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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR VANHO LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ADAM M. VANHO
Counsel of Record
VANHO LAW
243 Furnace Street, Suite 201
Akron, Ohio 44304
adam@vanholaw.com
(330) 653-8511

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would material disrupt the work and discipline of the school, applies to student speech that occurs off campus.

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INTEREST OF *AMICI CURIAE*[1]

VanHo Law is an Ohio law firm that represents families and juveniles with a wide variety of legal needs, including but not limited to juvenile delinquency proceedings and student disciplinary hearings. Its current and future clients will inevitably be impacted by this Court's decision in this case, as will millions of children around the nation.

VanHo Law is filing the instant *amicus curiae* brief to highlight concerns with (1) the diminishment and subjugation of parental rights and responsibilities to governmental officials, including school officials; (2) the infringement of the rights of juveniles to freedom of expression and speech; and (3) the logistical and legal issues associated with allowing educators to police statements made outside of school.

For the reasons contained in this brief, as well as those contained in the briefs of the Respondent and supporting *amicus curiae* briefs, *Amicus Curiae* encourages this Court to affirm the underlying decision of the Third Circuit Court of Appeals.

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[1] Pursuant to this Court's Rule 37.3(A), all parties consent to the filing of this brief. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for a party authored this brief, in whole or in part, and that no person other than *Amicus Curiae*, its members, and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Over the past several decades, the rights and responsibilities of parents have come under increasing subjugation to governmental authorities and agencies. Some of these intrusions have been a positive development; however, in some instances, the intrusion has infringed on the rights of parents to encourage their children's free expression or, alternatively, discipline their children for statements the children make in a public forum.

The other concern is, if the Petitioner's position is accepted, legitimate and otherwise acceptable speech by juveniles will be suppressed.

There is also a legitimate concern that educators lack the training and tools necessary to investigate online or out-of-school incidents and statements, which may also have tragic consequences.

This Court should affirm the decision of the Third Circuit and also provide nationwide guidance to the educators, students, and parents as to the ability to discipline students for conduct outside of the walls of America's schoolhouses.

ARGUMENT

America's most sacred values are those enshrined within the First Amendment to the United States Constitution: the right to free speech, freedom of religion, a free press, assembly, and the right to petition and air our grievances against the government and its actors. U.S. Const. amend. I (1787).

These values are so universally revered that they have been incorporated into the constitutions of every state in our nation; the laws and constitutions of other

nations; and are internationally recognized under the Universal Declaration of Human Rights.

Intertwining with the basic rights encased in the First Amendment are the fundamental rights of families. While there is no specific amendment or provision within the Constitution, this Court has recognized the basic rights of parents to exercise constitutional rights on behalf of their children. *See, e.g., Wisconsin v. Yoder et. al.*, 406 U.S. 205 (1972) (the First and Fourteenth Amendments protect the rights of families and parents to opt out of compulsory educational attendance laws).

I. If accepted, Petitioner's position would infringe upon the rights of parents and families to exercise control over their children.

No one condones the abhorrent comments Respondent made when she did not make the varsity cheerleading team.

To the contrary, she should have been punished.

But that punishment should have come from her parents – not school officials.[2]

In recent decades, there has been a gradual intrusion into the family unit by governmental agents and agencies. Some of this intrusion has been positive, such as the creation and development of children's services agencies, which advocate for

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[2] Arguably, as a private corporation, Snapchat, the online platform B.L. used to make her comments, could also have punished B.L. by suspending or expelling her from their platform. There is nothing within the available record to illustrate if such an action occurred.

neglected and abused children who are put in harm's way due to the actions or inactions of their parents.

An additional expansion of government's expanding role has been the increasing use of juvenile courts to address a child's criminal conduct. This intrusion is warranted by society's need to preserve law and order. The intrusion can not only help protect the public, but can also help reshape the child's behavior with hopes of deterring such behavior as the child grows into adulthood.

There are still other intrusions where the family invites the governmental intrusion, such as when a family reaches out for assistance or support from governmental agencies for necessities such as food, housing, or substance abuse or medical assistance,

However, some intrusions, such as in the case *sub judice*, raises serious concerns about where the line is drawn between the rights of the state and the rights of the family.

As a general rule, for otherwise-legal conduct by the juvenile, it is the role of parents to decide when, if, and how to discipline their children.

While the ability to discipline children is not unfettered, such as in cases of extreme corporal punishment or abusive neglect, the law grants parents or guardians a great amount of latitude in punishing their children for violation of household or societal rules.

II. This Court should be guided by its earlier decisions recognizing the right of parents to raise their children in a manner and method that the parents deem appropriate.

This Court has long recognized the rights of parents to make decisions regarding the "care, custody and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). See also *Santosky v. Kramer*, 455 U.S. 745 (1982) (discussing the fundamental liberty interest in parents engaged in cases with child protective services cases); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("[w]e have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Stanley v. Illinois*, 405 U.S. 645 (1972) (challenging Illinois law that allowed fathers to be denied rights due to their lack of marriage to the mother);

As noted long ago,

> [w]hile this Court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment's Due Process Clause], the term has received much consideration and some of the included things, have been definitely stated. Without doubt, it does not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at

> common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

This Court previously addressed the balancing of legitimate governmental needs versus the First Amendment rights of families, but in a different context.

In *Wisconsin v. Yoder*, *supra*, this Court examined the balancing between the Wisconsin's need to ensure that children are educated versus the rights of Amish families to freely exercise their religious beliefs.

As this Court noted in *Yoder*,

> As [*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)] suggests, the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society. Thus, a State's interest in universal education, however high we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, 'prepare (them) for additional obligations.

Yoder, 406 U.S. at 213-214 (citations omitted). *See also Espinoza v. Mont. Dep't of Revenue*, 591 U.S. _____, _____, 140 S.Ct. 2246, 2261 (2020) ("Drawing on

an 'enduring American tradition,' we have long recognized the rights of parents to direct 'the religious upbringing' of their children.").

The same logic that applies to the rights of parents to control the religious upbringing of their children also applies to the Free Speech Clause of the First Amendment. It is the role of parents to provide their children a framework for which to express their thoughts, feelings, and ideas.

While educators play a large role in shaping students' thoughts, it is ultimately parents who must decide what values and methods children use in expressing those thoughts – just as they do in shaping and providing children with their religious foundation.

As pointed out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), within schoolhouse walls, educators have the responsibility and ability to regulate conduct that "materially disrupts class work or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). This ability to regulate conduct comes, in large part, due to the school's need to maintain order so that all students can obtain an education in a safe, secure, and conducive environment.

However, the conduct alleged in the case *sub judice* does not rise to that level of conduct envisioned in *Tinker*.

First, while referencing school activities, B.L.'s conduct did not occur in school or on a school-controlled platform. It occurred on a social media platform on a weekend.

Second, the alleged conduct, even in a worst-case scenario, did not rise to the level that should have

disrupted the school or its activities. While other students may have found the Snapchats "inappropriate," there was no legitimate reason for others to be concerned for Respondent's safety or well-being or the safety or well-being of other students or educators.[3]

By interjecting their own definitions of what is acceptable conduct of the children, the school district infringed upon the rights of Respondent's parents to determine how, when, and where she could express her beliefs and opinions. Once outside of the schoolhouse walls, it should be the decision of parents if language used by the child is unacceptable.

Outside of school, it is the parent's role to discipline their children.[4] By punishing Respondent contrary to their wishes for out-of-school conduct, Petitioner usurped the parental rights of Respondent's parents to condone or discipline their daughter's out-of-school conduct.

III. Accepting Petitioner's position would create a tiered level of speech permitted against governmental officials.

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[3] School officials were correct to notify the parents of the Snapchat messages. The statements were disturbing and *may* have been a sign or symptom of the child risking self-harm or experiencing a mental healthcare crisis. However, the parents would be in the best situation to determine if the comments rose to that level.

[4] Nothing would preclude a school district from coordinating a punishment with parents for a student's conduct.

Accepting Petitioner's argument would create a new level of Constitutional speech, one in which certain governmental actors, i.e. educators, are given a heightened level of protection against grievances being made against them in public forums. This would create a loophole where the target of the speech, and not the speech itself, would be the critical question if governmental intervention and intrusion is constitutional.

For example, had Respondent made similar statements against local or state officials, such as a governor, mayor, or police officers, there is no question that the government would lack constitutional authority to discipline her.

However, if Petitioner's position was adopted, this Court would be creating a new tiered level of speech. Accepting Petitioner's position would create an unequal and constitutionally-impermissible double standard for criticism of educators: one in which adults, such as parents or members of the community, can issue the same criticisms of educators without any repercussion – but if juveniles make those same exact criticisms against educators, they would be subject to retaliation, discipline, or other sanctions by school officials.

In this case, there is no question that if B.L.'s parents made the exact same criticism of the cheerleading coach, their speech would be constitutionally protected. However, under Petitioner's proposed standard, children would not be as free to express the same opinions as their parents.

Petitioner's proposed standard also creates a unique issue: eighteen-year-olds, who are otherwise adults and thus full and equal citizens under the law, but would potentially be subject to rules that limit their free speech while still finishing high school.

The other question is the term "materially disrupts class work or involves substantial disorder or invasion of the rights of others." *Tinker,* 503 U.S. at 513.

The looseness of this term create a slippery slope, especially in terms of out-of-school statements. For example, would teachers and administrators be able to discipline children for out of school statements questioning the actions of school officials, such as teachers, principals, superintendents, or the school board? Would activities a student conducts individually or with his or her parents, such as campaigning against a school levies or contested school board races, fall under this definition?

For example, if students organized and called for the removal of a principal or superintendent, could they be punished for disrupting the educational environment?

Accepting Petitioner's position could risk students being punished due to activities that are disruptive to the school, but which are legitimate grievances against educators and school officials.

IV. School officials lack the tools and experience necessary to properly investigate out-of-school activities.

Petitioner's argument also fails from a practical perspective: school officials lack the tools, training, and experience necessary to fully investigate off-campus incidents.

School officials are educated and experienced in educating and enriching students; they are not experienced in the investigation of computer crimes or internet activities.

For example, in a recent case in northeast Ohio that mirrors the case *sub judice* in many aspects, a

cheerleader was kicked off a cheer squad for making statements seen as derogatory to the team. Jasmine Monroe, *Wickliffe High School Cheer Coach on Administrative Leave for Handling of Cheerleaders' Alleged Insensitive Posts*, WKYC (NBC Cleveland) (March 5, 2021), https://tinyurl.com/4jknp9kc.

In that case, the cheerleading coach suspended an African-American member of the cheerleading team for comments on TikTok, an online video-sharing platform. As in the case *sub judice*, the comments were perceived as being a distraction and negative reflection on the cheer team.

However, prior to disciplining the student, the coach did not know that the statements were in response to statements by other students on another platform. As reported by Cleveland's WKYC, the student was responding to two of her teammates who mocked police brutality on social media: "[o]ne student used homophobic slurs, made fun of a disabled cheerleader and told a Black student to go pick cotton." *Id.*.

While the cheer coach was later suspended for her actions, the case highlights a problem: educators are not trained or equipped to investigate activities on computers and the internet.

As pointed out in Petitioner's Brief, there are laws on the books in every state that criminalize harassment of school officials and students; these laws govern both online and in-person conduct. *Petitioner's Brief* at 31-32, 40-41. While those laws may be underutilized by law enforcement, they are readily available for local officials to use to combat bullying and threats online.

However, unlike law enforcement, educators lack the tools and training to investigate crimes that occur online. They lack the subpoena power necessary to

conduct thorough, or even adequate, investigations into the online activities of students, educators, parents, or others. They also lack the manpower and legal authority necessary to investigate incidents that occur off school premises.

For example, educators also lack the ability to seek and obtain search warrants for information, such as obtaining a student's phone, Internet Protocol (I.P.) address, or text communications. Educators also lack the ability to obtain search warrants or subpoenas for internet or computer data.

Educators, many of whom struggle to obtain the basic necessities necessary for their primary job of educating students, also lack the sophisticated hardware and software necessary to extract and understand the data that is extracted.

Conversely, law enforcement has these capabilities. Should a student's conduct rise to the level of telecommunications or online harassment, law enforcement can open a criminal investigation and obtain, review, and present the necessary information to prosecutors and courts for prosecution.

However, by allowing school officials to discipline students for out of school conduct, this Court would be risking incomplete or inadequate investigations being the basis for student discipline.

By conducting discipline hearings and sanctioning students based on what educators can find publicly available online or what is provided to them by other students and educators, without further abilities to investigate or obtain related items, there is a legitimate risk that students would be disciplined based on only a fraction of the relevant and pertinent information for a particular incident.

There is also a legitimate concern that, if students know their online conversations are subject to school

discipline, they would begin using spoof, or fake, social media accounts. If this happens, not only would it further hamper any inquiries by school officials or law enforcement into legitimate bullying or threatening activity, it will make it harder for school officials to detect children at risk.

For example, if a student currently expresses online thoughts of self-harm, harming others, or even their being abused, it is easier for school officials or other students to identify that student and attempt to give that student assistance.

This concern is validated through a recent United States Secret Service report. Per the report, which examined a number of thwarted school shooting, due to signs and indications that shooters exhibit in the time prior to shootings, many school shootings are preventable. Pete Williams, *Secret Service Report Says School Shootings are Preventable, with Similar Warning Signs*, NBC News, https://tinyurl.com/8vrdnsbk (March 30, 2021).

However, if students begin using fake or spoof accounts, it would be exponentially harder for educators, and even law enforcement, to quickly (1) determine the person's true identity, including if the person is a student and where he or she goes to school; and (2) reach out for assistance or to prevent a tragedy.

It could delay school officials or law enforcement from determining if a student is having a mental health crisis, if they are being abused, if they are risking harm to themselves or others, or if they are themselves planning harm on others, such as a school shooting situation.

While the delay could be only a matter of hours or days – or could be complete until after it is too late –

the delay could result in preventing harm or death to the student or others.

V. Only a bright line rule will recognize the logistical and legal limitations of educators.

There is no question that educators in America are under tremendous stress.

Educators are constantly under attack from students, parents, taxpayers, the media, and even their own state legislatures on an hourly and daily basis. These attacks not only come verbally, but also on occasion physically. Their decisions are endlessly being second-guessed by those both inside and outside of their classrooms.

However, there must exist a bright line between where the authority of school districts ends and where parents and guardians assume responsibility for disciplining their own children.

From a practical standpoint, this Court must recognize that a bright line rule recognizes the abilities and limitations of educators to thoroughly investigate out-of-school incidents and online communications.

Only a bright line rule would both to allow parents to decide when out-of-school speech is impermissible and recognize the legal and logistical limitations of educators. Further, only a bright line will prevent students from taking extraordinary measures to conceal their true identities, which could open a Pandora's box of undesirable side effects.

Therefore, *Amicus Curiae* strongly encourages this Honorable Court to establish a bright line rule that would allow and encourage educators to control the actions of students within their walls, and allow

parents the ability to control the actions of their children outside of those walls.

CONCLUSION

This Court should affirm the below decision of the Third Circuit Court of Appeals.

Respectfully submitted,

ADAM M. VANHO
Counsel of Record
VANHO LAW
243 Furnace Street, Suite 201
Akron, Ohio 44304
adam@vanholaw.com
(330) 653-8511

COUNSEL FOR *AMICUS CURIAE* VANHO LAW

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