

No. 20-255

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IN THE  
**Supreme Court of the United States**

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MAHANoy AREA SCHOOL DISTRICT,  
*Petitioner,*  
v.

B.L., A MINOR, BY AND THROUGH HER FATHER  
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,  
*Respondents.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit**

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**BRIEF FOR *AMICI CURIAE* CYBERBULLYING  
RESEARCH CENTER, COMMITTEE FOR  
CHILDREN, COUNCIL OF ADMINISTRATORS  
OF SPECIAL EDUCATION, GARDEN STATE  
EQUALITY, THE BULLY PROJECT, TYLER  
CLEMENTI FOUNDATION, STOMP OUT  
BULLYING, ONE CIRCLE FOUNDATION AND  
SEL4NJ IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT.....	4
I. BULLYING IS A SERIOUS AND PERVASIVE PROBLEM IN SCHOOLS ACROSS THE NATION .....	4
II. SCHOOL DISTRICTS MUST BE FREE TO REGULATE BULLYING THAT OCCURS OFF SCHOOL GROUNDS WHEN IT AFFECTS STUDENTS' SCHOOL EXPERIENCE OR DISRUPTS THE LEARNING ENVIRONMENT .....	10
III. THIS COURT SHOULD HOLD THAT <i>TINKER</i> PERMITS SCHOOLS TO ADDRESS OFF-CAMPUS HARASS- MENT.....	16
CONCLUSION .....	22

## TABLE OF AUTHORITIES

CASES	Page(s)
<i>A.S. by and through Schaefer v. Lincoln County R-III Sch. Dist.</i> , 429 F. Supp.3d 659 (E.D. Mo. 2019) .....	8-9
<i>B.L. v. Mahanoy Area Sch. Dist.</i> , 964 F.3d 170 (3d Cir. 2020) .....	16, 17
<i>Bell v. Itawamba Cnty. Sch. Bd.</i> , 799 F.3d 379 (5th Cir. 2015).....	12
<i>Bethel School Dist. No. 403 v. Fraser</i> , 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986).....	18
<i>Cox v. Warwick Valley Cent. Sch. Dist.</i> , 654 F.3d 267 (2d Cir. 2011) .....	21
<i>Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.</i> , 677 F.3d 109 (2d Cir. 2012) .....	21
<i>D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60</i> , 647 F.3d 754 (8th Cir. 2011).....	17
<i>Davis v. Monroe County Bd. of Educ.</i> , 526 U.S. 629, 119 S. Ct. 1661, 143 L.Ed.2d 839 (1999).....	15
<i>Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.</i> , 341 F. Supp.3d 793 (S.D. Ohio 2018).....	20
<i>Grossman v. Rockaway Twp.</i> , No. MRS-L-1173-18 (N.J. Superior Ct.).....	5

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Kowalski v. Berkeley Cty. Schs.</i> , 652 F.3d 565 (4th Cir. 2011).....	<i>passim</i>
<i>L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.</i> , 189 N.J. 381, 915 A.2d 535 (2007) .....	15, 19
<i>Layshock ex rel. Layshock v. Hermitage Sch. Dist.</i> , 650 F.3d 205 (3d Cir. 2011) .....	12
<i>Morse v. Frederick</i> , 551 U.S. 393, 127 S. Ct. 2618, 168 L.Ed.2d 290 (2009).....	18, 22
<i>Norris v. Cape Elizabeth Sch. Dist.</i> , 969 F.3d 12 (1st Cir. 2020) .....	20, 21
<i>Palosz v. Town of Greenwich</i> , 184 Conn. App. 201, 194 A.3d 885 (Conn. App. 2018) .....	19
<i>S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.</i> , 696 F.3d 771 (8th Cir. 2012).....	17
<i>Saxe v. State College Area Sch. Dist.</i> , 240 F.3d 200 (3d Cir. 2001) .....	21, 22
<i>Shively v. Green Local Sch. Dist. Bd. of Educ.</i> , 579 F. Appx. 348 (6th Cir. 2014) .....	20
<i>Shore Regional High School Bd. of Educ. v. P.S. ex rel. p.S.</i> , 381 F.3d 194 (3d Cir. 2004) .....	15

## TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Sypniewski v. Warren Hills Reg'l Bd. of Educ.</i> , 307 F.3d 243 (3d Cir. 2002) .....	22
<i>T.K. v. New York City Dept. of Educ.</i> , 779 F.Supp.2d 289 (E.D.N.Y. 2011) .....	4, 15, 19
<i>Tinker v. Des Moines Independent Community School District</i> , 393 U.S. 503 (1969).....	11, 18, 20, 21
<i>Vernonia School Dist. 47J v. Acton</i> , 515 U.S. 646, 115 S. Ct. 2386, 132 L.Ed.2d 564 (1995).....	18
<i>Wisniewski ex rel. Wisniewski v. Board of Education</i> , 494 F.3d 34 (2d Cir. 2007) .....	17
<i>Zamecnik v. Indian Prairie Sch. Dist. No. 204</i> , 636 F.3d 874 (7th Cir. 2011).....	21

## CONSTITUTION

U.S. Const. amend. I .....	12, 18, 21, 22
----------------------------	----------------

## STATUTES

Ala. Code § 16-28B-3 .....	13
Alaska Stat. § 14.33.200(a) .....	14
Alaska Stat. § 14.33.250.....	14
Ariz. Rev. Stat. § 15-341(36) .....	14
Ark. Code Ann. § 6-18-514 .....	13
Cal. Educ. Code § 48900 .....	13

## TABLE OF AUTHORITIES—Continued

	Page(s)
Colo. Rev. Stat. § 22-32-109.1(b).....	14
Conn. Gen. Stat. § 10-222d.....	13
14 Del. Code § 4161(1).....	13
14 Del. Code § 4164.....	13
D.C. Code § 2-1535.03(a).....	13
Fla. Stat. Ann. § 1006.147(1)(d).....	13
Ga. Code Ann. § 20-2-751.4(a).....	13
Hi. Admin. Code § 8-19-2.....	14
Hi. Admin. Code § 8-19-6(a).....	14
Idaho Code Ann. § 18-917A(a).....	14
105 Ill. Comp. Stat. Ann. 5/27-23.7(a).....	13
Ind. Code Ann. § 20-33-8-0.2.....	13
Ind. Code Ann. § 20-33-8-13.5.....	13
Iowa Code § 280.28.....	14
Kan. Stat. Ann. § 72-6147.....	14
Ky. Rev. Stat. Ann. § 158.148.....	13
La. Rev. Stat. Ann. § 416.13(c).....	13
20-A Me. Rev. Stat. § 6554.....	13
Md. Educ. Code Ann. § 7-424.....	13
Mass. Gen. Laws. ch.71 § 37O.....	13
Mich. Comp. Laws Ann. § 380.1310b.....	14
Minn. Stat. § 121A.031.....	13
Miss. Code Ann. § 37-11-67(1).....	14

## TABLE OF AUTHORITIES—Continued

	Page(s)
Miss. Code Ann. § 37-11-69(1) .....	14
Mo. Rev. Stat. § 160.775.....	14
Mont. Code Ann. § 20-5-208.....	14
Mont. Code Ann. § 20-5-209.....	14
Neb. Rev. Stat. § 79-2,137 .....	14
Nev. Rev. Stat. § 388.122 .....	14
Nev. Rev. Stat. § 388.135 .....	14
N.H. Rev. Stat. Ann. § 193-F:3 .....	13
N.H. Rev. Stat. Ann. § 193-F:4(I) .....	13
N.J. Stat. § 18A:37-15.3 .....	13
N.J. Stat. § 18A:37-14 .....	13
N.M. Admin. Code § 6.12.7.7 .....	13
N.M. Admin. Code § 6.12.7.8A.....	13
N.Y. Educ. Law § 11 .....	13
N.C. Gen. Stat. § 115C-407.15(a).....	14
N.C. Gen. Stat. § 115C-407.16.....	14
N.D. Cent. Code § 15.1-19-17.....	14
Ohio Rev. Code Ann. § 3313.666.....	14
Okla. Stat. Ann. Tit. 70, § 24-100.3 .....	13-14
Okla. Stat. Ann. Tit. 70, § 24-100.4 .....	14
Or. Rev. Stat. § 339.351(2)(b).....	14
Or. Rev. Stat. § 339.356 .....	14
24 P.S. § 13-1303.1-A .....	14

## TABLE OF AUTHORITIES—Continued

	Page(s)
R.I. Gen. Laws § 16-21-33 .....	14
R.I. Gen. Laws § 16-21-34 .....	14
S.C. Code Ann. § 59-63-120.....	14
S.C. Code Ann. § 59-63-140.....	14
S.D. Codified Laws § 13-32-15 .....	14
S.D. Codified Laws § 13-32-18 .....	14
S.D. Codified Laws § 13-32-19 .....	14
Tenn. Code Ann. § 49-6-4502.....	14
Tex. Educ. Code Ann. § 37.0832 .....	14
Utah Code Ann. § 53G-9-601(d).....	14
Utah Code Ann. § 53G-9-602(d).....	14
Vt. Stat. Ann. tit. 16, § 11(a)(32).....	14
Vt. Stat. Ann. tit. 16, § 570.....	14
Vt. Stat. Ann. tit. 16, § 570c .....	14
Va. Code Ann. § 22.1-276.01 .....	14
Va. Code Ann. § 22.1-279.6(D).....	14
Wash. Rev. Code § 28A.600.477.....	14
W. Va. Code Ann. § 18-2C-2.....	14
W. Va. Code Ann. § 18-2C-3.....	14
Wis. Stat. § 118.46.....	14
Wyo. Stat. Ann. § 21-4-312(a)(i).....	14



## TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
<i>Alan Mozes, Too Often, Bullying Has Lethal Consequences for LBGTQ Teens</i> , U.S. News & World Report (May 26, 2020), available at <a href="https://tinyurl.com/the6bum2...">https://tinyurl.com/the6bum2...</a>	16
Alyssa Giacobbe, <i>The Tragic, Enduring Legacy of Phoebe Prince</i> , Boston Magazine (January 21, 2020), available at <a href="https://tinyurl.com/1iudwlqp">https://tinyurl.com/1iudwlqp</a> .....	6
American Psychological Association, <i>Bullying and School Climate</i> , <a href="https://tinyurl.com/zep83p69">https://tinyurl.com/zep83p69</a> (last visited Feb. 22, 2021).....	16
Bill Dedman, <i>Secret Service Findings Overturn Stereotypes</i> , Chicago Sun–Times Report (Oct. 15–16, 2000).....	4
Brittany Wong, <i>How Remote Learning Has Changed The Nature Of School Bullying</i> , HuffPost (September 18, 2020), <a href="https://tinyurl.com/n4n2d6ko">https://tinyurl.com/n4n2d6ko</a> .....	12
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Committee for Children Policy White Paper, <i>Bullying Prevention in the Technology Age</i> (2017), available at <a href="https://tinyurl.com/wm4dkgvr">https://tinyurl.com/wm4dkgvr</a> .....	8

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Dylan Rogers, <i>BYOD In Schools: A Beginner’s Guide</i> , Schoolology Exchange (March 16, 2018), <a href="https://tinyurl.com/25o8r23c">https://tinyurl.com/25o8r23c</a> .....	12
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## TABLE OF AUTHORITIES—Continued

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Kathleen Conn, <i>Best Practices in Bullying Prevention: One Size Does Not Fit All</i> , 22 Temp. Pol. & Civ. Rts. L. Rev. 393 (2013).....	19
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Mary Esch, <i>Correction: School Bullying Parent Notification Story</i> , Associated Press (March 6, 2018), available at <a href="https://tinyurl.com/1uvpwrn">https://tinyurl.com/1uvpwrn</a> .....	6
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## TABLE OF AUTHORITIES—Continued

	Page(s)
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U.S. Department of Education “Dear Colleague” letter (October 26, 2010), <i>available at</i> <a href="https://tinyurl.com/2jeto6q4">https://tinyurl.com/2jeto6q4</a> .....	4, 14, 15
U.S. Department of Education “Dear Colleague” letter of Secretary Arne Duncan (December 16, 2010), <i>available at</i> <a href="https://tinyurl.com/6nu3sa4k">https://tinyurl.com/6nu3sa4k</a> .....	9

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

**Cyberbullying Research Center** (cyberbullying.org), founded in 2005 and directed by Sameer Hinduja, PhD (Professor, Florida Atlantic University) and Justin W. Patchin, PhD (Professor, University of Wisconsin-Eau Claire), is a research collaborative dedicated to providing up-to-date information about the nature, extent, causes, and consequences of cyberbullying among adolescents.

**Committee for Children** (cfchildren.org) is a global nonprofit organization that has championed the safety and well-being of children for more than 40 years, in large part through the development of Second Step, its universal school-based curricula.

**Council of Administrators of Special Education** (casecec.org) is an international nonprofit professional organization providing leadership, advocacy, and professional development to more than 4,500 administrators working on behalf of students with disabilities and their families in public and private school systems.

**Garden State Equality** (gardenstateequality.org) is the largest LGBTQ advocacy organization in New Jersey and one of the most successful statewide civil rights organizations for the LGBTQ community in the Nation.

**The Bully Project** (thebullyproject.com) is a social action campaign inspired by the award-winning film *BULLY*, committed to transforming children's lives

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<sup>1</sup> The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

and changing a culture of bullying into one of empathy and action.

**Tyler Clementi Foundation** ([tylerclementi.org](http://tylerclementi.org)) is a nonprofit organization committed to preventing bullying through inclusion and the assertion of dignity and acceptance of LGBT communities and other victims of hostile social environments.

**STOMP Out Bullying** ([stompoutbullying.org](http://stompoutbullying.org)) is a national nonprofit organization working to reduce and prevent bullying, cyberbullying, and other digital abuse, educate against homophobia, LGBTQ discrimination, racism and hatred, and deter violence in schools, online and in communities across the country.

**One Circle Foundation** ([onecirclefoundation.org](http://onecirclefoundation.org)) is a nonprofit organization that supports service providers in the United States, Canada, and internationally with gender-responsive research based circle program models, best practice approaches, and manual-guided curricula for programs serving youth.

**SEL4NJ** ([sel4nj.org](http://sel4nj.org)) is an organization of over 1200 educators and advocates representing New Jersey's major educational stakeholders promoting social-emotional learning and the importance of school culture and climate for the health and strength of students and schools.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

*Amici* have joined forces to inform the Court about the harmful effects of bullying in our public schools, and to discourage any holding in this case that would undermine school officials' ability to prevent harassment that affects students' experience at school or disrupts the learning environment.

For those of an earlier generation bullying may have been regarded as a rite of passage, but research has shown it has profound and long-lasting effects on our youth. Digital devices are now ubiquitous. Social media platforms are proliferating and children at ever-younger ages are accessing the Internet 24/7 in unstructured settings. The means and methods of modern-day bullying are far more sophisticated and online bullying (“cyberbullying”) is an increasingly troubling phenomenon.

For *Amici* and the children whose welfare they seek to protect, the stakes in this case are far higher than the disciplinary consequences for a high school cheerleader’s expletive-laden rant. As we explain below, schools’ ability to confront bullying is, quite literally, a matter of life and death for roughly 56 million children attending about 131,000 public schools across the Nation.

The Third Circuit’s new rule generally forbids school districts from regulating, or imposing discipline for, off-campus student speech. The court reserved for another day how that rule would apply to harassment of students, leaving school officials (and lower courts in the Third Circuit) no meaningful guidance. *Amici* will leave it to the parties and other stakeholders to argue the broader question of students’ free speech rights beyond the physical boundaries of the school property. *Amici’s* concern is for school districts’ ability to address peer harassment in the digital age when much of this behavior occurs off school grounds or online, and the distinction between on-campus and off-campus has become meaningless.

For the reasons presented below, the Court can, and should, protect school officials’ ability to regulate bullying off school grounds and online when it disrupts

the school's learning environment or violates other students' rights.

## ARGUMENT

### I. BULLYING IS A SERIOUS AND PERVASIVE PROBLEM IN SCHOOLS ACROSS THE NATION.

Bullying received national attention after the Columbine High School shooting in 1999. *See* Susan P. Limber, *Addressing Youth Bullying Behaviors*, American Medical Association Educational Forum on Adolescent Health: Youth Bullying at 5 (May 3, 2002), *available at* <https://tinyurl.com/105va5ed>. In the wake of that tragedy, the Secret Service reviewed thirty-seven shooting incidents and determined that in two-thirds of those cases, the shooter felt bullied, persecuted, or threatened at school.<sup>2</sup> It is now clear beyond question that bullying of school-age children is “an important societal problem in the United States.” Dewey Cornell, Susan P. Limber, *Law and Policy on the Concept of Bullying at School*, *American Psychologist* (May-June 2015) at 333, *available at* <https://tinyurl.com/1gpaqym2>.

“Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential.”<sup>3</sup>

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<sup>2</sup> *See* Bill Dedman, *Secret Service Findings Overturn Stereotypes*, *Chicago Sun–Times Report*, (Oct. 15–16, 2000), at 9, cited in *T.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d 289, 298 (E.D.N.Y. 2011).

<sup>3</sup> U.S. Department of Education “Dear Colleague” letter (October 26, 2010), *available at* <https://tinyurl.com/2jeto6q4>.



“According to a federal government initiative, student-on-student bullying is a ‘major concern’ in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide.” *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 572 (4th Cir. 2011).

*Amici* have no interest in B.L.’s restoration to the junior varsity cheerleading squad at Mahanoy Area High School. But we urge the Court to consider the fate of another cheerleader, a two-hour drive away across Route 80 in Northern New Jersey. Mallory Grossman was a 12-year-old middle school student who loved cheerleading and gymnastics but was tormented relentlessly by her classmates throughout the school year. This brutal harassment was not limited to the school campus but continued through text messages, Instagram posts and Snapchats. She was barraged with taunts, online and in person, like “you have no friends,” “poor Mal” and “when are you going to kill yourself?” As the school year drew to a close, Mallory was unable to withstand these attacks any longer and took her own life. Compounding this tragedy, her parents discovered her body after meeting with school officials to beg them for assistance in ending this cruelty.<sup>4</sup>

Mallory is not alone. Residents of Hampshire County, Massachusetts, are still haunted by the memory of Phoebe Prince, a 15-year-old high school freshman from South Hadley. She had just moved to town from Ireland and, as the new girl at the high school, made the mistake of dating a popular football player. When he later reunited with an old girlfriend, schoolmates

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<sup>4</sup> This account is based on the family’s allegations in the news media and in a lawsuit pending in the Superior Court of New Jersey, Law Division, Morris County, Docket No. MRS-L-1173-18

began targeting Phoebe for having the audacity to think she could be one of them. The bullying continued in person and online. They called her names like “stupid bitch” and “Irish slut.” When it became too much to bear, Phoebe hanged herself at the family home. Her 12-year-old sister discovered her body. Even that did not satisfy her tormenters who, after her death, wrote on her Facebook wall: “accomplished.”<sup>5</sup>

Jacobe Taras was a 13-year-old seventh grader from South Glens Falls, New York, who was mercilessly bullied by his schoolmates. They slammed him into lockers and harassed him with homophobic slurs. Jacobe killed himself with a hunting rifle, leaving his parents this note: “I’m sorry but I can not live anymore. I just can’t deal with all of the bullies, being called gay . . . being told to go kill myself. I’m also done with being pushed, punched, tripped. I’m sorry for all that I put you through. I LOVE YOU.”<sup>6</sup>

The Centers for Disease Control and Prevention (CDC) and other researchers have documented the link between bullying and suicide among school-age children.<sup>7</sup> It is now clear that “involvement in

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<sup>5</sup> Alyssa Giacobbe, *The Tragic, Enduring Legacy of Phoebe Prince*, Boston Magazine (January 21, 2020), <https://tinyurl.com/1iudwlqp>; Dale Archer, *Phoebe Prince’s Death Is a Call to Action*, Opinion, Fox News (April 6, 2010), <https://tinyurl.com/yol9t9oa>.

<sup>6</sup> Mary Esch, *Correction: School Bullying Parent Notification Story*, Associated Press (March 6, 2018), <https://tinyurl.com/1uypwrn>; Rachel Silberstein, *Parents Lose Appeal in South Glens student suicide case*, Times Union (January 2, 2020), available at <https://tinyurl.com/17rkjfff>.

<sup>7</sup> CDC National Center for Injury Prevention and Control, Division of Violence Prevention, *The Relationship Between Bullying*

bullying, along with other risk factors, increases the chance that a young person will engage in suicide-related behaviors.” *Id.* at 3. Even when bullying does not result in death, it still has significant harmful effects on victims including depression, anxiety, low self-esteem, self-harming behavior, alcohol and drug use and dependence, aggression, and involvement in violence or crime.<sup>8</sup>

Most incidents of bullying do not find their way into the headlines. But the data present a stark picture of how prevalent the problem is, and the challenges school officials face in confronting it. Approximately 20% of student ages 12-18 nationwide have experienced bullying.<sup>9</sup> Roughly 15% of bullying occurs through text messages or online posts.<sup>10</sup> A 2016 study found that 64% of students who experienced cyberbullying reported that it affected their ability to learn and feel safe at school.<sup>11</sup> As of 2019, the rate of cyberbullying of students was trending steadily upward over the previous five years.<sup>12</sup>

Bullying is especially impactful for so-called “tweens,” students ages 9-12, as documented in research by Professors Justin Patchin and Sameer Hinduja of

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and Suicide: What We Know and What It Means for Schools, (April 2014), *available at* <https://tinyurl.com/26r88up6>.

<sup>8</sup> See StopBullying.gov, Consequences of Bullying, <https://tinyurl.com/1lruyc61> (last visited Feb. 22, 2021).

<sup>9</sup> StopBullying.gov, Facts About Bullying, <https://tinyurl.com/jl4jezww> (last visited Feb. 22, 2021).

<sup>10</sup> *Id.*

<sup>11</sup> Cyberbullying Research Center, *New National Bullying and Cyberbullying Data*, [tinyurl.com/3yegfuvy](https://tinyurl.com/3yegfuvy).

<sup>12</sup> Cyberbullying Research Center, *Summary of Our Cyberbullying Research (2007-2019)*, <https://tinyurl.com/1rcjhfr4> (last visited Feb. 22, 2021).

Cyberbullying Research Center.<sup>13</sup> Among 1,034 tweens responding to their survey, nearly 80% had some exposure to bullying as a target, an aggressor, or a witness. 57% percent had been targeted at school or online. Half of tweens said they had been bullied at school while 15% had been cyberbullied. More than two-thirds of tweens who had been cyberbullied said it negatively impacted their feelings about themselves. Almost one-third said it affected their friendships. 13.1% said it affected their physical health, while 6.5% shared it influenced their schoolwork.<sup>14</sup>

Importantly, there is significant overlap between bullying at school and online. In one study, 83% of the students who had been cyberbullied within the past 30 days also had been bullied at school. Similarly, 69% of the students who admitted to bullying others at school also bullied others online.<sup>15</sup> These statistics confirm what parents of school-age children already know: students move seamlessly between in-person and online environments, and their contacts with others are not limited by physical location.

As the Secret Service's post-Columbine study showed, bullying victims also may be provoked into committing violent acts of their own. Those acts may not involve killing others but still can disrupt the school's learning environment. For example, in *A.S. by and through*

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<sup>13</sup> Justin W. Patchin, Ph.D. Sameer Hinduja, Ph.D., *Tween Cyberbullying in 2020 Executive Summary* (Oct. 7, 2020), available at <https://tinyurl.com/3pfn8xtf>.

<sup>14</sup> *Id.*

<sup>15</sup> Cyberbullying Research Center, *New National Bullying and Cyberbullying Data*, <https://tinyurl.com/3yegfuvy>. See also Committee for Children Policy White Paper, *Bullying Prevention in the Technology Age* (2017), available at <https://tinyurl.com/wm4dkgvr>.

*Schaefer v. Lincoln County R-III Sch. Dist.*, 429 F. Supp.3d 659 (E.D. Mo. 2019), a student created a Snapchat post depicting a fellow student in a casket with references to the student’s funeral and visitation at a funeral home. The post was shared with other students who reposted it to their own Snapchat stories, and fellow students were making comments about his supposed death. The target of this thoughtless harassment already had been bullied by his schoolmates for over a year and was suffering from depression requiring professional help. The pressure was so great that he “snapped” and placed another student in a chokehold.

The federal government has recognized the problem. Bullying prevention is now a non-partisan national priority. As former Education Secretary Arne Duncan wrote in a 2010 “Dear Colleague” letter,

Recent incidents of bullying have demonstrated its potentially devastating effects on students, schools, and communities and have spurred a sense of urgency among State and local educators and policymakers to take action to combat bullying. The U.S. Department of Education (Department) shares this sense of urgency and is taking steps to help school officials effectively reduce bullying in our Nation’s schools. Bullying can be extremely damaging to students, can disrupt an environment conducive to learning, and should not be tolerated in our schools.<sup>16</sup>

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<sup>16</sup> U.S. Department of Education “Dear Colleague” letter of Education Secretary Arne Duncan (December 16, 2010), *available at* <https://tinyurl.com/6nu3sa4k>.

At the first White House Conference on Bullying Prevention in 2011, President Obama observed, “[t]oday, bullying doesn’t even end at the school bell – it can follow our children from the hallways to their cellphones to their computer screens.”<sup>17</sup> Since then, federal agencies have committed significant resources to attacking the problem. For example, the U.S. Department of Health and Human Services operates a website, StopBullying.gov, providing guidance and support for school officials, parents and students. Federal Partners in Bullying Prevention, a consortium of federal agencies, regularly convenes Anti-Bullying Prevention Summits to highlight best practices and offer support.<sup>18</sup>

## **II. SCHOOL DISTRICTS MUST BE FREE TO REGULATE BULLYING THAT OCCURS OFF SCHOOL GROUNDS WHEN IT AFFECTS STUDENTS’ SCHOOL EXPERIENCE OR DISRUPTS THE LEARNING ENVIRONMENT.**

The data show that a pattern of bullying against a particular student can seamlessly move from on-campus to off-campus to online and back again. The accelerating pace of smartphone and social media use by teens and tweens has further exacerbated the problem.

Today, school-age children have round-the-clock access to technology and the online world. By 2018, 97% of thirteen- to seventeen-year-olds used at least

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<sup>17</sup> *President Obama & the First Lady at the White House Conference on Bullying Prevention* (March 10, 2011), <https://tinyurl.com/kcs872qx>.

<sup>18</sup> See StopBullying.gov, Federal Partners in Bullying Prevention, <https://tinyurl.com/jl4jezww> (last visited Feb. 22, 2021).

one social media platform.<sup>19</sup> Ninety-five percent of them had access to a smartphone, and almost half of them reported being online “almost constantly.” *Id.* The majority of tweens also have devices of their own and 90% have used one or more of the most popular social media and gaming apps in the last year. Smartphone ownership explodes in the tween years. About 21% percent of nine-year olds have their own smartphone compared to 68% of 12-year-olds. Two-thirds of tweens have used YouTube in the last year.<sup>20</sup>

It is hardly surprising that this universal access to text messaging and social media has offered greater opportunities for cyberbullying which can be far more harmful than “school yard” bullying in important ways. The aggressor is not in the target’s physical presence and typically cannot see or hear the victim’s reaction to his posts. Cyberbullying often occurs anonymously, with messages that can be spread instantly to thousands of recipients. And cyberbullying can occur round the clock in unstructured settings with parents unaware of what their children are doing.

For these reasons, most federal courts have recognized the arbitrariness of distinguishing between on-campus and off-campus student speech.]

[W]hen *Tinker* was decided, the Internet, cellphones, smartphones, and other digital social media did not exist. . . Students now have the ability to disseminate instantaneously and communicate widely from any

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<sup>19</sup> Monica Anderson & JinhJing Jiang, *Teens, Social Media & Technology, 2018*, Pew Research Center (May 31, 2018), <https://tinyurl.com/qhu3s3fd>.

<sup>20</sup> Patchin, *Tween Cyberbullying in 2020 Executive Summary*, *supra* note 13.

location via the Internet. These communications, which may reference events occurring, or to occur, at school, or be about members of the school community, can likewise be accessed anywhere, by anyone, at any time.

*Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015)(en banc) Wireless Internet, smartphones and social media platforms “give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.” *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220-21 (3d Cir. 2011)(Jordan, J., concurring).

Restrictions on in-person gatherings and the introduction of remote and hybrid learning during the COVID-19 pandemic have further increased students’ reliance on electronic communication and underscored the irrelevance of the school’s physical boundaries.<sup>21</sup> Even before the pandemic arrived, the on-campus/off-campus distinction had been blurred further by the advent of BYOD (“Bring Your Own Device”) initiatives in many school districts around the country that permit, encourage or even require students to use their own personal laptops or other devices at school.<sup>22</sup>

Limiting districts’ jurisdiction to school grounds or school-sponsored functions similarly makes no sense

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<sup>21</sup> See Brittany Wong, *How Remote Learning Has Changed The Nature Of School Bullying*, HuffPost (September 18, 2020), <https://tinyurl.com/n4n2d6ko>; Lori Orlinsky, *Bullying in the age of remote learning*, Motherwell (September 3, 2020), <https://tinyurl.com/npyltugs>.

<sup>22</sup> See Dylan Rogers, *BYOD In Schools: A Beginner’s Guide*, Schoolology Exchange (March 16, 2018), <https://tinyurl.com/25o8r23c>.



for in-person bullying that occurs off campus, if it significantly impacts students' ability to access their education or substantially disrupts the learning environment. Imagine students taunting a classmate on her walk to school then escalating their harassment in the cafeteria at lunch. Schools must have the power to address such off-campus misbehavior that meaningfully impacts students' school experience.

To be clear, *Amici* do not suggest that schools need intercede when bullying occurs at times, and in settings, far removed from school. Harassment occurring over the summer, long after the school year ends and well before it resumes, may be less likely to have an impact on a student's school experience. There is no reason to believe trial courts and government agencies are unable to discern a sufficient nexus between the offending behavior and a student's ability to access her education in a given case.

Every state in the Nation, and the District of Columbia, have evidenced their commitment to bullying-prevention by adopting statutes addressing the matter. At least twenty-five states and the District of Columbia explicitly require districts to regulate off-campus bullying that substantially disrupts the school environment.<sup>23</sup> Seven states expressly permit schools

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<sup>23</sup> Ala. Code § 16-28B-3; Ark. Code Ann. § 6-18-514; Cal. Educ. Code § 48900; Conn. Gen. Stat. § 10-222d; 14 Del. Code § 4164; *id.* § 4161(1); D.C. Code § 2-1535.03(a); Fla. Stat. Ann. § 1006.147(1)(d); Ga. Code Ann. § 20-2-751.4(a); 105 Ill. Comp. Stat. Ann. 5/27-23.7(a); Ind. Code Ann. § 20-33-8-13.5; *id.* § 20-33-8-0.2; Ky. Rev. Stat. Ann. § 158.148; La. Rev. Stat. Ann. § 416.13(c); 20-A Me. Rev. Stat. § 6554; Md. Educ. Code Ann. § 7-424; Mass. Gen. Laws. ch.71 § 37O; Minn. Stat. § 121A.031; N.H. Rev. Stat. Ann. § 193-F:3; *id.* § 193-F:4(I); N.J. Stat. § 18A:37-15.3; *see also id.* § 18A:37-14; N.M. Admin. Code § 6.12.7.7; *id.* § 6.12.7.8A; N.Y. Educ. Law § 11; Okla. Stat. Ann.

to do so,<sup>24</sup> and eighteen neither expressly permit or prohibit it.<sup>25</sup>

Even when state anti-bullying statutes do not impose an affirmative duty to regulate off-campus harassment, that duty may be imposed by federal and state anti-discrimination laws when the mistreatment is directed toward students in legally protected classes. The U.S. Department of Education alerted school districts as far back as 2010 that bullying based on race, color, national origin, sex or disability may constitute unlawful discrimination under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans with Disabilities Act of 1990.<sup>26</sup> Significantly for purposes of

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Tit. 70, § 24-100.3; *see also id.* § 24-100.4; R.I. Gen. Laws § 16-21-34; *see id.* § 16-21-33; Tenn. Code Ann. § 49-6-4502; Tex. Educ. Code Ann. § 37.0832; Utah Code Ann. § 53G-9-601(d); *id.* § 53G-9-602(d); Vt. Stat. Ann. tit. 16, § 11(a)(32); *id.* § 570; *id.* § 570c.

<sup>24</sup> Iowa Code § 280.28; Mo. Rev. Stat. § 160.775; N.C. Gen. Stat. § 115C-407.15(a); *id.* § 115C-407.16; 24 P.S. § 13-1303.1-A; S.D. Codified Laws § 13-32-15; *id.* § 13-32-18; *id.* § 13-32-19; W. Va. Code Ann. § 18-2C-2; *id.* § 18-2C-3; Wyo. Stat. Ann. § 21-4-312(a)(i).

<sup>25</sup> Alaska Stat. § 14.33.250; *id.* § 14.33.200(a); Ariz. Rev. Stat. § 15-341(36); Colo. Rev. Stat. § 22-32-109.1(b); Hi. Admin. Code § 8-19-2; *id.* § 8-19-6(a); Idaho Code Ann. § 18-917A(a); Kan. Stat. Ann. § 72-6147; Mich. Comp. Laws Ann. § 380.1310b; Miss. Code Ann. § 37-11-67(1); *id.* § 37-11-69(1); Mont. Code Ann. § 20-5-208; *id.* § 20-5-209; Neb. Rev. Stat. § 79-2,137; Nev. Rev. Stat. § 388.122; *id.* § 388.135; N.D. Cent. Code § 15.1-19-17; Ohio Rev. Code Ann. § 3313.666; Or. Rev. Stat. § 339.351(2)(b); *id.* § 339.356; S.C. Code Ann. § 59-63-120; *id.* § 59-63-140; Va. Code Ann. § 22.1-276.01; *id.* § 22.1-279.6(D); Wash. Rev. Code § 28A.600.477; Wis. Stat. § 118.46.

<sup>26</sup> U.S. Department of Education “Dear Colleague” letter (October 26, 2010), *supra* note 3.

this case, actionable harassment includes the “use of cell phones or the Internet[.]” *Id.* Special education students who are bullied also may have a claim for deprivation of a “free appropriate public education” guaranteed by the Individuals with Disabilities Education Act.<sup>27</sup>

State courts may construe their own anti-discrimination statutes even more expansively and require aggressive anti-bullying measures beyond what is mandated by federal law. For example, the Supreme Court of New Jersey, in *L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 381, 915 A.2d 535 (2007), rejected Title IX’s “deliberate indifference” standard for student-to-student sexual harassment claims, see *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633, 119 S. Ct. 1661, 1666, 143 L.Ed.2d 839, 847 (1999), and applied a workplace “hostile environment” standard to class-based peer bullying cases under New Jersey’s Law Against Discrimination.

Sadly, students in these protected groups may be the most likely targets of bullying and also the least able to defend themselves. As the research shows, students with disabilities are bullied at two to three times the rate of non-disabled students.<sup>28</sup> A national

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<sup>27</sup> See *Shore Regional High School Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194 (3d Cir. 2004); *T.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d at 316 (“[U]nder IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities[.]”).

<sup>28</sup> National Bullying Prevention Center, *Students with Disabilities and Bullying/5 Important Facts*, <https://tinyurl.com/4u4vl9td>. See also D.M. Holben, & P.A. Zirkel, *School Bullying*

school climate study found that more than 80% of lesbian, gay, bisexual and transgender (LGBT) youth reported some form of bullying or harassment at school. Over 92% of LGBT youth reported hearing homophobic remarks from other students at school.<sup>29</sup> Those who die by suicide are five times more likely to have been bullied than other students.<sup>30</sup>

School officials must retain the ability to regulate harassing speech that originates off campus and substantially disrupts the learning environment or infringes on the rights of students at school. Otherwise, students will be put at risk and the constitutionality of most states' anti-bullying laws immediately called into question.

### **III. THIS COURT SHOULD HOLD THAT *TINKER* PERMITS SCHOOLS TO ADDRESS OFF-CAMPUS HARASSMENT.**

The court below “[took] no position on schools’ bottom-line power to discipline speech” constituting harassment or a threat of violence. *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d at 190 (3d Cir. 2020). As Judge Ambro observed in his separate opinion, however, flagging the issue for resolution another day leaves schools with no guidance on “[w]hat type of speech constitutes ‘harassment’ in the school and social media context[,]” and no “clear and administrable line for this new

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*litigation: An empirical analysis of the case law*, 47 Akron L. Rev. 299-328 (2014).

<sup>29</sup> American Psychological Association, *Bullying and School Climate*, <https://tinyurl.com/zep83p69> (last visited Feb. 22, 2021).

<sup>30</sup> Alan Mozes, *Too Often, Bullying Has Lethal Consequences for LBGTQ Teens*, U.S. News & World Report (May 26, 2020), available at <https://tinyurl.com/the6bum2>.

rule[.]” *Id.* at 195. (Ambro, J., concurring in the judgment). *Amici* agree.

The majority hinted that four decisions may serve as guideposts for delineating school officials’ authority to regulate off-campus harassment in a future case. 964 F.3d at 190 (citing *Wisniewski ex rel. Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565 (4th Cir. 2011); and *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012)). But each of these cases involved misconduct far more threatening or humiliating than the sort of harassment that schools must routinely address to protect their students and the learning environment.

In *Wisniewski*, a student created an instant messaging icon showing “a pistol firing a bullet at a person’s head, above which were dots representing splatted blood,” and beneath which were the words “Kill Mr. VanderMolen,” the student’s teacher. 494 F.3d at 35-36. That icon was visible to the student’s “buddies” who sent messages displaying it to fellow students. *Id.* at 36. *D.J.M.* also involved a threat of violence. In *Kowalski*, a student created a MySpace page suggesting that a fellow student was sexually promiscuous and had a contagious disease (herpes). In *S.J.W.*, students created a website featuring a blog with offensive and racist posts as well as sexually explicit and degrading comments about female classmates, whom they identified by name. If these cases are what the Third Circuit had in mind as the bar for permissible regulation of off-campus bullying, much harmful harassment would go unregulated and students’ welfare would be compromised.

*Amici* will leave it to the parties and other stakeholders to argue what rules should apply to off-campus speech generally. But there must be a clear and unmistakable pronouncement that school officials may take reasonable measures to curtail peer bullying that negatively impacts students' ability to access their education, wherever and in whatever form it takes place. Students may not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969). But the First Amendment should not immunize them for harassment they perpetrate outside it.

There is precedent for the doctrinal approach we suggest. In *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 168 L.Ed.2d 290 (2009), the Court recognized that certain challenges faced by school officials – illegal drug use, in that case – justify specific and narrow exceptions from the legal framework governing students' First Amendment rights generally. As the Court observed, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." 551 U.S. at 404-405 (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986)), and are circumscribed "in light of the special characteristics of the school environment." 551 U.S. at 394 (quoting *Tinker*, 393 U.S. at 506). The Court noted the "severe and permanent damage to the health and well-being of young people" caused by drug abuse, 551 U.S. at 407, and that school officials had "an 'important—indeed, perhaps compelling' interest" in deterring it. *Id.* (quoting *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 661, 115 S. Ct. 2386, 132 L.Ed.2d 564 (1995)).

Bullying raises similar concerns. Like drug abuse, it is a direct threat to students' health and welfare, significantly interfering with their education and at times resulting in death. The federal government has acknowledged the seriousness of the problem and committed substantial resources to supporting school districts' efforts to confront it. In many states there is an affirmative statutory duty imposed by state law, and federal anti-discrimination laws expose all districts to liability if appropriate measures are not taken to address certain protected classes. "Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, . . . schools have a duty to protect their students from harassment and bullying in the school environment[.]" *Kowalski*, 652 F.3d at 572 (4th Cir. 2011)(citation omitted).

Protecting students' safety is the primary goal of schools' anti-bullying efforts. School officials no longer can merely respond to bullying incidents one by one as they arise, but are charged with taking proactive measures to establish a school climate where harassment is not tolerated by anyone.<sup>31</sup> Discharging that affirmative duty is near impossible if they cannot take aggressive measures to curtail hurtful taunts or

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<sup>31</sup> See, e.g., *Palosz v. Town of Greenwich*, 184 Conn. App. 201, 194 A.3d 885 (Conn. App. 2018); *L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. at 389 (Schools must "take proactive steps to protect the children in their charge."); *T.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d at 301 ("Several other factors play a major role in determining what makes students more likely to bully. One is the climate of the school. When a school is not supportive or is negative, bullying thrives."). See also Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 Temp. Pol. & Civ. Rts. L. Rev. 393 (2013).

intimidating messages emanating from beyond the four corners of the school property. Denying school districts the tools to do so will not only expose students to harm but also will expose school districts and staff to significant financial liability. *See, e.g., Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.*, 341 F. Supp.3d 793, 800 (S.D. Ohio 2018). “This is because the ‘decision not to enforce rules against bullying or punishments for bullying [gives] students license to act with impunity.’” *Id.* at 803 (quoting *Shively v. Green Local Sch. Dist. Bd. of Educ.*, 579 F. Appx. 348, 356 (6th Cir. 2014)). Seven-figure jury verdicts and settlements in bullying cases are not uncommon.<sup>32</sup> It is essential that school officials retain the power to implement effective anti-bullying protocols without being arbitrarily hampered by meaningless physical boundaries.

For these reasons, the Court should recognize, and protect, school officials’ ability to regulate and, if necessary, impose discipline for harassment that affects students’ school experience or disrupts the learning environment at school, regardless of the aggressor’s physical location.

The *Tinker* substantial disruption framework should be applied to off-campus speech constituting peer harassment. *Tinker* limited not just speech that “materially disrupts classwork or involves substantial disorder[,]” but other expressive conduct that is an “invasion of the rights of others[.]” *Tinker*, 393 U.S. at 513. The Court should rule, as the First Circuit recently did in *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020), that “bullying is the type of

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<sup>32</sup> Public Justice, *Jury Verdicts and Settlements in Bullying Cases* (April 2019), available at <https://tinyurl.com/3xfx65cj>.



conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*.” 969 F.3d at 29 (citing *Kowalski*, 652 F.3d at 572). Schools should be permitted to “restrict such speech even if it does not necessarily cause substantial disruption to the school community more broadly.” 969 F.3d at 29.

As long as there is “a reasonable basis for the administration to have determined both that the student speech targeted a specific student and that it invaded that student’s rights,” *id.*, there should be no First Amendment impediment to enforcing a school’s anti-bullying policies and applicable law. “[S]chool administrators must be permitted to exercise discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment.” *Id.* at 29, n. 18 (citing *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 274 (2d Cir. 2011); *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877-78 (7th Cir. 2011)). Courts should consider the information available to school officials at the time they disciplined the student or implemented the speech restriction, *Norris*, 969 F.3d at 31-32, and base their review on the objective reasonableness of the school’s response rather than the intent of the student. *Id.* at 25 (citing *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir. 2012)).

Finally, *Amici* acknowledge the “very real tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech[.]”<sup>33</sup> There may be “no

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<sup>33</sup> *Zamecnik*, 636 F.3d at 877 (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001)).

constitutional right to be a bully[.]”<sup>34</sup> but “[t]here [also] is no categorical ‘harassment exception’ to the First Amendment’s free speech clause[.]”<sup>35</sup> Still, school districts’ anti-bullying efforts are “[f]ar from being a situation where school authorities ‘suppress speech on political and social issues based on disagreement with the viewpoint expressed[.]’ *Morse*, 551 U.S. at 423, 127 S. Ct. 2628 (Alito, J., concurring)[.] [S]chool administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.” *Kowalski*, 652 F.3d at 572.

### CONCLUSION

For the reasons presented above, *Amici* submit that the constitutionality of school officials’ efforts to curtail harassment that affects students’ school experience should not turn on whether the offending speech originated or continued on campus, off campus or online. This Court should so rule.

Respectfully submitted,

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<sup>34</sup> *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

<sup>35</sup> *Saxe*, 240 F.3d at 204.