No.

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

PETITION FOR A WRIT OF CERTIORARI

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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 materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Constitution and statutes:

Miscellaneous authorities:

Page

Miscellaneous—continued:

Page

Miscellaneous authorities—continued:

Page

Miscellaneous authorities—continued:

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Petitioner Mahanoy Area School District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 964 F.3d 170; *see* Pet.App.1a-48a, *infra*. The opinion of the District Court for the Middle District of Pennsylvania is reported at 376 F. Supp. 3d 429; *see* Pet.App.49a-76a. The district court's order is unreported and is available at Pet.App.77a-79a.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

STATEMENT

This case presents an ideal vehicle for resolving a critically important and acknowledged circuit conflict over whether public K-12 schools may discipline students for any off-campus speech. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court recognized that students retain First Amendment rights in the school setting. But, in keeping with schools' obligation "to prescribe and control conduct in the schools," *id.* at 507, the Court held that public schools may discipline primary- and secondary-school students whose speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id.* at 509 (cleaned up).

In the aftermath of *Tinker*, courts have repeatedly confronted the extent to which schools' authority under *Tinker* applies to off-campus speech. That question has become especially acute because social media has made it far easier for students' off-campus messages to instantly reach a wide audience of classmates and dominate the on-campus environment. Until now, all five circuits to face the question—the Second, Fourth, Fifth, Eighth, and Ninth—have agreed that under *Tinker*, schools may discipline off-campus student speech that has a close nexus to the school environment. The Pennsylvania Supreme

Court has likewise indicated that *Tinker* allows schools to regulate off-campus speech.

But in the decision below, a divided panel of the Third Circuit expressly broke ranks with all other circuits to "forge [its] own path." Pet.App.31a. The majority categorically held that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Pet.App.31a. Thus, in the Third Circuit, off-campus student speech is beyond the school's power to discipline so long as that speech receives a modicum of First Amendment protection—even if that off-campus speech is closely connected to campus, seriously disrupts the school environment, and threatens or harasses other students or administrators. The majority concluded that teachers and administrators within the Third Circuit will henceforth be subject to money damages in civil rights suits for addressing off-campus speech that schools in other circuits routinely proscribe to avoid substantial disruptions to the school environment.

Respondents' counsel aptly described the decision below as a "landmark" case that reflects "the most expansive ruling on students' off-campus speech rights in the country." ACLU of Pennsylvania, *Federal Appeals Court Upholds and Expands Students' Free Speech in Schuylkill County Case* (June 30, 2020), https://tinyurl.com/yxe7xqr6. Likewise, commentators and respondents' *amici* below have called the decision a "bona-fide bombshell," "a dramatic departure from the reasoning of other circuits," "historic," and "huge."

Only this Court can resolve this acknowledged split and settle this critical issue, and no further percolation is needed. Six circuits have weighed in, comprising more than 31 million students, nearly 2 million teachers, and

over 60,000 schools—more than 61% of the Nation's total. The split over *Tinker*'s application to off-campus speech is clear and was outcome-determinative in this case, which is a clean vehicle for its resolution.

Waiting to resolve this split would only exacerbate the drastic impact the decision below is having on the more than 5,800 public K-12 schools in the Third Circuit and the more than 3 million students they serve. The question presented recurs constantly. Students can use social media to speak instantaneously to an audience of the whole school, forcing school administrators to frequently assess whether to discipline off-campus speech that is inextricably linked with the campus environment. Innumerable schools within the Third Circuit have until now relied on school policies allowing administrators to discipline substantially disruptive off-campus student speech that inexorably affects the school. Now, schools must redo their policies at the worst possible time. The coronavirus pandemic has forced schools and students to increasingly move online many of the educational and social interactions that previously occurred on campus. Technology allows students of all ages to connect with each other in virtual classrooms. But that same technology acts as a megaphone for off-campus speech, ensuring that it reverberates throughout the classroom and commands the school's attention.

The decision below creates particularly untenable outcomes within the Third Circuit for Pennsylvania and New Jersey schools. The Pennsylvania Supreme Court has stated that *Tinker* authorizes schools to discipline disruptive off-campus speech with "a sufficient nexus" to campus. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002); *see id.* at 865 n.12. The decision below holds the opposite. As a result, no Pennsylvania school administrator can roll the dice, discipline any disruptive

off-campus student speech, and hope to face suit only in state court—especially when the alternative is to face money damages in federal court. The decision below will thus prevent Pennsylvania administrators from taking disciplinary measures that the Pennsylvania Supreme Court has long considered lawful. Worsening the situation is New Jersey law, which requires schools to develop policies to address off-campus threats, harassment, and bullying. Either the decision below cavalierly invalidated that state law *sub silentio*. Or the decision below puts New Jersey administrators to an impossible choice: comply with state law and face federal-court damages suits, or violate state law and face state-law penalties.

In sum, this case is an ideal vehicle for resolving a profoundly important split on a recurring constitutional question. Only this Court's intervention can resolve this issue affecting thousands of public schools and millions of teachers, administrators, and students nationwide.

A. Factual Background

This case fits a paradigmatic fact pattern involving off-campus speech: student speech about school affairs on social media. Here the subject is a high school cheerleading program. The undisputed record is as follows. Respondent B.L. made the Mahanoy Area High School junior varsity cheerleading team as a rising freshman. As a rising sophomore, B.L. hoped to make varsity, but to her chagrin again made only JV. Meanwhile, an incoming freshman made the varsity squad, skipping JV entirely. Pet.App.4a-5a.

B.L. responded by posting two messages on Snapchat, a social media application that allows users to send text, photo, and video messages to other users, or "friends." B.L.'s first message consisted of a photo in which B.L. and a friend raised their middle fingers; B.L.

captioned the photo, "Fuck school fuck softball fuck cheer fuck everything." B.L.'s second message, posted just after the first, consisted of the text: "Love how me and [another student] get told we need a year of jv before we make varsity but that[] doesn't matter to anyone else? 🙃." Pet.App.5a (some alterations in original).

B.L. sent these messages on a Saturday during the school year to an audience of 250 Snapchat friends, many of whom were classmates and some of whom were fellow cheerleaders at the school. One of B.L.'s fellow cheerleaders sent a screenshot of the messages to one of Mahanoy's two cheerleading coaches. That coach informed her co-coach, who had already heard of B.L.'s messages from cheerleaders and other students. Pet.App.5a.

During the school week, "word of B.L.'s [s]naps spread through the school," prompting "[s]everal students, both cheerleaders and non-cheerleaders, [to] approach[]" the second coach throughout the school day "to express their concerns" about B.L. returning to the team. Pet.App.52a (cleaned up); Luchetta-Rump Dep. 62-63, Oct. 10, 2018, ECF No. 40-13, No. 3:17-cv-1734 (M.D. Pa.). The uproar escalated: "Students were visibly upset" and "repeatedly for several days" brought B.L.'s messages up with the cheerleading coaches. Pet.App.52a (cleaned up). Given the magnitude of the reaction, "the coaches felt the need to enforce [the relevant school rules] against B.L. to avoid chaos and maintain a team-like environment." *Id.* (cleaned up).

The coaches determined that B.L. had violated team rules that B.L. had agreed to follow, namely that cheerleaders "have respect for [their] school, coaches, teachers, [and] other cheerleaders" and avoid "foul language and inappropriate gestures." Pet.App.50a-51a. The rules further warned students that "[t]here will be no toleration of

any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Pet.App.51a. The coaches also concluded that B.L.'s messages "violated a school rule requiring student athletes to 'conduct[] themselves in such a way that the image of Mahanoy School District would not be tarnished in any manner.'" Pet.App.6a.

The coaches removed B.L. from the cheer team for the school year, but informed B.L. that she could try out again as a rising junior. B.L. and her parents appealed to the athletic director, the principal, the district superintendent, and the school board, all of whom upheld the coaches' decision. *Id.* B.L. and her parents responded by filing a federal lawsuit under 42 U.S.C. § 1983.

B. Procedural History

B.L. and her parents sued the Mahanoy Area School District in the U.S. District Court for the Middle District of Pennsylvania. Pet.App.6a. They alleged, *inter alia*, that the school district violated B.L.'s First Amendment rights by disciplining her off-campus speech. *Id.* As relief, they sought an injunction compelling B.L.'s reinstatement to the cheerleading squad and expungement of her disciplinary record, declaratory relief, and money damages. *Id.*

The district court granted B.L.'s motion for summary judgment, holding that B.L.'s dismissal from the cheerleading team violated her First Amendment rights. The court noted that "whether *Tinker* applies to speech uttered beyond the schoolhouse gate is an open question" in the Third Circuit. Pet.App.76a. But the district court concluded that even if *Tinker* extends to off-campus speech, B.L.'s off-campus messages were insufficiently disruptive for the school to discipline. Pet.App.73a-74a.

A divided Third Circuit affirmed on different grounds. Breaking with every other circuit court to consider the question, the majority "forge[d] [its] own path" and held that *Tinker* categorically "does not apply to off-campus speech." Pet.App.31a. The majority explained that the Third Circuit had "avoided answering to date" whether *Tinker* authorizes schools to discipline any off-campus speech, in part to give other circuits or this Court the chance to weigh in. Pet.App.21a. The majority acknowledged that only an *amicus* supporting respondents had argued that *Tinker* is categorically inapplicable to off-campus speech; B.L. had assumed *Tinker*'s applicability. Pet.App.21a n.8.

The majority nonetheless addressed the issue and held that schools have no authority to discipline off-campus speech under *Tinker*. The majority observed that "social media has continued its expansion into every corner of modern life" and that district courts had "voice[d] their growing frustration" with their uncertainty as to whether *Tinker* applied off campus. Pet.App.24a. Further, the majority declined to assume *Tinker*'s applicability and then address whether B.L.'s speech was substantially disruptive. The majority explained that B.L. "does not dispute that her speech would undermine team morale and chemistry," and that other circuits had held as a matter of law that disruptions to school athletics programs' unity and cohesion can qualify as substantial disruptions under *Tinker*. Pet.App.23a n.10.

The majority then held that *Tinker* never allows schools to punish off-campus speech, *i.e.*, speech that students do not engage in at school or through school-owned, -operated, or -supervised channels. Pet.App.25a. The majority expressly recognized that its holding split with the Second, Fourth, Fifth, Eighth, and Ninth Circuits, which have held that *Tinker* applies to off-campus speech

with a connection to campus. Pet.App.25a-27a. The majority deemed those "approaches unsatisfying," Pet.App.27a, criticizing other circuits for "sweep[ing] far too much speech into the realm of schools' authority." Pet.App.28a.

Instead, the majority invoked three policy rationales for a hard, bright-line rule limiting *Tinker* to on-campus speech. First, the majority reasoned, "any effect on the school environment" from off-campus speech "will depend on others' choices and reactions." Pet.App.32a. Second, the majority believed that allowing schools to regulate off-campus speech in the social-media age would suppress too much speech. Pet.App.32a. Third, the majority stated that its bright-line rejection of schools' authority to regulate off-campus speech under *Tinker* would offer "up-front clarity." Pet.App.33a. Henceforth, the majority stated, school administrators and teachers could not claim qualified immunity for disciplining off-campus speech, and would face money damages. Pet.App.24a-25a.

The majority elaborated that schools cannot discipline even "off-campus student speech threatening violence or harassing particular students or teachers" under *Tinker*. Pet.App.34a. The majority held that, to the extent that schools may discipline off-campus threats or harassment, schools may do so only if that speech is unprotected by the First Amendment or if the school's regulation of such speech satisfies strict scrutiny. For example, the majority suggested that schools could discipline "true threats," a narrow category of unprotected, non-satirical speech conveying the intent to harm others. Pet.App.35a. But the majority rejected "the *Tinker*-based . . . approach that many of our sister circuits have taken" in such cases, leaving schools unable to discipline threats or harassment that disrupt the school environment. Pet.App.35a.

Judge Ambro concurred in the judgment but "dissent[ed] from the majority's [*Tinker*] holding." Pet.App.42a. He stressed the groundbreaking nature of the court's decision: "[O]urs is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech." Pet.App.46a. He disagreed with this categorical rule, noting that "Circuit Courts facing harder and closer calls have stayed their hand and declined to rule categorically that *Tinker* does not apply to off-campus speech." Pet.App.47a-48a. Judge Ambro would have instead affirmed the district court's judgment because, in his view, there was insufficient evidence of substantial disruption of the school environment. Pet.App.45a.

REASONS FOR GRANTING THE PETITION

This petition presents an acknowledged conflict among the courts of appeals on an important, recurring First Amendment question concerning the scope of public schools' authority to discipline students for speech that occurs off campus. The Third Circuit acknowledged that the decision below directly conflicts with decisions of the Second, Fourth, Fifth, Eighth, and Ninth Circuits holding that *Tinker* applies to off-campus student speech with a sufficient nexus to the school environment.

This clear circuit split calls out for this Court's immediate review. The question presented carries substantial legal and practical importance for thousands of schools and millions of teachers, administrators, and schoolchildren nationwide. The circuit split will not resolve without this Court's intervention. Waiting would only magnify the unnecessary chaos from the decision below, which throws out countless school disciplinary policies within the Third Circuit and leaves administrators in this circuit powerless to discipline disruptive off-campus student speech unless that speech is unprotected by the First Amendment. And

this case, which presents the issue squarely, cleanly, and in a paradigmatic fact pattern, is an optimal vehicle in which to address the question presented.

I. The Decision Below Creates a Clear Circuit Split Over Whether *Tinker* Applies to Off-Campus Speech

As the Third Circuit recognized below, five circuits (the Second, Fourth, Fifth, Eighth, and Ninth) squarely hold that *Tinker* gives schools authority to discipline off-campus speech with a sufficient nexus to the school. In those five circuits, comprising 55.6% of the Nation's public schools, 54.8% of the Nation's public-school teachers, and 56.3% of the Nation's public schoolchildren, schools can address off-campus speech under *Tinker*. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Digest of Education Statistics 2019*, tbls. 203.20, 208.30, & 216.70 (2019), https://tinyurl.com/yyu6j9tz. The Pennsylvania Supreme Court has similarly endorsed schools' jurisdiction under *Tinker* to discipline certain off-campus speech. But absent this Court's intervention, the opposite rule would control in the Third Circuit: schools would categorically lack any authority under *Tinker* to discipline students for off-campus speech, no matter how obvious it is that the speech is directed at the school and will significantly disrupt the school environment. Worse, schools in Pennsylvania face diverging rules in state and federal court. This conflict is crystal clear.

1. In the Second, Fourth, Fifth, Eighth, and Ninth Circuits, as well as the Pennsylvania state courts, *Tinker* allows schools to discipline off-campus speech with a sufficiently close connection to campus.

Start with the Second Circuit. For over a decade, the Second Circuit has held that under *Tinker*, school districts may discipline off-campus student speech when "it

was reasonably foreseeable" that the off-campus speech "would come to the attention of school authorities." *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38-39 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

Reaffirming that holding, the Second Circuit in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), stated it was "acutely attentive in this context to the need to draw a clear line between student activity that affects matter of legitimate concern to the school community, and activity that does not." *Id.* at 48 (cleaned up). But, the Second Circuit emphasized, "territoriality is not necessarily a useful concept in determining the limit of school administrators' authority," especially "when students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication." *Id.* at 48-49 (cleaned up); *see Doninger v. Niehoff*, 642 F.3d 334, 347 (2d Cir.) (reiterating at later stage of proceedings that off-campus speech can be disciplined), *cert. denied*, 565 U.S. 976 (2011).

The Fourth Circuit agrees that under *Tinker*, schools may discipline off-campus speech with a connection to the school. The court noted that "[t]here is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate." *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 565 U.S. 1173 (2012). But, the Fourth Circuit held, schools retain authority to discipline off-campus student speech with a "sufficient nexus with the school" or its "pedagogical interests," such as when online, off-campus speech is directed at and would foreseeably reach the school environment. *Id.* at 573-74, 577. Administrators

must be able to "provide a safe school environment conducive to learning," *id.* at 572, and "the Constitution is not written to hinder school administrators' good faith efforts to address" that purpose, *id.* at 577.

The en banc Fifth Circuit also held that schools have jurisdiction over some off-campus speech under *Tinker*. The court observed that "the Internet, cellphones, smartphones, and digital social media" "and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations." *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016). Invoking other circuits' decisions and schools' "paramount need . . . to react quickly and efficiently to protect students and faculty," the Fifth Circuit held that *Tinker* allows schools to discipline threatening, intimidating, or harassing off-campus speech "intentionally directed at the school community." *Id.* at 393.

The Eighth Circuit has likewise repeatedly held that schools can discipline off-campus speech that "could reasonably be expected to reach the school or impact the [school] environment." *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (quoting *Kowalski*, 652 F.3d at 573). Agreeing with other circuits, the Eighth Circuit observed that "the location from which [the students] spoke may be less important than the [fact] that the posts were directed at" the school community. *Id.*; *see D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (schools can discipline off-campus threats under *Tinker* if it is "reasonably foreseeable" that those threats "would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment").

The Ninth Circuit three times has held that *Tinker* extends to off-campus speech. "[O]utside of the official school environment," the court observed, "students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment"—yet "school officials" must also "take care not to overreact" and unnecessarily stifle speech. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013). After surveying other circuits' approaches, the Ninth Circuit rejected the notion that "all off-campus speech is beyond the reach of school officials," and assessed whether the speech had a nexus to the school and whether it was "reasonably foreseeable" that the speech would impact the school environment. *Id.* at 1068-69; *see C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1146, 1150-51 (9th Cir. 2016) (adopting this approach for all types of off-campus speech), *cert. denied*, 137 S. Ct. 2117 (2017). Recently, the Ninth Circuit reaffirmed that "a school district may constitutionally regulate off-campus speech" under *Tinker* when "the speech bears a sufficient nexus to the school." *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019) (per curiam).

Finally, the Pennsylvania Supreme Court has long concluded that schools may discipline speech originating off campus if "there is a sufficient nexus between the [speech] and the school campus." *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002). The court indicated that schools could discipline off-campus speech that was "school-targeted" if the speaker posted it "in a manner known to be freely accessible from school grounds," and "actual accessing by others in fact occur[red]." *Id.* at 865 n.12.

In sum, in nearly a dozen decisions spanning two decades, five circuits and a state supreme court have concluded that schools may address under *Tinker* off-campus speech with a connection to the school environment. Those courts rightly reject any notion that schools can intrude into students' private lives or into students' political or religious views. But when off-campus speech is inextricably linked to campus and inevitably affects the school community, the First Amendment authorizes schools to discipline that speech, just as schools can discipline similarly disruptive on-campus speech.

2. The Third Circuit majority expressly rejected these courts' holdings. Pet.App.25a-31a. Instead, the majority categorically held that "*Tinker* does not apply to off-campus speech." Pet.App.25a. Thus, within the Third Circuit, schools cannot discipline otherwise protected "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur"—no matter how disruptive that speech will be to the educational environment. Pet.App.31a. The court also rejected a "*Tinker*-based" approach to off-campus threats or harassment. Pet.App.35a.

This split could not be more stark. Off-campus speech categorically lies beyond a school's reach in the Third Circuit, yet schools in five other circuits can discipline the same speech if it is tightly connected to the school environment. Magnifying the split, the Pennsylvania Supreme Court has long stated that Pennsylvania schools retain some jurisdiction over off-campus speech under *Tinker*. But the Third Circuit now exposes those same schools to money-damages suits in federal court for trying to regulate that same off-campus speech.

3. Commentators agree with the Third Circuit's assessment of the split: the decision below sharply breaks from other circuits. Commentators have variously described the decision as "a dramatic departure from the reasoning of other circuits"; a "huge" decision that makes the Third Circuit "the first court of appeals squarely to hold" that *Tinker* does not apply to off-campus speech; and a "departure from the reasoning of many other courts."[1] In the words of another commentator, the Third Circuit's position "has been *entirely* rejected by all other circuits" to reach the question. Chris Gilbert, *Cheerleaders and the Internet: B.L. by and through Levy v. Mahanoy Area School District*, The Oldest Blog (July 8, 2020), https://tinyurl.com/yyywow9d. Others have made similar observations.[2]

Respondents' counsel and their *amici* acknowledge the split. As respondents' counsel correctly summed up, the decision below is the "first time" any circuit has held that *Tinker* does not apply to off-campus speech, and "reject[s] the law of the other Circuits." Theresa E. Loscalzo & Arleigh P. Helfer III, *Third Circuit Expands First*

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[1] Eric Harrison & Kajal Patel, *Tinkering With 'Tinker': 3d Cir. School Districts May No Longer Discipline Students for Certain Off-Campus Speech*, Law.com (Aug. 6, 2020), https://tinyurl.com/y65eu8tk ("dramatic departure"); Howard Wasserman, *Third Circuit: Tinker Does Not Apply Off-Campus*, PrawfsBlawg (June 30, 2020), https://tinyurl.com/y6ymmo9s ("huge"); Stephen Wermiel, *Tinkering With Circuit Conflicts Beyond the Schoolhouse Gate*, 22 Penn. J. Const. L. 1135, 1144 (2020) ("departure").

[2] *E.g.*, Mark Walsh, *Federal Appeals Court Rejects Student Discipline for Vulgar Off-Campus Message*, Education Week (July 1, 2020), https://tinyurl.com/yynxmcac (Third Circuit "ruled for the first time that off-campus speech categorically falls outside" *Tinker*); Matthew Stiegler, *New Opinion: Third Circuit Rules for the Student in a Major Student-Speech Case*, CA3blog (June 30, 2020), https://tinyurl.com/y5ezlul3 ("The court split with various other circuits . . . .").

Amendment Speech Protection for Students' Off-Campus Speech, Schnader (July 1, 2020), https://tinyurl.com/yy2ed7wb. And respondents' *amicus* Electronic Frontier Foundation described the opinion as "reject[ing] all the[] approaches" of its sister circuits. Sophia Cope, *In Historic Opinion, Third Circuit Protects Public School Students' Off-Campus Social Media Speech*, Electronic Frontier Foundation (July 31, 2020), https://tinyurl.com/y6arw4ej.

This division of authority over whether *Tinker* applies off campus is clear, indisputable, and widely recognized. The question presented has a binary answer: either off-campus student speech lies categorically beyond a school's power to discipline under *Tinker*, or it does not. Nor is there any need for further percolation. Six circuits have weighed in. The Second, Eighth, and Ninth Circuits have repeatedly reaffirmed their positions. The Fifth Circuit went en banc to hold that *Tinker* applies to some off-campus speech. Given that the Third Circuit waited for five other circuits to weigh in before pointedly disagreeing with them all, the possibility that lower courts will reach consensus is fanciful. Only this Court can resolve this fundamental First Amendment question.

II. The Question Presented Is Important and Squarely Presented

This case is an ideal vehicle to decide the question presented, which has enormous legal and practical consequences for students, parents, teachers, and school administrators. Commentators and respondents' *amici* below have rightly depicted the decision below as a "bona-fide bombshell," "historic," and "huge." Education-law experts have lamented that lower courts, students, and

educators "desperately need some guidance on this incredibly common question."[3]

1. The decision below divests more than 5,800 public K-12 schools in the Third Circuit of any jurisdiction over off-campus speech under *Tinker*—no matter how linked that speech is to campus, or how much that speech disrupts the learning environment. Those schools and their nearly 250,000 teachers are responsible for the wellbeing and education of more than 3 million students. *See* Nat'l Ctr. for Educ. Statistics, *supra*, tbls. 203.20, 208.30, & 216.70 (2017-18 statistics). Absent this Court's immediate intervention, those schools must now jettison the disciplinary policies they have relied on to protect student welfare. Mahanoy is one of many school districts that hitherto allowed schools to discipline "off-campus or after hours [student] expression" if it "is likely to or does materially or substantially interfere with school activities." Philadelphia and Newark school districts, for example, had the same policies.[4] The decision below upends the discipline policies of countless schools that have relied on

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[3] *See* Corey Friedman, *Circuit Court Cheers Student Speech Rights*, Creators (July 11, 2020), https://tinyurl.com/y6nagl4x ("bombshell"); Walsh, *supra* (quoting Yale Law professor Justin Driver on need for guidance); Wasserman, *supra* ("huge"); Cope, *supra* ("The Third Circuit's opinion is historic because it is the first federal appellate court to affirm that the substantial disruption exception from *Tinker* does not apply to off-campus speech."); *see also* Cameren Boatner, *Federal Appeals Court Ruling Affirms Students' Off-Campus First Amendment Rights*, Student Press Law Center (July 16, 2020), https://tinyurl.com/y6eb847u (quoting counsel for B.L. calling the opinion "the most student speech-protective decision in the country right now").

[4] *See* Mahanoy Area Sch. Dist. Sch. Bd., *Student Expression/Distribution and Posting of Materials*, Policy Manual, Code 220 (rev. 2007), https://tinyurl.com/y3gvyobq; Phila. Sch. Dist. Bd. of Educ., *Student Expression/Distribution and Posting of Materials*, Policy Manual, No. 220, 2 (rev. 2018), https://tinyurl.com/yxt8jn4t; Newark Bd. of

Tinker to formulate their policies and train school personnel on dealing with off-campus speech that disrupts the school environment.

The decision below puts New Jersey schools in a particularly difficult bind. New Jersey law obligates schools to take "appropriate responses to harassment, intimidation, or bullying . . . that occurs off school grounds." N.J. Stat. § 18A:37-15.3 (2019); *see id.* §§ 18A:37-14, 18A:37-15. New Jersey law, for instance, *requires* schools to discipline off-campus speech sexually harassing and bullying other students online. *See Dunkley v. Bd. of Educ. of the Greater Egg Harbor Reg'l High Sch. Dist.*, 216 F. Supp. 3d 485, 490, 494 (D.N.J. 2016). Schools that fail to act face damages suits and other sanctions. *See* N.J. Stat. Ann. §§ 10:5-12.11, 18A:37-18. Either the decision below invalidated that state law *sub silentio*, or the decision exposes New Jersey schools to federal-court liability for doing what state law commands.

2. The question presented is all the more important in the Internet age. Students' near-ubiquitous and near-constant access to social media creates ever more avenues for off-campus communications that can rapidly permeate the school environment. Some 95% of teenagers are regularly on social media. Terri Apter, *How to Reduce the Toxicity of Teen Girls' Social Media Use*, Psychology Today (Oct. 20, 2019), https://tinyurl.com/y3crr3hs. Almost half of them "are online on a near-constant basis." Pew Research Center, *Teens, Social Media & Technology 2018* (May 31, 2018), https://tinyurl.com/uzcepg3. In seconds, from anywhere, students can share any thought with the entire school community—a force multiplier for

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Educ., *Harassment Intimidation & Bullying*, Policy, File Code 5131.1, 1-2 (rev. 2017), https://tinyurl.com/y4ncfbuh.

both the best and worst student impulses. The pervasiveness of social media ensures that more of students' off-campus speech finds its way to the school community instantly, inevitably, and sometimes virally. *See* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 Wm. & Mary Bill Rts. J. 591, 592 (2011).

No surprise, then, that "school speech and discipline cases" such as B.L.'s are "continually arising." *See Bell*, 799 F.3d at 401 (Jolly, J., concurring). Students regularly challenge schools' disciplinary measures for off-campus speech in federal and state court, with "[t]he rise of the Internet" leading to an "explosion" of cases involving off-campus student speech. Waldman, *supra*, at 617-18. Just in the past year, schools have been sued after disciplining students for off-campus messages: (1) to black classmates with the phrases "white power" and "the South will rise again," *see* Compl. ¶ 36, *Child A v. Saline Area Schs.*, 5:20-cv-10363 (E.D. Mich. Feb. 11, 2020); (2) featuring several friends with the caption "[m]e and the boys bout to exterminate the Jews," *see* Compl. ¶ 33, *Cl. G. v. Siegfried*, 1:19-cv-03346 (D. Colo. Nov. 26, 2019); and (3) featuring photos of guns immediately after the Parkland shooting, mirroring language and images that the Parkland shooter had employed, *see* Defs.' Ans. to Am. Compl. ¶ 27, *Conroy v. Lacey Twp. Sch. Dist.*, 3:19-cv-09452 (D.N.J. June 8, 2020). Many more incidents resolve without reaching federal court. And because incidents can arise any time, whether schools can discipline off-campus speech under *Tinker* looms over every school every day. The recurring nature of the issue calls out for this Court's intervention.

3. This case is the ideal vehicle for resolving the question presented. There are no jurisdictional or procedural barriers to this Court's review. The question presented arises in a common fact pattern involving speech on social

media. The majority below acknowledged the views of other circuits and intentionally created a split by holding that schools have no power whatsoever under *Tinker* to discipline off-campus speech. And the question presented was outcome-determinative. The majority explained that it was tackling *Tinker* after refusing to sidestep the question by concluding that B.L.'s speech was not substantially disruptive. Pet.App.23a n.10. The Third Circuit's categorical limitation of schools' authority to discipline off-campus speech under *Tinker* not only determined this case, but also has immediate, far-reaching consequences for schools throughout the Third Circuit.

III. The Decision Below Is Wrong

In just three brief paragraphs, the Third Circuit rejected *Tinker's* applicability to any off-campus speech based solely on three policy concerns. The court's reasoning ignores the principles animating *Tinker* and reflects arbitrary and counterproductive line-drawing.

1. The Third Circuit majority concluded that allowing schools to discipline student speech to prevent substantial disruptions to the school environment "makes sense" only when students address "a captive audience of [their] peers" on campus. Pet.App.32a. The majority thus thought that "any effect on the school environment" from off-campus speech "will depend on others' choices and reactions." Pet.App.32a (cleaned up).

That reasoning misapprehends the nature of both on- and off-campus student speech. Plenty of incidents from *on-campus* speech arise when students share disruptive messages with voluntary (rather than captive) listeners, whether by passing notes or because students surreptitiously check social media during the day. *E.g.*, *Lowery v. Euverard*, 497 F.3d 584, 600-01 (6th Cir. 2007) (upholding

school's decision to remove from the football team players who orchestrated an on-campus campaign to get signatories to a letter stating, "I hate [the head coach] and I don't want to play for him"). And plenty of incidents from *off-campus* speech involve captive listeners. *E.g.*, *C.R.*, 835 F.3d at 1146 ("older boys circled the younger students" in a public park near campus, preventing them from leaving, and made sexually harassing comments).

Further, whether the speech happens on or off campus, the "effect on the school environment" invariably "depend[s] on others' choices and reactions." Pet.App.32a. That observation is no reason to ignore off-campus speech; as the majority acknowledged, it is often a "virtual certainty" that off-campus speech will arrive on campus. Pet.App.29a. The whole premise of *Tinker* is that if the campus will predictably react to certain disruptive speech, schools should be able to act swiftly to prevent disturbance or restore order. *See* 393 U.S. at 514. Schools should not be powerless to confront incoming speech tied to the school that will inevitably disrupt the school environment, just as schools need not turn a blind eye to the same speech on campus.

2. The majority also invoked a purported pre-Internet "consensus . . . that controversial off-campus speech was not subject to school regulation," and reasoned that new "technologies open new territories where regulators might seek to suppress speech they consider inappropriate, uncouth, or provocative." Pet.App.32a.

That consensus is illusory. The majority cited just two cases, *Thomas v. Board of Education*, 607 F.2d 1043, 1050-52 (2d Cir. 1979), and *Porter v. Ascension Parish School Board*, 393 F.3d 608, 611-12, 615-16 (5th Cir. 2004). Pet.App.32a. Neither case suggested that off-campus speech is off-limits. To the contrary, the Second Circuit

cited *Thomas* as support for its longstanding holding that schools can regulate off-campus speech with a close connection to the campus. *Wisniewski*, 494 F.3d at 39. Similarly, the en banc Fifth Circuit cited *Porter* as support for the conclusion that "a speaker's intent matters when determining whether the off-campus speech being addressed is subject to *Tinker*." *Bell*, 799 F.3d at 395. If anything, pre-Internet cases show a consensus in the other direction. *Porter* features a footnote listing many cases in which courts "[r]efus[ed] to differentiate between student speech taking place on-campus and speech taking place off-campus," applying *Tinker* to both. 393 F.3d at 615 n.22; *see also Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972).

Further, the majority's assumption that schools will respond to students' growing avenues for online expression by improperly suppressing speech, Pet.App.32a, is baseless. Whether the speech happens on or off campus, *Tinker* does not allow schools to punish speech merely because of "the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. Nor does *Tinker* allow schools to "suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring). For decades, schools in five circuits comprising over 55% of the Nation's schools have applied *Tinker* to regulate only off-campus speech with a sufficiently close connection to the school. Nothing suggests that schools' limited off-campus jurisdiction transformed those schools into roving speech police.

3. Finally, the Third Circuit portrayed its categorical holding that schools lack jurisdiction over off-campus speech as affording "up-front clarity to students and school officials." Pet.App.33a. In particular, the majority

explained, its ruling removes "a significant obstacle in the path of any student seeking to vindicate her free speech rights through a § 1983 suit"—qualified immunity. Pet.App.25a.

But adopting a hard, bright-line rule for the sake of convenient administration hardly justifies the majority's approach. The opposite rule—that schools have jurisdiction over *all* off-campus speech—would be just as clear. Nor is the majority's rule as clear-cut as the majority projects. One way or another, schools must still grapple with off-campus speech when it migrates on campus. The Third Circuit's approach purports to allow schools to address the consequences of off-campus speech by disciplining on-campus eruptions, but that approach will just breed litigation over what speech the school is actually punishing.

Further, by breaking with all other circuits, upending schools' settled disciplinary policies, and disempowering schools from disciplining speech that schools genuinely believe threatens on-campus order, the Third Circuit's bright line creates inordinate costs that the majority ignored. And depriving school administrators of qualified immunity and subjecting them to money-damages suits for punishing off-campus speech is a virtue only insofar as the Third Circuit's minority view of *Tinker* is the right one. Otherwise, all the Third Circuit has done is needlessly expose school administrators to litigation and tie their hands to address legitimate disciplinary interests.

The majority also reflected that "it is often not easy to predict whether speech will satisfy *Tinker*'s substantial disruption standard." Pet.App.33a n.13. But any such difficulties apply equally to on- and off-campus speech; the solution cannot be to arbitrarily circumscribe schools' authority. The ultimate question is what limits the First

Amendment places on schools' jurisdiction, and *Tinker* explains that the First Amendment must accommodate both students' free speech rights and schools' obligation "to prescribe and control conduct in the schools." 393 U.S. at 507. Schools' ability to maintain order within the schoolhouse gates should not disappear just because the disruption originates off campus. In sum, the many errors in the Third Circuit's resolution of an important and frequently occurring constitutional question call out for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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