No. 20-255

In the Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT, PETITIONER,
v.
B.L., A MINOR, BY AND THROUGH HER FATHER LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY, RESPONDENTS.

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

BRIEF OF FIRST AMENDMENT AND EDUCATION LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONER

SARAH E. CRANDALL
TROUTMAN PEPPER HAMILTON SANDERS LLP
1001 Haxall Point,
15th Floor
Richmond, Virginia 23219

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
CHRISTOPHER VERDUGO
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe,
Suite 3900
Chicago, Illinois 60606
(312) 759-5947
misha.tseytlin@troutman.com

Counsel for *Amici Curiae* First Amendment and Education Law Scholars

QUESTION PRESENTED

1. 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

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici First Amendment and Education Law Scholars are Professors Benjamin A. Holden of the University of Illinois College of Media; Emily Gold Waldman of the Elisabeth Haub School of Law at Pace University; Derek W. Black of the University of South Carolina School of Law; Watt Lesley Black, Jr., of the Simmons School of Education and Human Development at Southern Methodist University; Martha A. Field of Harvard Law School; Philip Lee of UDC David A. Clarke School of Law; Rachel F. Moran of the University of California, Irvine School of Law; and Adjunct Professor Shannon L. Doering of the Nebraska College of Law.[2] *Amici* have particular knowledge and expertise in the application of the Free Speech Clause of the First Amendment to student speech, having published scholarship analyzing schools' authority to regulate student online speech. *See* Benjamin A. Holden, *Tinker Meets the Cyberbully: A Federal Circuit Conflict Round-Up and Proposed New Standard for Off-Campus Speech*, 28

---

[1] Under Rule 37.6, *Amici* affirm that no counsel for a party authored this brief, in whole or in part, and that no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this merits-stage amicus brief in writing. Rule 37.3(a).

[2] *Amici* provide these institutional names for identification purposes only.

Fordham Intell. Prop. Media & Ent. L.J. 233 (2018); Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 Wm. & Mary Bill of Rts. J. 591 (2011); Watt Lesley Black, Jr., *Omnipresent Student Speech and the Schoolhouse Gate: Interpreting Tinker in the Digital Age*, 59 St. Louis U. L.J. 531 (2015); Watt Lesley Black, Jr. & Elizabeth A. Shaver, *The First Amendment, Social Media, and the Public Schools: Emergent Themes and Unanswered Questions*, 20 Nev. L. J. 1 (2019); Shannon L. Doering, *Tinkering with School Discipline in the Name of the First Amendment: Expelling a Teacher's Ability to Proactively Quell Disruptions Caused by Cyberbullies at the Schoolhouse*, 87 Neb. L. Rev. 630 (2009); Philip Lee, *Expanding the Schoolhouse Gate: Public Schools (K-12) and the Regulation of Cyberbullying*, 2016 Utah L. Rev. 831; Derek W. Black, *Education Law: Equality, Fairness, and Reform* (3d ed. 2021).

Amici are united in their views that public schools have *some* authority to regulate student online speech under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and that, therefore, the Third Circuit erred in adopting a categorical rule that provides radically different treatment for student speech based upon the physical location of the student when she posts online. In place of the Third Circuit's wooden, one-factor approach, *Amici* propose a three-element test for when *Tinker* can apply to student online speech that is posted by the student while off campus. This test promotes the

essential free-speech rights of students by both clarifying the broad scope of those rights and offering certainty and predictability for schools' legitimate regulation in this sphere. Accordingly, *Amici* agree with Petitioner on the Question Presented—namely, that *Tinker* may apply to student speech that occurs off campus, in at least some circumstances. That said, *Amici* do not take a position on whether, if the lower courts were to apply *Amici*'s proposed three-element test on remand, Petitioner could regulate Respondent's speech at issue here.

INTRODUCTION AND SUMMARY OF ARGUMENT

Students' online speech introduces new First Amendment challenges that this Court has not yet confronted. While outside of school, students often go online to engage in speech that lies at the very core of the First Amendment: bona fide commentary about matters of public concern, as well as legitimate critiques of the government, including public schools, school administrators, and teachers. But students also use the Internet to engage in harmful speech of a different character, including vicious harassment of other students and their teachers, causing significant disruption of student learning in the classroom. The new First Amendment challenge for public schools is how to address the hostile student cyberspeech without infringing on students' right to offer bona fide commentary and critique online.

The Third Circuit's decision below offers the wrong answer to this question. In the Third Circuit's view, the broad *Tinker* framework provides schools with no power to regulate student cyberspeech—regardless of how disruptive or hurtful the speech may be—if the student communicates that speech while standing off campus. Yet, the school may regulate that very same cyberspeech under *Tinker* if the student happens to be on campus when she hits "send." This is not a sensible or constitutionally grounded approach. In either scenario, the potential disruptive effect of this cyberspeech is the same, and the First Amendment values underlying the speech are largely equivalent. Accordingly, the Third Circuit's single-factor, bright-line approach to determining when schools may regulate cyberspeech under *Tinker* fails to calibrate correctly the First Amendment values at stake here.

Amici propose a three-part test to determine when a school may regulate student off-campus cyberspeech under *Tinker*. First, for schools to have the power to regulate under *Tinker*, the student's off-campus cyberspeech must not comprise bona fide commentary on matters of public concern, or bona fide critique of the student's school or school officials. In other words, default First Amendment principles, not *Tinker*, govern student off-campus cyberspeech offering such bona fide commentary and critique. Second, the student's off-campus cyberspeech must have a close nexus to the school grounds, which properly cabins schools to their more limited role when addressing off-campus speech. Third, in line

with *Tinker*'s core rationale, to be subject to school regulation, the student's off-campus cyberspeech must be reasonably likely to cause substantial disruption to the school's student-learning environment. Only when the student off-campus cyberspeech satisfies all three of these elements may the school regulate it under the *Tinker* standard.

Notably, if the Court were to adopt *Amici*'s three-part test, it should then remand to the lower courts to apply this test to Respondent's cyberspeech in the first instance. *Amici* take no position on whether Respondent's speech satisfies any of the three elements comprising their test.

ARGUMENT

I. The Third Circuit's Single-Factor Approach Does Not Properly Calibrate First Amendment Values In The Internet Age

Today, the Internet is the most important forum where "all persons . . . can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Almost all students use the Internet, including email, texting, Facebook, Instagram, Snapchat, Twitter, Tumblr, and on and on. Waldman, *supra*, at 591; *see* Pew Research Center, *Teens' Social*

Media Habits and Experiences (Nov. 28, 2018);[3] Pew Research Center, *Teens, Social Media & Technology 2018* (May 31, 2018).[4] And unlike with most traditional on-campus or off-campus speech by students, student cyberspeech may reach an exceedingly broad audience of students, school officials, and others—almost at the very instant the speech is posted online. Holden, *supra*, at 287.

The Third Circuit's one-size-fits-all approach does not give sufficient respect and nuance to the different First Amendment challenges that student cyberspeech presents for schools and students alike. *See* Waldman, *supra*, at 654; Holden, *supra*, at 298.

Under the Third Circuit's approach, schools are powerless to regulate any student online speech that happens to be posted by the student while she is off campus, including "cyberbullying"—ridiculing, disparaging, and abusive cyberspeech targeting other students—or abusive cyberspeech toward others, including school teachers or other officials. *See* Pet.App.31a; *accord* Pet.App.48a (Ambro, J., concurring in the judgment); Waldman, *supra*, at 649; Holden, *supra*, at 260, 280, 290 n.326, 295.

---

[3] Available at https://www.pewresearch.org/internet/2018/11/28/teens-social-media-habits-and-experiences/ (all websites last visited February 25, 2021).

[4] Available at https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/.

The Third Circuit placed off-campus student cyberspeech beyond a school's regulatory authority after concluding that the "online nature" of this speech "makes *no constitutional difference*" vis-à-vis off-campus speech "in the physical world." Pet.App.34a (emphasis added; citations omitted). Yet, with all respect, that conclusion fails to "realiz[e]" the "historic proportions" of the Internet Age "revolution." *Packingham*, 137 S. Ct. at 1736. This error is problematic in multiple respects.

To begin, the Third Circuit appeared to conclude that schools may regulate student online speech if the student posted the speech while on campus, *see* Pet.App.34a, even though the disruptive effect of student online speech does not generally depend on the geographic location of the student, *see* Waldman, *supra*, at 654. Where a student physically hits "send" when posting online does not, as a usual matter, change whether that speech will negatively affect the student-learning environment or most other First Amendment values. *See* Holden, *supra*, at 285–87.

Further, by mechanically analogizing off-campus cyberspeech with traditional off-campus speech, the Third Circuit failed to confront the new reality of the Internet Age. *Accord Packingham*, 137 S. Ct. at 1736. Online speech, such as cyberbullying, has created new challenges for schools not presented by speech in prior times. Holden, *supra*, at 242. Students' cyberbullying and other online harassing speech may cause significant damage to the student-learning

environment precisely because of its difference from traditional off-campus speech: this cyberspeech is exceedingly low cost; has a broad proliferation rate, especially among students; and may exist online for the foreseeable future. *See infra* Part II.C.2.

Next, the Third Circuit's concern for "offering up-front clarity," such that "students [will be] able to determine when they are subject to schools' authority" when speaking online, does not justify its rigid approach. Pet.App.27a–31a, 33a. Whatever the claimed faults of the various tests considered and rejected by the Third Circuit, Pet.App.33a, *Amici*'s three-element test, as discussed in detail below, provides sufficient predictability to students and schools alike—especially because it fully protects students' online speech comprising bona fide commentary on matters of public concern, on the school, or its officials. *See infra* Part II.A. And even where student cyberspeech strays beyond that category to include hostile content, students *only* fall within schools' regulatory authority under *Tinker* when the cyberspeech has a close nexus to the school, *infra* Part II.B, *and* when their speech is so hostile that it will cause a *substantial* disruption to student learning, *infra* Part II.C.

Finally, and relatedly, the Third Circuit's fear that school "regulators might seek to suppress [online, off-campus] speech they consider inappropriate, uncouth, or provocative" does not compel the adoption of the Third Circuit's categorical

rule. Pet.App.32a. As *Amici* explain below, schools cannot constitutionally regulate speech under the relaxed *Tinker* standard when the cyberspeech comprises bona fide commentary or critique, *infra* Part II.A, or when it lacks a close nexus to the school, *infra* Part II.B, or when it is not reasonably likely to cause substantial disruption to the student-learning environment, *infra* Part II.C.

II. The First Amendment Permits Schools To Regulate Constitutionally Protected, Online Speech Under The *Tinker* Framework Only In A Narrow, Well-Defined Category Of Circumstances

We respectfully submit that this Court should adopt a rule under which schools can constitutionally regulate student online speech under *Tinker*'s relaxed framework only if they can satisfy three specific, well-defined elements. First, the student's online speech must not consist of bona fide commentary on matters of public concern, or about the school, its administrators, or its teachers. *Infra* Part II.A. Second, the student online speech must bear a close nexus to the school. *Infra* Part II.B. Finally, the student online speech must substantially disrupt the school's student-learning environment. *Infra* Part II.C.

A. The Online Speech Must Not Involve Core First Amendment Activity, Such As Bona Fide Commentary On Matters Of Public Concern, The School, Or School Officials

1. The First Amendment protects from state regulation "the right to free speech," except in "carefully restricted circumstances." *Tinker*, 393 U.S. at 513; *see W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 633–34 (1943). The First Amendment protects children as well as adults, although "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)); Lee, *supra*, at 878. So while students are sometimes subject to more speech restrictions than adults, "it can hardly be argued that [they] . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; Holden, *supra*, at 243.

Historically, the First Amendment's purpose was to protect "individual freedom of mind in preference to official disciplined uniformity" in thought by government "official[s]," whether "high or petty." *Barnette*, 319 U.S. at 637, 642; *accord Tinker*, 393 U.S. at 511; *Morse*, 551 U.S. at 423 (Alito, J., concurring). The First Amendment's core includes protecting dissent and protest about government action. Waldman, *supra*, at 592. This Court's First Amendment jurisprudence thus reflects a deep

distrust of government censorship, since the government may stifle certain messages not out of legitimate concern about the harm that the speech might cause, but out of an illegitimate dislike for the message. *See* Holden, *supra*, at 287; Doering, *supra*, at 660; *accord Morse*, 551 U.S. at 423 (Alito, J., concurring). Political speech about matters of public concern, including speech criticizing public officials, lies "at the core of what the First Amendment is designed to protect." *Morse*, 551 U.S. at 403 (citation omitted); *see Tinker*, 393 U.S. at 505–06.

"In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views," without regard to whether those views conflict with the "particular opinion[s]" of their schools. *Tinker*, 393 U.S. at 511. Thus, students possess a robust First Amendment right to "comment[ ] on any political or social issue," *Morse*, 551 U.S. at 422 (Alito, J., concurring), and to offer bona fide critique of the government and government officials—including their school, and administrators and teachers, *see* Holden, *supra*, at 287, 289; Waldman, *supra*, at 592, 659. Public schools "are, after all, organs of the State," which means that school administrators and teachers are also government officials. *Morse*, 551 U.S. at 423 (Alito, J., concurring); *accord* Holden, *supra*, at 287; Waldman, *supra*, at 592, 659 n.3. Further, the classroom is often the first experience of the power of government that many students have, and so the

school is a particularly influential public institution in the lives of students. Holden, *supra*, at 243. And, of course, bona fide critiques of the school administration, school policy, or school officials, are critiques of the government itself, firmly within the First Amendment's core. *Id.* at 293; Waldman, *supra*, at 594; *Morse*, 551 U.S. at 422 (Alito, J., concurring).

2. In our view, schools have no authority under the more-permissive *Tinker* framework to regulate students' bona fide commentary when published online. The *Tinker* rule addresses the narrow problem of disruption of the student-learning environment on campus, including from students' core political speech. However, that rule would undermine significant First Amendment values if this Court were to apply it to bona fide commentary from students on the Internet. Stated differently, student cyberspeech comprising such bona fide commentary falls within a constitutional "safe harbor" from schools' regulatory authority under *Tinker*.

As this Court held in *Tinker*, when students are *on campus*, schools may, under some circumstances, have more leeway to regulate even the high-value speech of students—that is, speech comprising matters of public concern or bona fide critiques of the school or its officials. *See* Waldman, *supra*, at 596; Holden, *supra*, at 250–51; Doering, *supra*, at 642–43; *accord Tinker*, 393 U.S. at 513. Specifically, under *Tinker*, schools may regulate even this high-value student speech if it "materially disrupts classwork or

involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. For example, a student engaging in political speech at an inappropriate time—such as during an algebra lecture, *see* Waldman, *supra*, at 594–95—could face school sanction, whereas the school cannot punish non-disruptive political speech, such as the black armbands of *Tinker*, Holden, *supra*, at 250–51.

When students' bona fide commentary or critique moves *online*, schools lose the authority to regulate it under the relaxed *Tinker* framework. In other words, default First Amendment doctrine applies when schools attempt to regulate students' off-campus cyberspeech comprising bona fide commentary on matters of public concern, on the school, or about school officials. *See* Holden, *supra*, at 280; Waldman, *supra*, at 613. Giving school officials power to censor bona fide online commentary raises serious questions about the suppression of student dissent from the school's chosen educational mission. *See* Waldman, *supra*, at 592; *accord Morse*, 551 U.S. at 423 (Alito, J., concurring). It invokes the specter of signaling to students that they cannot express bona fide disagreement with what is happening at school, even when they use their own device at home, not on school time. Waldman, *supra*, at 592.

This Court has a long history of protecting such high-value speech, including bona fide critiques and commentary. *Accord Morse*, 551 U.S. at 422 (Alito, J., concurring) (joining the majority opinion with the

understanding that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue"). A non-exclusive list of factors determining what counts as bona fide commentary might include whether the student speech touches on politics, social issues, school policies, individual class policies, and the like. Waldman, *supra*, at 653–54. By contrast, speech that simply targets a particular individual for personal attack would generally not amount to bona fide commentary. *Id.* at 657–58; *see* Holden, *supra*, at 280.

High-value, off-campus student cyberspeech does not generally cause the kinds of disruption recognized in *Tinker* as justifying stronger speech regulation of students on campus. *See Tinker*, 393 U.S. at 509, 513; *see also infra* Part II.C. While "much political and religious speech might be perceived as offensive to some," *Morse*, 551 U.S. at 409, including to school officials, that offense cannot justify restricting that speech, Waldman, *supra*, at 654; *see* Holden, *supra*, at 279. Or, as *Tinker* explained, "discomfort and unpleasantness . . . always accompany an unpopular [political] viewpoint," yet that does not authorize "school officials" to "prohibit[ ] [that] particular expression of opinion" by students. 393 U.S. at 509; Lee, *supra*, at 835–36. To hold otherwise would allow schools to become "enclaves of totalitarianism," possessing "absolute authority over their students," even when expressing bona fide critique online and off

campus. *Tinker*, 393 U.S. at 511; Waldman, *supra*, at 592.

Further, student online speech that offers bona fide critiques of the school or its officials may highlight questionable behavior by these government actors, informing the public about problems at the school. Waldman*, supra*, at 654. This, in turn, could expose actual wrongdoing at the school. Holden, *supra*, at 287; Waldman, *supra*, at 654. Students, just like adults, deserve the right to speak and expose government wrongdoing—by expressing bona fide critique online—when school authorities misbehave. Holden, *supra*, at 287, 291–92. And students only have that right when engaging in such critique triggers the default First Amendment protection, rather than *Tinker*'s relaxed standard. *Id.* at 287, 291–92.

3. While default First Amendment rules apply to student off-campus cyberspeech comprising bona fide commentary or critique, *supra* Part II.A.2, schools may have more leeway to regulate student online speech that has *lower constitutional value*, or that falls outside the First Amendment's core. Such lower value speech includes, for example, cyberspeech that is bullying to other students or harassing to teachers. Waldman, *supra*, at 651.

This Court's student-speech jurisprudence already recognizes that schools may, under some circumstances, have more authority to regulate the

speech of students when that speech has lower constitutional value. In *Morse*, for example, this Court held that a school could prohibit a student from displaying a banner reading "BONG HiTS 4 JESUS" because this Court determined that the banner "celebrat[ed] drug use," rather than offering bona fide commentary on the Nation's drug policy. 551 U.S. at 401–03, 409; *see* Waldman, *supra*, at 598–99 n.43, 659; Holden, *supra*, at 256–57. This Court explained that "part of a school's job is educating students about the dangers of illegal drug use," and that job is undermined by "[s]tudent speech celebrating illegal drug use at a school event." *Morse*, 551 U.S. at 408; *accord Fraser*, 478 U.S. at 680 (emphasizing "[t]he marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case").

To be sure, when considering whether a school may regulate specific student online speech, complications will sometimes arise in separating hostile speech from legitimate, bona fide commentary. Waldman, *supra*, at 651. The school and courts may face "difficult[ies]" when "conducting the[ ] inquiries" needed to classify student online speech as either bona fide commentary (subject to school regulation only under default First Amendment principles) or as cyberbullying (subject to such regulation under the broader *Tinker* standard). *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). This is especially so when student online speech both contains cyberbullying or other harassing content *and also* expresses a bona

fide opinion or comments on a political, social, or school-related issue. Waldman, *supra*, at 598 n.43, 659; Holden, *supra*, at 287. Yet, even in those circumstances, schools should still be able to regulate the hostile *portion* of that speech under *Tinker*—particularly where that portion dominated the mix—assuming the other two elements of our proposed test are satisfied. *Infra* Part II.B–C. Those other two elements themselves would reduce the frequency of complications caused by such combined speech, since they further cabin and clarify the scope of schools' authority here, striking the appropriate balance between free-speech rights of students and the legitimate interests of the school. Waldman, *supra*, at 651.

B. The Speech Must Also Have A Close Nexus To The School

When student online speech strays beyond bona fide commentary to include cyberbullying or other harassing content, *see supra* Part II.A, the school may then have the power to regulate that speech under *Tinker* if the speech has a close nexus to the school. Student cyberspeech may satisfy this close-nexus element if the content of the speech sufficiently relates to the school, or if it is reasonably foreseeable that the speech would reach the school, or if the student speaker intended the speech to reach the school.

This close-nexus element is necessary to confine schools to their proper role in society. Waldman, *supra*, at 655; Lee, *supra*, at 884. The Constitution entrusts parents or guardians, not school officials, with the primary duty to oversee student cyberspeech and take appropriate corrective action in response. *See* Waldman, *supra*, at 594; Holden, *supra*, at 240. Without a robust close-nexus requirement to enforce these boundaries, schools risk becoming roving commissions of student speech, encroaching on the prerogatives of the family to raise students as full members of society. Waldman, *supra*, at 654–55.

Off-campus student cyberspeech may satisfy this close-nexus element in three scenarios, in appropriate cases. First, the content of the online, off-campus speech may sufficiently relate to the school. Waldman, *supra*, at 655; Holden, *supra*, at 284, 289. Second, there may be a reasonable foreseeability that the off-campus cyberspeech would reach school grounds. Waldman, *supra*, at 655; Holden, *supra*, at 284, 289; W. Black, *supra*, at 552. Third, the student speaker may intend the cyberspeech to reach the campus environment or, in other words, purposefully direct the cyberspeech there. Waldman, *supra*, at 655; Holden, *supra*, at 284, 289; *see* Doering, *supra*, at 671; W. Black, *supra*, at 552.

The need to demonstrate this close nexus between the student online speech and the school itself—a need met by each of these three scenarios—reflects the commonsense understanding that the more

removed from campus the speech is, the more there is reason to doubt the sincerity of the school's efforts to regulate it. Holden, *supra*, at 283, 285. Therefore, the close-nexus element ultimately connects online student speech to the school's legitimate sphere of authority, potentially justifying the school's regulation under the *Tinker* standard. Waldman, *supra*, at 625; Doering, *supra*, at 637; *accord* Holden, *supra*, at 283.

Certain factors may indicate the presence or absence of the close-nexus element, depending on the specific factual scenario presented in a given case. For example, a student may send the cyberspeech to another student only in an email or text, under the reasonable belief that the recipient will not distribute it further. *See* Waldman, *supra*, at 623; W. Black, *supra*, at 552. Or the student may post the speech to a social-media site under the reasonable belief that access to the site will remain limited and apart from the school environment, such as a private Facebook Group with a very small number of members who all lack school ties. *See* Holden, *supra*, at 284, 289. In contrast, if the student affirmatively invites a large number of fellow students to join in the cyberbullying—perhaps by inviting them all to a Facebook Group showcasing the speech—that would likely satisfy this close-nexus element. Holden, *supra*, at 284, 289, 295; Lee, *supra*, at 883–84. So too would the student-speaker accessing the online speech on campus itself, such as by logging onto that Facebook Group from a school computer used by

multiple students. Waldman, *supra*, at 658. That said, the accidental or inadvertent transmission of student cyberspeech to campus would almost certainly fail the close-nexus element. Holden, *supra*, at 284, 289. So, for example, if a student's sibling emailed that student's private blog to a teacher—either to embarrass the student, or even by sheer mistake—that student would not have engaged in speech falling within the school's authority under *Tinker*. *See* Waldman, *supra*, at 622–23; Holden, *supra*, at 283–84.

C. And The Speech Must Be Reasonably Likely To Cause A Substantial Disruption To The Student-Learning Environment

Finally, assuming the other two elements are met, *supra* Part II.A–B, the school may regulate student online speech under the relaxed *Tinker* framework only if the speech would substantially disrupt the school's student-learning environment.

1. A school's legitimate interests in regulating student speech differ in important respects as between on-campus speech and off-campus online speech.

With respect to *on-campus* student speech, this Court's student-speech cases recognize two distinct interests that afford schools greater regulatory authority over this speech. Waldman, *supra*, at 595–97, 659; Holden, *supra*, at 290–91. First, as

articulated in *Tinker*, schools may restrict on-campus speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 512; Waldman, *supra*, at 596–97; *see* Holden, *supra*, at 291; Doering, *supra*, at 673. Second, this Court held in *Fraser*, 478 U.S. 675, and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), that schools may restrict on-campus student speech when the restrictions themselves teach students the line between appropriate and inappropriate expression, Waldman, *supra*, at 597–98.

With respect to student *online* speech, however, we propose that *only* the school's interest in protecting the student-learning environment—the first interest discussed above, comprising protection of classwork from substantial disruption, as well as preventing invasion of students' rights—could support a school's broader, *Tinker*-based authority to regulate. Waldman, *supra*, at 655–56; Lee, *supra*, at 886. The school's legitimate need to protect the student-learning environment from substantial disruption, including disruption from hostile speech, does not depend on the *origin* of that disruption. Waldman, *supra*, at 655; Doering, *supra*, at 667. That is, because this legitimate school interest is not tied to geographic boundaries, hostile student cyberspeech may impair this interest just as much as hostile student speech on campus. Waldman, *supra*, at 655. In marked contrast, the school's interest in teaching students appropriate expression—the second interest

discussed above—*does* generally end at the campus boundaries, since students' parents or guardians assume the authority to regulate appropriate student expression once students leave the school grounds. *Id.* at 655–56.

2. Cyberbullying and other online harassing speech may, when sufficiently severe, substantially disrupt the student-learning environment, thus justifying school regulation of such speech under *Tinker*. The disruptive potential of this hostile cyberspeech is all the more apparent in light of the nature of online communication: it takes far less effort than its traditional on-campus counterparts, *see Packingham*, 137 S. Ct. at 1735; it may be seen by hundreds (or even thousands) of fellow students in the blink of an eye, Holden, *supra*, at 287; *accord* Pew Research Center, *Teens' Social Media Habits and Experiences*, *supra*; Pew Research Center, *Teens, Social Media & Technology 2018*, *supra*; it reverberates indefinitely across the Web, Waldman, *supra*, at 592; Lee, *supra*, at 858–59; and it may be harsher in tone, given the Internet's disinhibition effect, Waldman, *supra*, at 592; *see also id.* at 647–49.

Consider cyberbullying. This is cyberspeech that is ridiculing, disparaging, and abusive, directed at a "target student" and assuming an unforgiving, "everywhere and all the time" quality. *See id.* at 649–50. Cyberbullies often pair their harassing speech with an invitation to other student peers to publicly join in, magnifying the speech's injurious impact.

Holden, *supra*, at 238, 280, 298; W. Black, *supra*, at 554. And this speech frequently causes great harm to its victim, including by undermining the target's psychological and emotional well-being. Holden, *supra*, at 295. This all, in turn, impairs the target student's ability to concentrate in class, to operate at his or her normal academic potential, and to learn effectively what the school is attempting to teach. *Id.* at 290; Lee, *supra*, at 886.

Online harassment of teachers and school administrators can also disrupt student learning. While online harassment of these school officials ranges in severity, *see* Waldman, *supra*, at 598–99 & n.43; Holden, *supra*, at 279, its more extreme versions may significantly undermine a teacher's authority with the students who observed this hostile speech, such that the teacher cannot adequately manage and control his or her classroom, degrading the effectiveness of the learning environment, Waldman, *supra*, at 654–55, 658–59. Further, severe forms of harassment may cause emotional harm to the targeted teachers. *Id.* That harm could then impair the teachers' abilities to do their jobs—teaching academic material to students—thus directly disrupting student learning en masse. *Id.* Such online harassing may do so much damage to a teacher that it undermines students' learning environment, implicating the school's legitimate concerns. Holden, *supra*, at 292.

Truly disruptive examples of cyber harassment toward school officials are not hard to find. *See* Waldman, *supra*, at 620–29. Consider the case of an algebra teacher targeted by a student's website, which website severely attacked her appearance, repeated "Fuck you . . . you are a bitch" 136 times, graphically depicted her being murdered, and requested money to pay for the teacher's assassination. *Id.* at 620–22 (discussing *J.S. v. Bethlehem Sch. Dist.*, 807 A.2d 847 (Pa. 2002)). This teacher suffered severe emotional harm, ultimately resulting in her taking medical leave for the remainder of the school year, and requiring the school to hire three substitute teachers. *Id.* at 621. Causing the students in that algebra class to acclimate to four different algebra teachers during a single school year is unquestionably a substantial disruption of their student-learning environment— and the direct cause was hostile cyberspeech.

Importantly, because student online speech must cause *substantial* disruption to the student-learning environment before school regulation may occur under *Tinker*, not all hostile cyberspeech will fall within the school's power to regulate under this broader standard. The high *substantial*-disruption threshold prevents schools from reflexively or automatically regulating under *Tinker* harassing student cyberspeech that, although possessing some hostility, also expresses bona fide critique of the school or its officials. Waldman, *supra*, at 654–56, 659; Holden, *supra*, at 292–93. And it offers more

protection for immature student cyberspeech that, while offensive, falls short of the cruelty typifying cyberbullying. *See* Holden, *supra*, at 292–94; Waldman, *supra*, at 624–25; *accord* Holden, *supra*, at 279. This is a speech-protective feature of this final element, designed to provide students with "breathing space" if they make mistakes online.

* * *

In all, *Amici* respectfully submit that their three-element test strikes the proper balance between protecting students' broad First Amendment right to engage in bona fide commentary and critique online and schools' legitimate need to protect the student-learning environment from hostile cyberspeech and other improper disruption. Should this Court adopt *Amici*'s approach, we respectfully submit that this Court should thereafter reverse the Third Circuit's judgment and remand to the lower courts to apply this test in the first instance. *Amici*, again, take no position on the proper application of their test on remand to Respondent's cyberspeech here.

CONCLUSION

This Court should reverse the judgment below and remand the case for further proceedings.

Respectfully submitted,

SARAH E. CRANDALL
TROUTMAN PEPPER
HAMILTON SANDERS LLP
1001 Haxall Point,
15th Floor
Richmond, Virginia 23219

March 2021

MISHA TSEYTLIN
Counsel of Record
KEVIN M. LEROY
CHRISTOPHER VERDUGO
TROUTMAN PEPPER
HAMILTON SANDERS LLP
227 W. Monroe,
Suite 3900
Chicago, Illinois 60606
(312) 759-5947
misha.tseytlin@
troutman.com