, on the other hand, both protects parents' fundamental outside-of-school right to raise their children as they wish and limits the administrative problems that would result if this Court extended *Tinker* off-campus.

II. TRADITIONAL FIRST AMENDMENT STANDARDS GIVE SCHOOLS AMPLE LEEWAY TO ADDRESS HARMFUL OFF-CAMPUS SPEECH.

As explained, public education fulfills a "fundamental obligation of government to its constituency." *Ambach*, 441 U.S. at 76 (quotation

marks omitted). That is because public schools' primary aims are to prepare children for "participation as citizens," *id.*, shape their "cultural values," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and "provide[] the basic tools by which [they] might lead economically productive lives to the benefit of us all," *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Unsurprisingly, then, public education plays a "fundamental role in maintaining the fabric of our society." *Id.*

To carry out the promise of public schools, teachers and administrators must not only promote students' free expression rights, but also be able to shield the campus community from harassment, bullying, and threats of violence—all of which can seriously impede learning, whether the harassing, bullying, or violent words are written inside or outside of school. Recognizing as much, the federal government and nearly every state has enacted laws holding school officials financially liable if they fail to redress such harmful speech.

But *Tinker*'s extension off campus is not necessary for schools to address these unfortunate realities. As respondents' brief makes clear, typical First Amendment standards already provide schools with ample means to address youth speech outside the school environment that harms the school environment in these ways. And school officials have an abundance of other, non-punitive tools to effectively redress other potentially troubling speech.

A. Schools Must Be Able To Protect Students, Teachers, And Staff From Bullying, Harassment, And Violence.

Amici recognize that teachers and administrators "must be able to prevent and punish harassment[,] bullying," and violent speech so as "to provide a safe school environment conducive to learning" for all students. *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 572 (4th Cir. 2011). Bullying and harassment are a major concern for schools today. *See generally* Br. for States as *Amici Curiae* in Support of Neither Party, *Mahanoy Area Sch. Dist. v. B.L.*, No. 20-255. As the U.S. Department of Education has explained, bullying "can seriously impair the physical and psychological health of its victims," "create conditions that negatively affect learning," and undermine "the ability of students to achieve their full potential." U.S. Dep't of Educ., *"Dear Colleague" Letter* (Oct. 26, 2010), https://tinyurl.com/ynpbx39c. Bullying can "cause victims to become depressed and anxious, afraid to go to school, and to have thoughts of suicide." *Kowalski*, 652 F.3d at 572.

The rise of the internet has only exacerbated the problem. As the "new bathroom wall," the internet is "the virtual place kids scrawl something when they want to be mean." Shannon Doering, *Tinkering With School Discipline in the Name of the First Amendment: Expelling A Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 Neb. L. Rev. 630, 634 (2009) (quotation marks omitted). And because the internet allows students "to speak with fewer inhibitions" and carries information far and wide, the issue of bullying

"has exploded in the digital age." Waldman, *supra*, at 618, 647.

Schools must similarly be able to address threats of violence directed at the school community. "[S]chool violence is an unfortunate reality that educators must confront on an all too frequent basis." *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). For instance, the one year period from July 1, 2016 to June 30, 2017 alone saw 42 school-associated violent deaths in the United States. Nat'l Ctr. for Educ. Statistics, *School Crime*, https://tinyurl.com/urn4zej5. And in 2018, "[n]early all mass attackers" made "threatening or concerning communications" before carrying out their attacks. Sandy Hook Promise, *16 Facts About Gun Violence And School Shootings*, https://tinyurl.com/4y66tybt; *see also* Jillian Peterson & James Densley, *School Shooters Usually Show These Signs of Distress Long Before They Open Fire, Our Database Shows*, The Conversation (Feb. 8, 2019), https://tinyurl.com/46c9dfd4 (78% of mass school shooters communicate their plans before committing violence, often on social media). To keep students safe, teachers and administrators must therefore be able to address violent speech before any violent acts materialize in school.

So too must educators and administrators be allowed to protect teachers and school staff from student harassment, even if it arises off campus. Students' hostility toward school officials "can make school officials fearful for their safety," cause "emotional distress," and foster an environment of "disrespect"—all of which can make teachers "anxious, depressed, or disengaged" and thus "less

able to sustain the academic engagement of their students." Waldman, *supra*, at 617, 644, 646. In effect, then, student harassment of educators ultimately "harm[s] student motivation and behavior" and undermines schools' pedagogical aims. *Id.* at 646.

Amici agree, therefore, that schools must be able to address at least some speech by young people initiated outside of school: regardless of its origin, speech that attacks another student, teacher, or administrator "has the potential ... to severely upset its target, with spillover effects on the larger school community." *Id.* at 592. As catalogued elsewhere, numerous federal and state statutes require teachers and school administrators to respond to bullying, harassment, and school violence, or else face financial liability. *See generally* Br. for States as *Amici Curiae* in Support of Neither Party, *Mahanoy Area Sch. Dist. v. B.L.*, No. 20-255. Those laws reflect the reality that students' off- and on- campus lives are sufficiently intertwined that teachers and administrators must sometimes address off-campus speech by young people in order to maintain a safe and productive learning environment for all.

B. Schools Can Protect Students, Teachers, And Staff From Bullying, Harassment, And Violence Under Ordinary First Amendment Standards.

None of these interests, however, means that the Court must extend *Tinker* to off-campus speech. As respondents' brief illustrates, schools have ample other authority to police off-campus speech that bullies, harasses, or threatens.

Most importantly, even when *Tinker* does not apply, schools may regulate young peoples' speech under ordinary First Amendment principles. For instance, schools may respond to "true threats," which are not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Schools may also proscribe some speech involving harassment or bullying as speech integral or incidental to proscribable conduct. *See, e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204-14 (3d Cir. 2001) (Alito, J.) (describing limits). And, as in other First Amendment contexts, application of these rules can take account of students' youth and the educational environment. Thus, for instance, the threshold for harassment of a young person is surely lower than that for harassment directed towards an adult, not only because of the student's age, but also because the harassment can impede her access to education. That is presumably why the federal government and nearly all states have enacted anti-bullying laws without serious First Amendment challenge.

Further undermining the claim that *Tinker* must be projected beyond the school to address such harms, many of those anti-bullying laws limit schools' failure-to-intervene liability to the school environment, *e.g.*, where the school "exercises substantial control over the harasser" and "the context in which the harassment occurs." *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, Public Justice (2017), https://tinyurl.com/h8tjv9yw (quotation marks omitted). Petitioner's concern that failing to give schools extensive authority to regulate

off-campus student speech "would invalidate major components of the laws and policies of schools in every State" is therefore misplaced. Pet. Br. 35. Widespread regulation of any off-campus speech that "concerns" the school environment is not what petitioner's cited laws actually condone.

Limiting *Tinker*'s application in this way would also leave schools with numerous non-punitive tools to address less harmful speech they nevertheless deem troubling. Punitive measures do not necessarily further schools' pedagogical missions, whereas other tools may do so more effectively, and without triggering any First Amendment concerns. Instead of reaching the root cause of misbehavior, traditional school punishments—detention, suspension, and expulsion—often teach students that they "just ha[ve] to be more careful next time to avoid getting caught." *See* Larry Ferlazzo, *Positive, Not Punitive, Classroom Management Tips*, Edutopia (Apr. 16, 2013), https://tinyurl.com/vu5chshh. Or, for students who dislike going to school, the possibility of time away from the classroom can serve as an "incentive" rather than a "deterrent" for misconduct. Karen Joyce Clifford, *Traditional Suspension Practices and Nonpunitive Alternatives for Secondary Students with Disabilities*, Walden Dissertations & Doctoral Studies Collection 39 (2016), https://tinyurl.com/zbwdce3n.

Worse still, punishments that involve removal from class often damage the learning environment: "the student learns that if they make a mistake, they must isolate themselves from their community, their resources, and their role models." *See* Rose Reiken, *Restoring Students' Right to Learn: An Alternative to Punitive Discipline*, School Discipline, https://tinyurl.

com/4a62mbdw. Punitive school discipline sends the unwarranted message that "students' missteps [are] so detrimental that they no longer deserve to learn." *Id.*

It is therefore unsurprising that punitive discipline creates a "dangerous cycle," in which students experience "reduced learning time, become disengaged from school, and lose trust in their teachers and connection to their school community," all of which increases their likelihood of "violent behavior" and "lowers their academic performance." *Id.*; *see Alternative School Discipline Strategies*, Educ. Comm'n of States (Mar. 2018), https://tinyurl.com/rvsvd45h (punitive discipline increases "the likelihood that students repeat grades, are excessively absent from school, drop out entirely and/or get involved with the juvenile justice system"); Dominique Smith, Douglas B. Fisher & Nancy E. Frey, *Better Than Carrots or Sticks: Restorative Practices for Positive Classroom Management* (Aug. 2015) (similar). Just one suspension doubles a student's risk of later dropping out of school. *See* U.S. GAO, *Discipline Disparities for Black Students, Boys, and Students with Disabilities*, https://tinyurl.com/w845tee5.

And those measures disproportionately disadvantage students of color and individuals with disabilities. For instance, nearly 20% of Black middle school students in California were suspended in 2019, compared to only 7% of all middle school children in the state. *See* Kristen Taketa, *A legacy of systemic racism: Black students, especially boys, still being suspended at far greater rates*, Recordnet (Feb. 20, 2021), https://tinyurl.com/y9f8wwas. And while

students with disabilities comprise only 12% of the K-12 population nationally, they account for nearly 25% of suspensions and expulsions and nearly 30% of students referred to police. *See* Beah Jacobson, *New Reports Reveal Extreme Discipline Disparities for Students with Disabilities*, America's Promise Alliance (Apr. 30, 2018), https://tinyurl.com/83ff49se.

Restorative discipline, on the other hand, allows schools to curb undesirable student behavior without those damaging effects—and better yet, does not require application of *Tinker*'s exception to normal First Amendment rules at all. Most basically, restorative discipline "resolves conflicts through finding and addressing root causes" of negative behavior and is "geared towards rebuilding [the student's] relationship" with the school community. Reiken, *supra*, at 23. For example, teachers and administrators may facilitate parent-teacher conferences, peer juries, mediations, or support groups, all of which provide students with the time, space, and encouragement to talk about why they engaged in particular behavior and how they will work toward resolution. *See id.*

These alternative disciplinary measures result in students "feeling more connected to their school and their classes" and lead to "improved teacher-student relations and a subsequent decrease in teacher-issued disciplinary referrals." Sarah Guckenburg, *Restorative Justice: An Alternative to Traditional Punishment*, WestEd. (Oct. 17, 2016), https://tinyurl.com/au5ffaz7. And most significantly, these efforts do not remove students from the classroom, and therefore do not undermine the entire purpose of going to school: to learn.

In short, respondents' approach protects schools' real-world need to shield students and educators from harassment, bullying, and violence, without sweeping into the schools' authority an untenable amount of off-campus speech by young people. Petitioner's test, in contrast, projects schools into regulating private speech to the detriment of the educational mission.

III. THE COURT SHOULD HOLD THAT *TINKER* DOES NOT APPLY OFF CAMPUS AND THAT B.L.'S FREE SPEECH RIGHTS WERE UNLAWFULLY CURTAILED.

Amici believe that limiting *Tinker* to the school environment appropriately resolves this case by striking the proper balance between students' free speech rights and school officials' needs. That standard is also familiar and readily administrable. If the Court believes that school officials need additional leeway to address off-campus speech that produces on-campus harms, a properly tailored intent-based limitation could represent a reasonable accommodation. Under either set of principles, B.L.'s speech falls outside of the boundaries on the schools' authority: she spoke on her own time, to friends, away from the school. And that her speech related to an extracurricular school activity does not justify school officials' punishment of her personal and independent speech.

1. As explained, respondents' approach protects students' free expression rights, promotes schools' pedagogical interests, and honors parents' primacy in child rearing. *See supra* at 6-17. That approach also

has the added virtue of being easily administrable by school officials.

Teachers and administrators can readily determine whether speech by young people occurs within the school environment. In the vast majority of cases, it will be easy for school officials to decide whether a student spoke on campus or off, during school-sponsored activities or not, or under school supervision or outside it. Indeed, educators are already required to make precisely that determination under this Court's existing school-speech jurisprudence, which applies in place of ordinary First Amendment standards only if the speech occurs within the school environment. And they are required to make a similar calculation when deciding whether they must regulate student speech to avoid financial liability under at least some states' anti-bullying statutes. *See supra* at 5, 22-23.

Petitioner's standard, by contrast, is far less clear for school officials to apply. It might be interpreted to mean that simply talking to another student or posting about an event at school brings an off-campus communication under *Tinker*. *See id.* at 10-11. Yet petitioner claims that such speech should not be so covered. Pet. Br. 28-29. So it is unclear precisely where even petitioner believes its own test would draw the line. Surely, teachers and administrators would have even more difficulty.

This Court should therefore endorse respondents' approach, and hold that *Tinker* applies only within, and not outside of, the school environment itself.

2. If the Court does not limit *Tinker*'s application to speech inside the school environment because of

concerns that some off-campus speech directed at the school requires school intervention, *Tinker* should at most extend only to speech that the student intends to undermine the school's programs or diminish the rights of other members of the school community to enjoy a safe and productive learning environment, or is reasonably understood as reflecting that purpose. *See* Resp. Br. 23-24.

Like respondents' primary proposal, this test would provide teachers and administrators appropriate latitude to address off-campus speech that directly and immediately triggers school concern: bullying, harassment, threats of violence, and cheating are paradigmatic examples. But, unlike petitioner's broad approach, it would also ensure that students can generally continue to speak freely about their schools off-campus, such as by condemning a teacher's anti-gun comments, or criticizing a coach's homophobic remarks. And it would rightly recognize that school officials should not have regulatory authority over young peoples' private expression simply because some students disagree with or are upset by the speech and the expression happens to come to the attention of a school.

Respondent's fallback standard thus strikes a far better balance between students' First Amendment rights and schools' legitimate needs than does petitioner's overbroad and unwieldy test.

3. Under either approach, this Court should affirm.[2] B.L.'s Snapchat was created outside of school

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[2] For similar reasons, *amici* also believe that B.L.'s suspension would fail under *Tinker*'s test, assuming it applied: B.L.'s speech was ephemeral by design, and no evidence

on a Saturday afternoon and placed on a social media platform unaffiliated with the school where posts automatically evaporate after twenty-four hours. Nor does any evidence exist that the post was intended to undermine the school's programs or hamper other school community members' rights. To the contrary, B.L. merely expressed her frustration, without naming her school let alone any particular students, teachers, or coaches, to a select group of friends who voluntarily agreed to receive her Snapchat messages.

That B.L.'s speech touched upon an extracurricular activity does not change that conclusion. As respondents explain, this Court's unconstitutional-conditions case law makes clear that the government may regulate speech as the condition of receiving a programmatic benefit only *within* the program itself. Resp. Br. 41-42. Thus, while schools may impose reasonable conditions on extracurricular-activity participants that limit what they say *within* a program, the First Amendment bars schools from imposing such speech-restrictions *outside* the program itself. That accords the "relevant distinction" that this Court has drawn between "conditions that define the limits of the government spending program," which are permissible, and those that seek "to leverage funding to regulate speech outside the contours of the program itself," which are not. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). And schools cannot

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whatsoever indicates that it caused any substantial disruption at school or interfered with another school community member's rights. The Court could thus affirm the judgment below on that basis as well. *See* Resp. Br. 44-47.

"recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001).

Under that framework, while a school might be able to condition a band member's participation in the school band on the student's agreeing to certain speech restrictions *while* at band practice or in situations where the student would reasonably be perceived as speaking with the school's imprimatur, it cannot impose the same conditions when the student is at the family dinner table, on the phone with their grandparents, or at the grocery store, without running headlong into the First Amendment. *See id.*

Yet that is precisely what petitioner seeks to do here. According to petitioner, schools may condition participation in extracurricular activities on *any* speech that school officials conclude would undermine team "unity" or "cohesion." Pet. 9; Pet. Br. 31; *see also* U.S. Br. 27-28 (similar). That flawed approach, however, would violate young peoples' First Amendment rights by conditioning a student's ability to participate in a program on her limiting her "speech outside the contours of the program itself." *Agency for Int'l Dev.*, 570 U.S. at 214-15. What is more, petitioner's approach would also undermine a core aim of extracurricular activities: to help students develop as adults outside of the classroom. In *amici*'s view, extracurricular activities are integral to students' growth as citizens and community participants, as they allow students to cultivate their strengths and interests separate from their schools' academic demands.

But if participating in the school play or soccer team would require young people to agree to speech restrictions in *every* facet of their private lives, their ability to grow as adults would be severely undermined. *See supra* at 7-11. And just the fear of never-ending censorship might cause some students to opt out of extracurricular activities altogether, exacerbating that troubling result. Conditioning participation in extracurricular activities "on reduced speech rights forces students to choose between engaging in a central part of the educational experience and speech." Rebecca L. Zeidel, *Forecasting Disruption, Forfeiting Speech: Restrictions on Student Speech in Extracurricular Activities*, 53 B.C. L. Rev. 303, 338-39 (2012) (quotation marks omitted). That is not a choice young people may be forced to make.

In sum, petitioner violated B.L.'s free speech rights. And its proposed expansion of *Tinker* to all realms of speech by students—on their own time, and in non-school endeavors—would license a far-reaching power of school officials to censor self-expression. No legitimate pedagogical reason would justify that novel extension of schools' authority. Thus, for the benefit of students, teachers, and administrators alike, the Court should reject petitioner's test and endorse respondents' time honored and administrable school-environment line.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 31, 2021

APPENDIX

APPENDIX A
LIST OF TEACHER AND SCHOOL ADMINISTRATOR *AMICI CURIAE*[1]

Irene Bender
Teacher, Olney High School, Pennsylvania (1967-1972)
Assistant Principal, West Chester Area School District, Pennsylvania (1975-1979)
Assistant Superintendent, Wyomissing Area School District, Pennsylvania (1985-1988)
Superintendent, New Hope-Solebury School District, Pennsylvania (1988-1992)
Superintendent, Gorham School District, Maine (1998-1999)
Assistant Superintendent, Springfield Township School District, Pennsylvania (2001-present)

David Bloomfield
Teacher, New Lincoln School, New York (1975-1979)
General Counsel, New York City Board of Education, New York (1990-1991)
Elected Parent Member & President, Citywide Council on High Schools, New York City Department of Education, New York (2004-2008)

Joseph Bruni
Teacher, Oakleaf Elementary School, Pennsylvania (1964-1966)
Teacher, McAnnulty Elementary School, Pennsylvania (1966-1968)

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[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

Principal, Ridge Avenue Elementary School, Pennsylvania (1971-1978)
Principal, Bell Avenue Elementary School, Pennsylvania (1978-1980)
Principal, Park Lane Elementary School, Pennsylvania (1980-1982)
Principal, East Lansdowne Elementary School, Pennsylvania (1982-1992)
Principal, Pleasantville Elementary School, Delaware (1992-2006)
Principal, Martin Luther King School, Delaware (2004-2006)
Principal, Colonial Early Education Program at the Colwyck Center, Delaware (2006-2008)
Superintendent of Schools, William Penn School District, Pennsylvania (2008-2016)

Larry Cuban
Teacher, Glenville High School, Ohio (1956-1963)
Teacher, Cardozo High School, Washington D.C. (1963-1967)
Teacher, Roosevelt High School, Washington D.C. (1968-1969; 1970-1972)
Superintendent, Arlington County Public Schools, Virginia (1974-1981)

Bruce Kanze
Teacher, Joan of Arc Junior High School, New York (1969-1979)
Teacher, Central Park East Elementary School, New York (1980-1993)
Principal, Central Park East 2, New York (1994-2002)
Head of School, Montclair Cooperative School, New Jersey (2002-2008)

Robert Lubetsky

Teacher, Eastern District H.S. & F.K. Lane High School, New York (1968-1970)

Assistant Principal & Various Supervisory Positions, Bronx Regional High School & Schools in the New York City Alternative H.S. Superintendency, New York (1986-1993)

Staff Development & Training Specialist, New York City Department of Education, Deputy Chancellor's Office, New York (1986-1993)

Principal, City-as-School High School, New York (1993-2006)

Principal, Coach & Facilitator, New York City Leadership Academy, New York (2006-2013)

James Lytle

Principal, Pennsylvania Advancement School and Intensive Learning Center, Pennsylvania (1972-1975)

Principal, Parkway Program, Pennsylvania (1975-1983)

Superintendent, Northwest Region, District of Philadelphia, Pennsylvania (1990-1993)

Assistant Superintendent, Office for School and Regional Support, District of Philadelphia, Pennsylvania (1993-1994)

Principal, University City High School, Pennsylvania (1995-1998)

Superintendent/Chief School Administrator, Trenton Public Schools, New Jersey (1998-2006)

Robert Monson

Principal, Chapel Hill High School, North Carolina (1978-1981)

Superintendent of Schools, Beachwood City School District, Ohio (1985-1987)
Superintendent of Schools, Westwood Public Schools, Massachusetts (1987-1994)
Superintendent of Schools, Independent School District 197, Minnesota (1994-1999)
District Superintendent & Chief Executive Officer, Southern Westchester BOCES, New York (2009-2010)

Duff Rearick
Teacher, York High School, Virginia (1972-1975)
Teacher, Chambersburg Area Senior High School, Pennsylvania (1975-1980)
Assistant Principal, Greencastle Antrim, Pennsylvania (1980-1983)
Assistant Principal, Waynesboro High School, Pennsylvania (1983-1985)
Assistant Superintendent for Secondary Services, Chambersburg Area School District, Pennsylvania (1986-1991)
Associate Superintendent, Chambersburg Area School District, Pennsylvania (1991-1995)
Superintendent, Greencastle Antrim School District, Pennsylvania (1995-2007)

Joshua Starr
Teacher, Brooklyn P753K, D75, New York (1993-1997)
Superintendent, Stamford County Public Schools, Connecticut (2005-2011)
Superintendent, Montgomery County Public Schools, Maryland (2011-2015)

William Stroud

Principal, Urban Peace Academy, New York (1995-2000)

Principal, Baccalaureate School for Global Education, New York (2002-2008)

Executive Director for School Quality, New York City Department of Education, New York (2008)

Network Leader, New York City Department of Education, New York (2009)

Mark Weiss

Teacher, Brooklyn Tech High School, New York (1967-1975)

Founding Principal, Bronx Regional High School, New York (1979-1990)

Assistant Superintendent of Curriculum & Instruction, District 79, Alternative High Schools and Programs, New York (1990-1993)

Founding Principal, New Visions Expeditionary Learning School, New York (1993-2000)