

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MAHANoy AREA SCHOOL DISTRICT,)
)
) Petitioner,)
)
) v.) No. 20-255
)
B.L., A MINOR, BY AND THROUGH HER)
)
FATHER, LAWRENCE LEVY, AND HER)
)
MOTHER, BETTY LOU LEVY,)
)
) Respondent.)
- - - - -

Pages: 1 through 114
Place: Washington, D.C.
Date: April 28, 2021

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10 - - - - -
11
12 Washington, D.C.
13 Wednesday, April 28, 2021
14
15 The above-entitled matter came on
16 for oral argument before the Supreme Court of the
17 United States at 10:00 a.m.
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9 the Respondent.
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 20-255,
5 Mahanoy Area School District versus B.L.

6 Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE PETITIONER

9 MS. BLATT: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Tinker should apply off-campus for
12 three reasons. First, such speech can cause
13 on-campus disruption. Second, Respondents'
14 approach would create chaos. And, third, a
15 school nexus requirement and Tinker's
16 substantial disruption test guard against abuse.

17 First, off-campus speech, particularly
18 on social media, can be disruptive. The
19 Internet's ubiquity, instantaneous and mass
20 dissemination, and potential permanence make the
21 speaker's location irrelevant. Yet, the
22 decision below arbitrarily treats location as
23 dispositive.

24 Second, Respondent concedes schools
25 can address off-campus speech, but they propose

1 an administrative nightmare where the sheer
2 complexity heightens the risk of calamitous
3 error. First, a seven-part test would define
4 the school environment. Second, then one would
5 check if the off-campus speech fits within five
6 separate First Amendment doctrines that have
7 never been defined in the school context.
8 Tinker would mystifyingly toggle in and out of
9 coverage as kids move about today. This Court
10 should not substitute the 20-year status quo of
11 applying Tinker off-campus.

12 Third, schools cannot target political
13 and religious speech. Tinker applies off campus
14 only when the student targeted both the school
15 audience and a school topic. And, more broadly,
16 this Court can clarify Tinker's reach both on
17 and off campus.

18 It is irrelevant that critical or
19 unpopular speech is the but-for cause of
20 substantial disruption. The speech itself must
21 be culpable. It must inherently compromise
22 school functions, like organizing lockouts. Or
23 the speech must objectively interfere with the
24 rights of others, like severe bullying.

25 But, if listeners riot because they

1 find speech offensive, schools should punish the
2 rioters, not the speaker. In other words, the
3 hecklers don't get the veto. Schools' special
4 needs are limited to teaching kids how to think,
5 not what to think.

6 I welcome your questions.

7 CHIEF JUSTICE ROBERTS: Counsel, you
8 said that the schools can't regulate political
9 or religious speech but -- but also that the
10 schools can regulate speech from off campus that
11 is directed at the school.

12 So what do you do with political or
13 religious speech that is directed at the school?
14 You know, a sign the student is carrying around
15 off campus that says don't approve the school
16 bond funding referendum. Where -- how do you
17 balance the -- the one situation against the
18 other?

19 MS. BLATT: Well, that -- that speech
20 would not come within the school's regulation
21 even remotely because it would fail both nexus
22 and Tinker. It fails the nexus case because
23 it's not directed to a school audience. That's
24 the public. And it has nothing to do with a
25 particular school. It's just not a school

1 topic. So, under our approach -- and I think
2 this is the government's approach too; it's
3 identical -- you go to two steps, either of
4 which is easier for a court to handle in terms
5 of protecting free speech.

6 One, make sure the audience is the
7 school and the topic has to be about the school.
8 And if it's easier, go ahead and jump to Tinker
9 and say that no matter how much offense someone
10 takes to that speech, that's not a substantial
11 disruption just because listeners are offended.

12 CHIEF JUSTICE ROBERTS: Well -- well,
13 let's -- let's say that the -- the -- the
14 protesters don't approve the school referendum
15 because the school is -- is awful or because Ms.
16 Johnson is -- is teaching at the school --

17 MS. BLATT: So --

18 CHIEF JUSTICE ROBERTS: -- and --
19 and -- and it's -- it's -- and it's put out by
20 somebody on their -- as a Snapchat, so it
21 certainly reaches the school audience.
22 Political speech that's directed at the school.

23 MS. BLATT: Yes. So you can have --
24 that would be a school audience, and Ms. Johnson
25 is a school topic, so it's a nexus test, and the

1 reason why is that could never satisfy Tinker
2 and that is because, if it just delivers
3 reaction, speech that's critical, even ridicule
4 of a school, schools cannot punish it because of
5 their offense or their reaction to it.

6 They could punish the manner. So, in
7 other words, if a -- if a -- if a -- if a female
8 student wants to say, Mr. Jones keeps calling on
9 boys, that's fine. She can text about it, she
10 can social media about it. She can't picket the
11 teacher's house or stand up in class and say it
12 because that inherently interferes with the
13 school's ability to teach. But she's entitled
14 to her views and to express them.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Ms. Blatt, how -- how do you separate
21 that? What if a student said some of those same
22 things that the Chief Justice posited but in a
23 social studies class? How would you separate
24 that from -- then from just participating in
25 class or -- as opposed to doing the exact same

1 thing or saying the exact same thing off campus?

2 MS. BLATT: Yeah. So Tinker, again,
3 assuming it fits the nexus test, Tinker is
4 always going to be context-specific, and whether
5 teachers or school officials can forecast a
6 reasonable disruption depends on when and where
7 the student speaks, how many people hear it, and
8 what the student said.

9 And when and where in the classroom is
10 going to be very different as opposed to a
11 sleepover. But now, when it's on social media
12 to 200 people or even a thousand people, there's
13 no question that the effect might be different.
14 But, in your case, if you want to say, Ms.
15 Johnson, you're a terrible teacher, she should
16 do that in office hours or on social media, not
17 in the middle of class. That's disruptive,
18 can't do that, that interferes with the -- with
19 the instruction of the classroom.

20 JUSTICE THOMAS: So you did say -- you
21 mentioned context and you said that, well, the
22 sleepover is different from school. You
23 suggested that. And then you did mention social
24 media.

25 But aren't we at a point where, if

1 it's on social media, where you post it on
2 social media doesn't really matter? You could
3 do it in class, algebra class, or you could do
4 it at a sleepover and say the exact same thing
5 about Ms. Johnson. It's -- so how would that
6 make any difference, where you post it?

7 MS. BLATT: Well, that's precisely
8 correct. When it comes to the Internet, things
9 like time and geography are meaningless, and it
10 makes absolutely no sense whatsoever to say that
11 the same speech is somehow within the school's
12 regulation if it's one foot on campus or one
13 foot off campus or at the Starbucks or at the
14 CVS or in your car or on the school bus. The
15 Internet is ubiquitous. It -- it -- it just
16 doesn't have a geography.

17 JUSTICE THOMAS: So why does it have
18 to be about the school? Can't there be comments
19 about other hot-button issues or about current
20 controversies, like protests or Black Lives
21 Matter, Antifa, or Proud Boys or something like
22 that, people can take sides that are just as
23 disruptive in the school setting as comments
24 about Ms. Johnson?

25 MS. BLATT: The difference is from

1 Tinker itself. Schools are not in the business
2 of teaching kids what to think, Justice Thomas.
3 You're entitled to think whatever you want about
4 Israel or race or Black Lives Matter.

5 Now it's a different thing if you take
6 something that's political speech, like the
7 Confederate flag alone, it communicates nothing.
8 But, if you take that speech and terrorize a
9 black student with it, then the message is, I
10 don't want you here at the school because you're
11 black.

12 That's very different than just a
13 Confederate flag standing alone. I don't know
14 what that communicates. I need to know more
15 about context. But it's inconceivable that
16 talking about a wide variety of religious or
17 political speech, unless you take it in a way
18 that uses that as a weapon to terrorize a
19 particular student or teacher, it is off limits,
20 it has been off limits since 1969. And the
21 other side is just wrong to suggest that schools
22 somehow are the Gulag on campus. That has never
23 been the rule since -- since Tinker, and in
24 2001 --

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Good morning. I -- I
3 read Tinker, and Tinker seems to say that -- in
4 the context of a student protest in school at
5 least, school, you cannot punish this unless
6 there is material and substantial disruption or
7 you invade the rights of other students. You
8 cannot.

9 It doesn't say if it does those things
10 you can punish it. It says you can't unless.
11 And the issue here seems, does that apply off
12 campus? Why not? After all, if I look at the
13 case here in the record, is there in the record
14 something that shows that what this young woman
15 did -- I mean, she used swear words, you know,
16 unattractive swear words, off campus.

17 Did that cause a material and
18 substantial disruption? I don't see much
19 evidence it did. And if swearing off campus
20 did, I mean, my goodness, every school in the
21 country would be doing nothing but punishing.
22 And it certainly didn't help others -- I mean
23 disrupt others. It didn't hurt others as far as
24 I'm aware, as far as I can see in the record.

25 So why isn't that the case? I mean,

1 sure, if you exceed Tinker -- unless you meet
2 Tinker, you can't punish it it, at least in the
3 context of protests, and, here, pretty clearly,
4 it didn't satisfy what Tinker says is necessary
5 to satisfy.

6 MS. BLATT: So I think it's fair to
7 have the approach that the concurring judge
8 disallowed, which is, I don't really need to
9 talk about any of this because the school failed
10 Tinker, but the Third Circuit said it was
11 dispositive, it didn't matter what she said, she
12 could have done this to a thousand people every
13 night of the season.

14 JUSTICE BREYER: All right. You want
15 to review the Third Circuit. That's what's
16 mystifying me. The Third Circuit says Tinker
17 doesn't apply. If Tinker doesn't apply, they
18 can punish more, not less, because Tinker puts
19 the limits on what you can punish in school.
20 You'd think a fortiori outside of school.

21 MS. BLATT: So what is mystifying
22 about the Third Circuit and the other side's
23 brief is that we think Tinker faithfully
24 applied, and this Court has not had a Tinker
25 decision since Tinker, so I think it would be

1 helpful to explain that substantial disruption
2 can't be a direct but-for causation.

3 But more to your point, they say
4 schools can do whatever they want under five
5 separate doctrines. They say look at strict
6 scrutiny. Bullying, I don't know what they say.
7 Extracurricular, I don't know what they say
8 either. Maybe there's a conduct exception,
9 and -- oh, also threats, but let's adapt all of
10 this for the -- for the kid environment.

11 Tinker has been a familiar test for
12 50 -- 51 years, and it is -- in this case, I
13 don't think it's that difficult. The question
14 is, here, she targeted her coaches, the sport,
15 and another teammate's ability to play, and the
16 coach recently forecasted someone who berates
17 with a profane gesture and word, all three of
18 those things is not somebody you'd want at the
19 bottom of the pyramid. And the -- the record
20 was not just the swearing, but it was disrespect
21 for the -- for the -- for the coaches and the
22 entire team and her teammates in connection with
23 the swearing.

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: Ms. Blatt, I

1 understand you to say that schools cannot
2 discipline a student for things that the student
3 says outside the school, not in connection with
4 a school program about subjects such as
5 politics, religion, morality, economics, et
6 cetera, et cetera.

7 The problem is when the student says
8 something that implicates those subjects but
9 links it in some way to a student or a teacher.
10 And what you say is -- and the Solicitor General
11 makes a similar argument -- it matters whether
12 the speech targets the school. I have no idea
13 what it means to target the school.

14 Now let me give you an example to make
15 this more concrete. And since Tinker occurred
16 back during the Vietnam War, it -- it -- it will
17 relate to that.

18 So, during the war, a student says,
19 war is immoral, American soldiers are baby
20 killers, I hope there are a lot of casualties so
21 that people will rise up. Even if that would
22 cause a disruption in the school, I understand
23 you to say the school couldn't do anything about
24 it. Is that right?

25 MS. BLATT: That's correct, that would

1 be a heckler's veto, no can do.

2 JUSTICE BREYER: All right. So now
3 the student says exactly the same thing and he
4 adds, "Our classmate, Johnny Jones' brother, is
5 one of those blankety-blank baby killers."

6 Can the school do something about
7 that?

8 MS. BLATT: So that -- that would turn
9 not on, obviously, where, if it's on the
10 Internet, the location. It turns on, I think,
11 what -- what the Third Circuit originally said
12 in fact -- obviously, it was a decision by you
13 -- that said there has to be a line drawn
14 between somebody taking offense and an actual
15 objective interference with their ability to
16 educate.

17 I'm not sure your example would, but
18 that's what schools have to face every day.
19 When you insult someone, okay, that was not
20 nice, your feelings are hurt, we need to have a
21 conversation.

22 JUSTICE ALITO: Yeah. Well, that's
23 where the --

24 MS. BLATT: You make sure the kids
25 know --

1 JUSTICE ALITO: -- that -- that is
2 where I -- I think there is a problem because,
3 when you tell me that it's -- or you or one of
4 the other -- a very able attorney says it's
5 context-specific, it depends on the facts of a
6 particular case, there are a lot of things you
7 have to consider.

8 I'm really worried about how that is
9 going to be implemented. I think, if we're
10 going to -- if schools are going to have any
11 authority under Tinker outside of school, there
12 has to be a clear rule. That's what I'm looking
13 for.

14 MS. BLATT: Sure. The clear rule has
15 been, I think, under -- under this -- the -- the
16 law or policies in all 50 states and it's
17 certainly in written statutory law in 26 states
18 that the standard for bullying is severe,
19 persistent harassment that interferes, actually
20 prevents that child from getting an education.
21 So being offended is irrelevant. You have to --
22 basically, it has to be very severe and
23 persistent.

24 JUSTICE ALITO: Well, I -- I just
25 don't understand what that means in concrete

1 terms. I'll give you another example. My time
2 is -- is basically up. A student believes that
3 someone who is biologically male is a male, and
4 there is a student who is biologically male but
5 identifies as a woman, has adopted a female
6 name, but the student who has the objection
7 refers to this person by the person's prior male
8 name and uses male pronouns.

9 Can the school do something about
10 that?

11 MS. BLATT: I think, with something
12 like a name, a school could say: Listen, we're
13 going to have -- everybody is going to be called
14 by the name we have on the school records as a
15 matter of decorum. We're going to do that. And
16 if they want, they can just accommodate the
17 person by saying why don't you just call -- call
18 him/her Johnny, or whatever the name is, and
19 just use that and say Johnny's book. I think
20 you just accommodate.

21 But, to answer your question about
22 being -- you know, that's what -- Tinker has
23 been around for 51 years. The federal
24 government has, like, 10 federal agencies that
25 deal with this. Schools have to deal with this

1 every day. They try not to make mistakes while
2 keeping kids from killing themselves because
3 they're bullied.

4 JUSTICE ALITO: All right. Thank you.
5 My time is up.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Ms. Blatt, the
9 problem that I have with Tinker is that I'm not
10 sure it's any clearer a rule than any of the
11 others that you're criticizing.

12 Let me start with just this case. Can
13 you punish the student for cursing at home --

14 MS. BLATT: Absolutely --

15 JUSTICE SOTOMAYOR: -- or at her
16 parents' home?

17 MS. BLATT: -- absolutely not, nor
18 could you do that --

19 JUSTICE SOTOMAYOR: Can you -- can you
20 curse -- can you punish her for cursing in her
21 conversations as she walks to school?

22 MS. BLATT: Absolutely not, although,
23 under Respondent's test, I guess you can. But
24 absolutely not.

25 JUSTICE SOTOMAYOR: All right. Now,

1 if you can't punish them for doing that, you're
2 punishing her here because she went on the
3 Internet and cursed and used a curse word
4 related to what? To her unhappiness with the
5 school and cheering, right?

6 MS. BLATT: Yes, she berated her
7 coaches, the sport, and other teammates --

8 JUSTICE SOTOMAYOR: Well --

9 MS. BLATT: -- and that --

10 JUSTICE SOTOMAYOR: -- we could
11 quibble with that, but my point is, I'm told by
12 my law clerks, that among certain populations --
13 a certain large percentage of the population,
14 how much you curse is a badge of honor. That
15 would surprise many parents.

16 However, if it is true, where do we
17 draw the line with respect to it targeting a
18 school? Kids basically talk to their
19 classmates. Most of their conversation is about
20 school. Most of their exchanges have to do with
21 their perceptions of the authoritarian nature of
22 their teachers and others. And why isn't this
23 any different than just that the coach of this
24 team took personal offense?

25 MS. BLATT: So all those are --

1 JUSTICE SOTOMAYOR: She spent -- she
2 spent a few minutes talking to students,
3 reporting this incident. How is that a
4 substantial disruption, number one? And how is
5 this, the nature of the speech, such that it
6 intends to provoke disrespect when she put it to
7 a page that was supposed to disappear and it was
8 only a classmate taking a snapshot who showed it
9 to anybody?

10 MS. BLATT: Yeah. Well, Justice
11 Sotomayor, I'm not impressed with the
12 snapshot defense -- Snapchat defense because she
13 could do the same thing to a thousand people and
14 say, oops, it disappeared and I'm going to do
15 this every night to my coaches. They don't like
16 it. It's disrespectful. My teammates are
17 afraid of me. I don't really care.

18 And the answer is because she's a
19 cheerleader and it's an extracurricular
20 program where she consented to an extra degree
21 of regulation because she's a school ambassador.
22 It's a self-contained program that teaches not
23 just teamwork but respect for coaches.

24 JUSTICE SOTOMAYOR: Counsel, I note --

25 MS. BLATT: If you're --

1 JUSTICE SOTOMAYOR: -- that the
2 school's ban on cursing is only during the
3 school year, and you did not rely or your
4 teacher did not rely on that prohibition of
5 cursing in its punishment of her.

6 MS. BLATT: Right. These are all --
7 these are all fair points and what was argued in
8 the district court. I will say the district
9 court said it was pretty much fatal to Tinker
10 that she said it off campus. And with all
11 respect, that is a silly, arbitrary, unfounded,
12 has no basis in any common sense. It would be
13 all of a sudden it mattered if she had sent it
14 from the school parking lot? And all of a
15 sudden, the school could look at it and apply
16 Tinker? And we would be having the same
17 conversation in a Supreme Court case. But the
18 fact she sent it at the Cocoa Hut shouldn't
19 matter into the analysis.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Ms. Blatt, it seems to
22 me that your argument that Tinker is the entire
23 analysis may depend on a -- on a version of
24 Tinker that the lower courts really have not
25 adopted, because you say that there can't be any

1 regulation of political or reg -- or regulation
2 of religious speech.

3 But I'll just give you two cases, one
4 where there was a ban on shirts saying "We are
5 not criminals" to protest an immigration bill,
6 another a shirt saying "Homosexuality is a sin."
7 And in both cases, the Court said Tinker allows
8 the school to say that you shouldn't wear those
9 kinds of things to school.

10 Do you think that's clearly wrong?

11 MS. BLATT: It's not. I -- I
12 thought that the -- I'll defer to you. I
13 thought the "Homosexuality is a sin" was fine.
14 The -- the "I am" -- the -- the border shirt or
15 the "We are not criminals" was a fight where it
16 had been -- there was basically a match that was
17 supposed to go off, and when dueling factions
18 were wearing dueling shirts, where gang fights
19 or fights are about to break out, and there was
20 a big dissent and a, you know, concurrence --

21 JUSTICE KAGAN: Yes. So I guess --

22 MS. BLATT: -- about --

23 JUSTICE KAGAN: -- that's what I'm
24 asking about, Ms. Blatt, because I would have
25 thought -- I mean, maybe I -- I did get that

1 holding wrong, but I would have thought where
2 students say, we're going to come in with the
3 Confederate flag or we're going to come in with,
4 you know, Black Lives Matter or homosexuality is
5 a sin or gay pride in ways that the school
6 thinks is going to cause disruption, that the
7 school can ban those if the school is right
8 about that, that, you know, where -- where --
9 where those symbols or -- or speech will cause
10 severe disruption, that the school can say: No,
11 you can't bring your Confederate flag to school
12 tomorrow.

13 MS. BLATT: So, no, I think the -- the
14 actual opposite is true. If you look at the
15 school handbook that we cite, and the New York
16 school handbook says the same thing, the leading
17 case on this is K.D. versus Fillmore. It is a
18 brilliantly -- a brilliant case where the
19 T-shirt was "Abortion is homicide" T-shirt.
20 Kids having abortions were upset. They said it
21 was false because abortion is actually legal.
22 And the school said: Get over it. She -- he is
23 passively wearing the shirt. He's not
24 terrorizing kids with it. He's going about his
25 day. Leave him alone.

1 And that case is cited as the gospel
2 case for heckler's veto. Now, when these kids
3 --

4 JUSTICE KAGAN: So you're saying,
5 Ms. Blatt, that what we should do in this case
6 is just make courts -- you know, tell courts:
7 Look, Tinker is it. It's it on campus; it's it
8 off campus. But, in applying Tinker, you have
9 to allow religious and political speech no
10 matter how disruptive the school -- it -- it
11 will be in the school?

12 MS. BLATT: Unless, as -- as -- as
13 that fact opinion says and as all of the
14 Confederate flags say, when it is used in
15 context to terrorize a student.

16 JUSTICE KAGAN: A particular student,
17 right, but it can't just be we're all bringing
18 our Confederate flags to school and it's going
19 to cause a riot?

20 MS. BLATT: So, if it's -- if there
21 are gang riots and there are -- yes, those cases
22 are all dealing with the Confederate flag is
23 being brought with the backdrop of race riots.
24 There is no question that that is like a
25 fighting word in context, and fighting words

1 aren't protected.

2 JUSTICE KAGAN: Well, now I don't know
3 what you're saying, Ms. Blatt, because first you
4 said a -- a school can't prohibit Confederate
5 flags, even if they're going to be disruptive,
6 and now you say they can.

7 MS. BLATT: So the difference is, when
8 we talk about disruptive, it's a misnomer. You
9 cannot ban T-shirts and symbols because people
10 are offended or they threaten to riot.

11 Now you can in context if you have a
12 very extreme situation where a -- really, the
13 facts are a new black kid arrived at school and
14 they raised a Confederate flag.

15 JUSTICE KAGAN: Okay.

16 MS. BLATT: That --

17 JUSTICE KAGAN: Thank you, Ms. Blatt.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Yeah. I -- I -- I'd
21 like to pick up where Justice Kagan left off.
22 I -- I -- I -- I'm confused. You started off
23 this presentation by saying political and
24 religious speech are absolutely protected, but I
25 think, in -- in response to both the Chief

1 Justice and Justice Kagan, you suggested that
2 there may be limits there as well. Can you
3 explain what your -- your test is?

4 MS. BLATT: Yes. The only limit is
5 where -- that -- that I've seen in any of the
6 case law, is where there are race riots and gang
7 fights and student walkouts. You have a very
8 disruptive volatile environment in the school.
9 So none of this applies to anything to do with
10 the question presented. But if --

11 JUSTICE GORSUCH: So -- so -- so -- so
12 it is a major disruption test with respect to
13 political and religious speech as well?

14 MS. BLATT: It is a major disruption
15 test that takes out the word just because
16 students are offended and feelings are hurt and
17 you're very angry about the speech --

18 JUSTICE GORSUCH: Sure.

19 MS. BLATT: -- dealing with the hurt.

20 JUSTICE GORSUCH: No, it's -- I
21 understand offense isn't enough. But, if
22 there's a major disruption, that -- that is
23 enough.

24 MS. BLATT: It's a major disruption
25 with reasonable. Just because kids say, Ms.

1 So-and-so, we're going to -- we're going to riot
2 if that kid walks in with a Confederate flag.
3 Then you suspend the kids who threaten to riot.
4 You don't suspend the kid with the Confederate
5 flag.

6 JUSTICE GORSUCH: Sure. But, if the
7 school thinks that it's a -- that -- that the
8 kids are reasonably reacting to offensive
9 political and religious speech, then it -- then
10 it can address that issue?

11 MS. BLATT: I would say not offensive.
12 I would use the word terrorizing.

13 JUSTICE GORSUCH: Terrorizing.

14 MS. BLATT: Religious and offensive.

15 JUSTICE GORSUCH: Okay. So --

16 MS. BLATT: Terrorizing.

17 JUSTICE GORSUCH: Terrorizing, all
18 right.

19 MS. BLATT: It has to really -- yeah.
20 It's not that --

21 JUSTICE GORSUCH: And does it make a
22 difference that this case involved an
23 extracurricular activity?

24 MS. BLATT: Yes, with respect to the
25 application of Tinker because of what I said

1 about the goals and you can offend and destroy
2 the program without affecting the school at
3 large. So, here, the student was not in any
4 way -- there was no disciplinary action taken
5 with respect to the school.

6 She was suspended from the cheer team,
7 and I think, under the other side's view, she
8 couldn't have even been asked to write an
9 apology or suspended for one game. And -- and
10 she could do this every night. As long as she
11 waited until the Cocoa Hut to do it, she could
12 berate her coaches all day long. And I think
13 that that's very different. If students want to
14 use swear words, even on the Internet, that's
15 fine. And they can do it with respect to
16 teachers too. It's going to have to rise to the
17 level of harassment.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Thank you, Chief
22 Justice.

23 And good morning, Ms. Blatt. I want
24 to focus on the facts of this case a bit and --
25 and my reaction to it. As you say and I think

1 helpful for you, the context here is a team and
2 a coach, not the school more generally. But, as
3 a judge and maybe as a coach and a parent too,
4 it seems like maybe a bit of over --
5 overreaction by the coach.

6 So my reaction when I read this, she's
7 competitive, she cares, she blew off steam like
8 millions of other kids have when they're
9 disappointed about being cut from the high
10 school team or not being in the starting lineup
11 or not making all league, and just by way of
12 comparison about -- and to show how much it
13 means to people, you know, arguably, the
14 greatest basketball player of all time is
15 inducted into the Hall of Fame in 2009 and gives
16 a speech. And what does he talk about? He
17 talks about getting cut as a sophomore from the
18 varsity team. And he wasn't joking. He was
19 critical 30 years later. It still -- it still
20 bothered him.

21 And I think that's just emblematic of
22 how much it means to kids to make a high school
23 team. It is so important to their lives, and
24 coaches sweat the cuts, and it guts coaches to
25 have to cut a kid who's on the bubble, and --

1 and good coaches understand the importance and
2 they understand the emotions.

3 So maybe what bothers me when I read
4 all this is that it didn't seem like the
5 punishment was tailored to the offense given
6 what I just said about how important it is and
7 you know how much it means to the kids. I mean,
8 a year's suspension from the team just seems
9 excessive to me.

10 But how does that fit into the First
11 Amendment doctrine or does it fit in at all in a
12 case like this?

13 MS. BLATT: Well, it -- it -- I don't
14 think it does because the -- it's analytically
15 distinct whether the coach could act at all
16 versus due process considerations about the
17 extent of the punishment and I think the rule --
18 but, I mean -- and also, this is the -- the
19 remand point, the district lost on this issue
20 and the Third Circuit did not go on this
21 rationale because there was evidence of the --
22 the team cohesion.

23 But I -- I think, you know, whether --
24 I understand that Michael Jordan was upset, but,
25 at some point, presumably, he was respectful to

1 his coaches and there's a line that coaches
2 always have to -- coaches have to know their
3 team and know what -- what works. They have to
4 act in the best interests of all teammates,
5 team -- team participants, and one of the
6 things you learn --

7 JUSTICE KAVANAUGH: But, in the
8 moment -- in the moment, you know that kid's
9 going to be upset, and -- and you -- you know,
10 you -- you -- you recognize that. I'm not
11 saying this is justified necessarily. I'm not.
12 But -- but a year seems like a lot.

13 MS. BLATT: Well, I mean, again, then
14 you're going to be in the business of --

15 JUSTICE KAVANAUGH: I agree. That's
16 the problem, I agree.

17 MS. BLATT: But I don't think --

18 JUSTICE KAVANAUGH: So the -- so the
19 do -- on the legal issue, the do no harm, I -- I
20 think legally speaking, you know, we should try
21 to do no harm here, your -- your approach would
22 be to just say the Tinker standard applies
23 regardless of the price -- precise location of
24 the speech and just remand? Is that enough?

25 MS. BLATT: That's absolutely enough.

1 JUSTICE KAVANAUGH: Thank you.

2 MS. BLATT: Yes, and I think -- yes.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 JUSTICE BARRETT: Good morning, Ms.
6 Blatt. So let me -- let -- let's assume that I
7 think about the case in the following way, you
8 know, that high school students enjoy the same
9 free speech rights as everyone else. Tinker
10 acknowledged that in the context of the -- once
11 you cross the schoolhouse gate, those rights are
12 somewhat reduced because of the school
13 environment and the need to, you know, control
14 and avoid substantial disruption, but they're
15 not lost altogether, but that nothing in Tinker
16 suggests itself that it applies outside of the
17 school environment.

18 And so what you're asking us to do is
19 to extend the school's authority that Tinker
20 acknowledges outside of the school environment.
21 And I think you have good policy reasons for
22 doing that. You know, I think harassment,
23 bullying, and I think threats of violence
24 against the school and cheating are all things
25 that would be of concern.

1 I don't see a lot of doctrinal support
2 for saying that Tinker applies, you know,
3 that -- that -- that schools' increased
4 authority applies. Tell me what you think
5 doctrinally your best authority is.

6 MS. BLATT: Sure. The 100 years of
7 case law that was unambiguous that schools could
8 regulate anything off campus --

9 JUSTICE BARRETT: Well --

10 MS. BLATT: -- that --

11 JUSTICE BARRETT: -- let's -- let's
12 assume I -- I -- I don't think there's -- I
13 think I read the history a little bit
14 differently. What about in our precedent? Do
15 you see anything in our precedent that really
16 requires this extension of Tinker?

17 MS. BLATT: Well, all the school
18 speech cases -- there's only four of them -- are
19 tailored to the school interest at stake, and so
20 the question is in terms of what need -- you
21 know, need to protect the school.

22 And if we're talking about a narrow
23 category of speech that actually -- and what
24 here is is threatening the extracurricular
25 program, so that doesn't fall into your cheating

1 or bullying. It is speech that destroys the
2 morality of team cohesion.

3 JUSTICE BARRETT: Well, but I think
4 actually, Ms. Blatt, that's part of the problem,
5 because, you know, you point out that the other
6 side, past their proposed cuts, has its problems
7 at the edges because of the Internet and remote
8 learning and all of that.

9 But your three-part test certainly has
10 its own issues. You know, it's not going to be
11 easy to apply, and I think a lot of the
12 questions that you've gotten today show a
13 concern, including in this case, that schools
14 abuse this authority and that they punish things
15 that maybe don't cause substantial disruption or
16 political speech or religious speech that they
17 shouldn't. Or, you know, I think you've heard a
18 lot of skepticism about whether the speech at
19 issue in this case actually caused substantial
20 disruption.

21 So I -- I -- I -- I guess my concern
22 is, if we have two -- two tests being offered,
23 or on offer, neither one is going to be easy to
24 apply in all cases, they'll both have hard
25 cases, which one ought we apply? Which one is

1 the more protective of speech?

2 And -- and let me ask you this:

3 Insofar as the policy concerns go, nothing in
4 the First Amendment prohibits soft discipline,
5 right, like, in this case, the cheerleader
6 coming to school and being told -- rather than
7 being kicked off the team and punished, being
8 told we're aware of the Snapchat, this is not
9 good for team cohesion, this is not respectful
10 of your coaches, if we see any of this kind of
11 behavior on the field or at practice or
12 undermining morale, there is going to be a
13 consequence but not imposing one yet. That
14 would be okay, right?

15 MS. BLATT: Yes, but there are cases
16 where the student was asked to apologize and the
17 student sued the coach and the school and said,
18 I don't have to say I'm sorry. I have a First
19 Amendment right not to say I'm sorry.

20 JUSTICE BARRETT: Okay. My time is
21 up. Thanks.

22 CHIEF JUSTICE ROBERTS: A minute to
23 wrap up, Ms. Blatt.

24 MS. BLATT: And I think this goes to
25 Justice Barrett's question. Your -- your choice

1 is between the familiar Tinker standard that has
2 applied to social media over the last 20 years.

3 Respondents are going to regulate
4 off-campus speech, but they send schools into
5 completely unchartered waters by replacing
6 Tinker with a Frankenstein's monster of First
7 Amendment doctrines all mashed together.

8 Respondents worry about schools
9 suppressing too much speech. But telling
10 schools they can regulate undefined categories
11 of harassment, bullying, and speech inciting
12 violations of school rules invites more
13 suppression. Vague, unfamiliar rules don't work
14 when student welfare is on the line.

15 All this Court needs to hold is that
16 Tinker is not subject to a territorial switch.
17 Under Respondent's view, it would not have
18 mattered had B.L. derided her team and coaches
19 every night throughout the season on 12
20 different social media platforms. Students
21 shouldn't be able to place their speech off
22 limits just by stepping off campus.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Stewart.

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. STEWART: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 Under the Third Circuit's approach,
7 B.L. could send out Snaps from her home every
8 evening disparaging the coaches, her teammates,
9 and the enterprise of cheerleading. Such
10 messages from a member of the squad would
11 have an evident tendency to disrupt the
12 functioning of a school program that depends on
13 and is intended to instill values of team
14 building and mutual support. In situations like
15 these, school officials should be able to
16 intervene to protect the interests of other team
17 members.

18 The Third Circuit's rigid geographic
19 approach is particularly unsound in the context
20 of online speech since there is no meaningful
21 causal link between the place from which an
22 online communication is sent and the likelihood
23 that it will disrupt school operations.

24 I welcome the Court's questions.

25 CHIEF JUSTICE ROBERTS: Mr. Stewart,

1 if you get to the point of considering whether
2 speech is directed at a school, I -- I wonder
3 how you parse that because, you know, teenagers,
4 maybe most of their friends are also their --
5 their classmates. And does that mean that
6 anything that they generally send out directed
7 at their friends has to be considered that it's
8 directed at the school?

9 MR. STEWART: I mean, first, we would
10 say no even for purposes of the first prong of
11 our test, which is, is it school speech?

12 But the second thing we would
13 emphasize is that even if speech is determined
14 to be school speech in the sense that it focuses
15 on the school as such, that doesn't mean that
16 the school can regulate it. That just simply
17 means that the school should have the
18 opportunity to make the showing that the speech
19 is likely to cause substantial disruption of
20 school operations.

21 CHIEF JUSTICE ROBERTS: What about
22 speech -- political speech that involves the
23 school, you know, opposing a school referendum
24 because Ms. Jones is a terrible teacher? Does
25 -- do you categorize that as political speech,

1 which is off limits, or speech directed at the
2 school, which can be regulated?

3 MR. STEWART: I mean, it's a little
4 bit of both. The part that says we oppose
5 the school referendum is very similar to the
6 speech that was at issue in Pickering, the
7 seminal case about the rights of public
8 employees, and the Court said in that case,
9 because there was no close working relationship
10 between the teacher and the school board, there
11 was no likelihood that this would disrupt
12 workplace operations.

13 The part that says Ms. Jones is a
14 terrible teacher, that might take it over the
15 line into school speech. But a single statement
16 like that wouldn't in our view have the capacity
17 to disrupt school operations. If there was a
18 continuing, ongoing, online campaign of virtual
19 harassment or intense disparaging of Mrs. Jones
20 or Ms. Jones, that -- that might be a different
21 situation, but a single negative comment
22 wouldn't qualify.

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Mr. Stewart, should we analyze a --
3 the rules of a team, as Justice Kavanaugh
4 alluded to, as opposed to the general rules that
5 apply to the school population? Is there a
6 difference in how we should treat team members
7 versus just students?

8 MR. STEWART: Yes, I think there is,
9 and if I could say something about what -- a
10 comment that Justice Kavanaugh made in the first
11 part of the argument. I think there -- there is
12 in some sense an intuition that people have that
13 the punishment didn't fit the crime in the sense
14 that the -- the suspension was very severe.

15 But there's another sense in which the
16 punishment did fit the crime; that is, B.L. was
17 suspended from the cheerleading squad, not from
18 school. If the school had suspended her from
19 school, that would have sent the message that
20 this was considered to be unacceptable speech
21 from any student, and that would have been a
22 very difficult showing to make.

23 But the sanction that was actually
24 imposed sent the message that this was
25 unacceptable speech from a member of the team.

1 And I think it's -- it's not limited to the
2 school setting or the team setting, that people
3 who participate in projects or organizations
4 that have as part of their raison d'etre
5 cooperation, team spirit, mutual support, they
6 may have to accept limitations on their speech
7 that couldn't be imposed on the workplace
8 generally.

9 For example, if I --

10 JUSTICE THOMAS: Well, let me -- let
11 me ask -- let me squeeze in one other question
12 real quick. The -- when we talk about material
13 disruption as a basis for preventing or
14 disciplining students who engage in certain
15 speeches or conduct, can you also localize that
16 to the team so that if a team member disrupts
17 the team, that it's okay to discipline that team
18 member, even though you wouldn't normally do it,
19 discipline that person as a member of the
20 student body?

21 MR. STEWART: Yes, absolutely, and I
22 -- I think it would -- it would be impossible to
23 run sports teams at public high schools or, for
24 that matter, public universities if that were
25 not the case. It happens all the time that

1 cheerleaders or student-athletes will do things
2 that disrupt the operations of the team but
3 don't have any larger effect on the school as a
4 whole. And at least so long as the discipline
5 is limited to exclusion from the team or
6 suspension of -- from the team, that that's not
7 a problem.

8 JUSTICE THOMAS: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer.

11 JUSTICE BREYER: As far as I can see,
12 I can't write a treatise on the First Amendment
13 in this case, and so, at the moment, I'm
14 thinking there are only two ways of dealing with
15 it. One, treat it as an example. We can't go
16 beyond that. Look at the record and then
17 decide. Or the other is everyone seems to want
18 some rule, and the rule, I think, might be take
19 Tinker as if it said, which it doesn't, as if it
20 said: School, you do have some authority where
21 there's a substantial injury to -- disruption in
22 the class or somebody's going to be hurt in that
23 school, et cetera.

24 And I would add: But, remember, it's
25 outside the school. And that's primarily the

1 domain of the parents. And even when it's
2 inside the school, you're not a schoolmaster.
3 Judge, be careful. Okay?

4 I can say something like that. Well,
5 what should I do?

6 MR. STEWART: I think the three or
7 four things I would say are, first, no per se
8 rule that off-campus speech is categorically
9 exempt from school regulation.

10 Second, with respect to online speech
11 in particular, the location from which the --
12 the post is sent is more or less irrelevant to
13 the likelihood that it would cause disruption.

14 Third, a school can permissibly
15 conclude, as in the team concept -- context,
16 that particular speech will disrupt the
17 operations of a particular school program even
18 if it doesn't disrupt the operations of the
19 school as a whole.

20 And, fourth, in determining what
21 counts as substantial disruption, we should look
22 to the purposes of the program. And, here, the
23 -- the coach testified, at JA 32, that part of
24 the purpose of cheerleading was to teach
25 team-building skills that students would take

1 with them to later life. Team cohesion was not
2 simply a means to some other end. It was one of
3 the objectives of the program.

4 And as I say, reasonable people could
5 differ about whether this isolated Snap would
6 likely have the effect of disrupting team
7 chemistry. But the Third Circuit's analytical
8 approach would apply equally in a situation
9 where B.L. had sent repeated Snaps disparaging
10 the coach, disparaging the team, where
11 absolutely the predictable effect would be a
12 breakdown in -- in team morale.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: Suppose a student says
15 something outside of school that relates to an
16 important subject, like politics, religion,
17 morality, et cetera, et cetera, makes no
18 reference to the school or to a teacher or
19 student, but the remarks are so offensive that
20 they will predictably cause controversy within
21 the school and could distract the students from
22 the educational process. Does the school have
23 any authority to discipline the student?

24 MR. STEWART: No, not on our view.
25 And, indeed, the -- the purpose in -- in our

1 analytic test of having a school speech prong is
2 simply to provide a safe harbor to make clear
3 that in the situation you posit, where the
4 speech off campus has no inherent connection to
5 the school, the justification for regulation
6 that people will be upset when the school day --
7 day starts, that that's simply an illegitimate
8 justification that doesn't belong.

9 JUSTICE ALITO: All right. So an
10 important part of the test that you propose is
11 whether the speech intentionally targets
12 specific individuals or groups in the school
13 community. The verb "target" means select as an
14 object of attention or attack. So does a school
15 target an individual, a student or a teacher,
16 whenever it refers to the teacher or student?

17 MR. STEWART: No, I don't think that
18 that's the case, and I -- this is a contextual
19 approach where you would look at the -- the
20 speech as a whole and ask, is this predominantly
21 a comment about an individual student or is it
22 predominantly a comment about a -- a social
23 issue.

24 But the other thing I would stress is,
25 even if a -- in a particular instance you get

1 past the -- the screen and say, this is school
2 speech, that -- that doesn't get the school
3 home. The school still --

4 JUSTICE ALITO: Well, what troubles me
5 is that that -- what you've just proposed is
6 a -- a very nebulous line. And I'm quite
7 concerned about the effect of this on -- on
8 freedom of speech. I think we need clear lines.

9 Can you clarify -- can you give me
10 anything firmer than what you just said?

11 MR. STEWART: I guess the two things I
12 would say are, first, even in cases where we are
13 applying Tinker, you should not just look to in
14 the likelihood that disruption will result. We
15 should -- you should employ concepts like
16 proximate cause to determine if a disruption
17 does result, can that properly be attributed to
18 the speaker or is it the fault of -- of the
19 listener?

20 JUSTICE ALITO: Thank -- thank you.

21 MR. STEWART: The other thing I would
22 say is, the Tinker framework in -- in some
23 respects will apply quite differently in the
24 schools.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Mr. Stewart, your
3 test speaks about -- I'm not sure, and I'm --
4 I'm following Justice Thomas's questioning. It
5 seems to focus on sports teams, but one could
6 say that about any extracurricular activity,
7 that there is team spirit of some sort involved
8 in science lab work, in after school science lab
9 work, in forensic speech writing or arguing.

10 There isn't an after school activity
11 where the spirit of that activity couldn't be
12 perceived as being impacted by what people find
13 is unpopular. So let's get to Black Lives
14 Matter T-shirts. How about if -- or the
15 Confederate flag, how about if students in any
16 after school activity want to wear those
17 T-shirts. When would you say that the school
18 could ban that?

19 MR. STEWART: I -- I -- I would say
20 not at all, at -- at least not on the team
21 building concept -- concept.

22 JUSTICE SOTOMAYOR: But why?

23 MR. STEWART: That is -- I think that
24 that's simply a -- a case in which the right --
25 the free speech rights of the student would be

1 paramount. That is, it is possible in theory to
2 imagine a team in which almost all the members
3 support a particular political candidate and to
4 some degree the presence of a teammate who
5 supports the -- the opposing political candidate
6 is going to be a -- a source of argumentation
7 but that doesn't strike at the core of what the
8 team is about. The -- what strikes at the core
9 of the team --

10 JUSTICE SOTOMAYOR: Do you agree with
11 Ms. Blatt, if there is race tensions, any other
12 kind of tensions on the team, that the school
13 could intervene at a certain point?

14 MR. STEWART: Yes. I mean, it --
15 it -- it certainly could be the case that if
16 people, were kind of, I don't know, operating in
17 close quarters and this pattern of -- of tension
18 was established, that that might justify some
19 form of speech regulation that wouldn't
20 otherwise be justified.

21 I think the -- the Seventh Circuit in
22 Zamecnik, a case cited in the reply brief for
23 the Petitioner, has referred to this as -- as
24 kind of a -- a species of fighting words
25 analysis. And the idea is even in the -- in the

1 adult context, though we don't usually look at
2 the reaction of the speaker, there are some
3 forms of speech that seem intentionally
4 provocative.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Mr. Stewart, is the
7 speech in this case school speech?

8 MR. STEWART: It -- it is close to the
9 line because it -- it mentions "school" and it
10 mentions "cheer" but it also mentions
11 "softball," which is -- that was not a school
12 softball team.

13 JUSTICE SOTOMAYOR: So which side of
14 the line does it fall on.

15 MR. STEWART: I -- I think it probably
16 falls on the school speech line, but it's not --
17 not entirely determined --

18 JUSTICE SOTOMAYOR: That mean really
19 everything that mentions a school at all is
20 school speech, right, because this is pretty
21 generic.

22 MR. STEWART: Well, it's not just the
23 content we're looking at. The speech -- the --
24 the Snap was sent to a wide audience. It
25 included a number of students, a -- a number of

1 cheerleaders. It predictably reached the -- the
2 cheerleading team and the coaches.

3 And again, the -- the fact that there
4 may be some indeterminacy about the first prong
5 of the test doesn't get the school over -- over
6 the hump. The school may still be unable to
7 establish on remand if the case is remanded that
8 this speech would have an actual tendency to
9 disrupt team chemistry.

10 JUSTICE KAGAN: Can I give you a few
11 hypotheticals and you just tell me school speech
12 or not school speech? And let's just assume
13 that all of these cause substantial disruption.
14 Okay?

15 MR. STEWART: Yes.

16 JUSTICE KAGAN: Student e-mails his
17 classmates the answer to the geometry homework
18 every day after school?

19 MR. STEWART: School -- school speech.

20 JUSTICE KAGAN: Student e-mails his
21 classmates that they should all skip school
22 tomorrow for an impromptu senior skip day?

23 MR. STEWART: School speech.

24 JUSTICE KAGAN: Student e-mails that
25 they should refuse to do any work for English

1 class until the teacher changes the syllabus to
2 include more authors of color?

3 MR. STEWART: School speech.

4 JUSTICE KAGAN: So that can be
5 punishable?

6 MR. STEWART: If it -- if it causes
7 substantial disruption if the --

8 JUSTICE KAGAN: Okay. Student tweets
9 that there's pervasive homophobia at his school
10 and that prospective gay students should stay
11 away?

12 MR. STEWART: That seems like school
13 speech, especially the last part of it, when
14 it -- it encourages other people to avoid the
15 school based on this characteristic.

16 JUSTICE KAGAN: Last one. Student
17 tweets that his school really stinks and
18 students should stay away?

19 MR. STEWART: I think it's still
20 school speech. It's a -- it's an assessment of
21 the school as a whole. And as I was saying
22 earlier, the principal point of our school
23 speech prong is to provide a safe harbor for
24 situations where a student engages in very
25 inflammatory off -- off-campus speech that has

1 no inherent connection to the school, and we
2 want to say that -- the school simply can't try
3 to make the case that that speech should be
4 regulated because of the spillover effects it
5 would have when school reconvenes.

6 JUSTICE KAGAN: Thank you,
7 Mr. Stewart.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch.

10 JUSTICE GORSUCH: Mr. Stewart, is
11 there anything that the Petitioner argued that
12 you disagree with this morning? Or -- and --
13 and can you explain if -- if, to the extent
14 there is, any daylight between your test and
15 theirs?

16 MR. STEWART: I -- I don't see any day
17 -- daylight. The only thing I -- I would
18 emphasize that I don't think is inconsistent
19 with the Petitioner's presentation is that in --
20 in the context of on-campus speech, the -- the
21 courts have applied a -- a concept of
22 quasi-fighting words, where taking into account
23 the relative immaturity of the school audience
24 and the fact that students have -- are -- are a
25 captive audience, the -- the courts have allowed

1 school authorities to crack down on a -- a
2 narrow range of speech that couldn't be punished
3 outside the school but is particularly likely to
4 cause a disturbance in the school environment.

5 But, with -- with that small caveat, I
6 would agree with Petitioner's argument that, in
7 general, disagreement, even strong disagreement
8 by the rest of the students, with even on-campus
9 speech, is not a basis for regulation.

10 JUSTICE GORSUCH: And then, if -- if
11 you could just address more broadly the -- the
12 the -- the thrust of the -- the argument from
13 the other side, which is that there's some irony
14 in the fact that as avenues for expression have
15 increased for all of us through the Internet,
16 this -- this actually leads to more regulation
17 of it by schools and that the authority for
18 schools as in loco parentis grows and -- and --
19 and reduces the room for parental control and
20 supervision.

21 MR. STEWART: I -- I think the -- the
22 two things I'd say are that the Internet is a --
23 an extra option. People still do have the
24 option -- I mean students in high school still
25 have the option of doing people -- what people

1 did in my day, that is, express their views to
2 their friends and classmates at parties, social
3 gatherings off campus, that there is no
4 requirement that everything a student thinks and
5 wants to communicate has to be communicated to
6 the broadest possible audience.

7 But I think the flip side is
8 off-campus speech has a much greater tendency
9 now than it did then to affect the operations of
10 the school simply because it can be made
11 available to a vast audience, not with respect
12 to -- with respect to the chat -- the Snap
13 that's different, but a lot of online speech
14 will literally occur -- appear on students'
15 phones when they're back in class and at the
16 next school day.

17 So I -- I don't think it would be
18 untoward for the Court to take account of that
19 potential effect of off-campus speech in
20 deciding what the constitutional rule should be.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 Good morning, Mr. Stewart. I strongly
2 share Justice Breyer's instinct when he
3 mentioned that we probably can't write a
4 treatise here and shouldn't write a treatise
5 here and can't foresee all the things that could
6 arise and a lot of the hypotheticals that have
7 been raised.

8 So I just want to get your reaction if
9 we just simply said the First Amendment does not
10 categorically prohibit public schools from
11 disciplining students for speech that occurs off
12 campus, period. It may matter that the analysis
13 here involves -- or the situation here involves
14 a team, not just the school more broadly,
15 period. Remand. Is that enough?

16 MR. STEWART: I -- I think that would
17 be enough. It -- it would probably be helpful
18 to say, with respect to online speech in
19 particular, the location from which the speech
20 was posted is ordinarily going to have no
21 significant effect on the likelihood that it
22 will cause substantial disruption, but -- but
23 we're -- we -- we entirely agree that the Court
24 shouldn't be writing a treatise, and we
25 particularly agree that this is not the occasion

1 for the Court to try to decide how the close
2 cases involving in-school speech ought to be
3 dealt with.

4 JUSTICE KAVANAUGH: And then I think
5 you mentioned this, but the proportionality of
6 the sanction here that I mentioned to Ms. Blatt,
7 that -- I -- I guess, how do you see that
8 fitting in at all, if at all, to the
9 constitutional analysis? And maybe the answer
10 is not at all.

11 MR. STEWART: I think the -- that the
12 length of the suspension doesn't factor into the
13 First Amendment analysis. It might conceivably
14 be the basis for a due process claim. As I
15 indicated earlier, I do think the fact that B.L.
16 was suspending from the cheerleading team,
17 rather than from school, is significant.

18 This would be a much harder case for
19 the school if -- if B.L. had been suspended from
20 school entirely, because that punishment would
21 rest on be the idea that no member of the
22 student body could acceptably have said this.
23 And that would be much harder case. What --
24 what made the speech objectionable was that it
25 was coming from inside the team.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Mr. Stewart, I want
4 to go back to Justice Kagan's hypothetical about
5 sharing the answers to the geometry homework
6 after class. You said that would be school
7 speech. Do you think it's speech to pass on the
8 answer key?

9 MR. STEWART: Yes, I think it would
10 be -- it would be speech.

11 JUSTICE BARRETT: What about threats
12 to the school? You know, I'm going to come in,
13 I'm going to bring a gun to school tomorrow,
14 and -- and, you know, open fire?

15 MR. STEWART: I think it would still
16 be considered speech. Now, it -- things like
17 true threats may not be constitutionally
18 protected, but that's not on the theory that
19 they aren't speech. And I think it is important
20 in the school context that you could -- if you
21 had a student who in his off-campus posts was
22 trying to cultivate a -- a vaguely menacing
23 persona and was careful not to say anything that
24 rose to the level of a true threat, but that was
25 still intended to put his audience in fear,

1 that's the sort of thing that a school ought to
2 be able to regulate, even though --

3 JUSTICE BARRETT: Those are the kinds
4 of things that the authorities could regulate if
5 there was someone who was discovered online
6 threatening the school or menacing the school
7 and -- and seeming like it could be a risk,
8 right?

9 MR. STEWART: Again, if the -- if the
10 communication rose to the level of a true
11 threat, something that could be punished under
12 the criminal or civil law even if an adult did
13 it, yes, that would be true. But the -- the
14 circumstance we have in mind is --

15 JUSTICE BARRETT: Let me ask you one
16 -- my -- my time is going to run out. Could a
17 school seek a waiver of First Amendment rights
18 for participation in an extracurricular activity
19 like cheer?

20 MR. STEWART: No, I don't think that
21 the school could seek a blanket waiver. And so,
22 for instance, if B.L. had been suspended from
23 the cheerleading team because the coach
24 disagreed with her political views, that would
25 be impermissible. That would be a clear

1 violation, even though the only sanction was
2 removal from the extracurricular, and it would
3 be no different if the school tried to extract a
4 waiver in advance of the right to engage in
5 speech that had no inherent connection to the
6 school or the team.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: A minute to
9 wrap up, Mr. Stewart.

10 MR. STEWART: Thank you, Mr. Chief
11 Justice.

12 We've been discussing the school
13 speech cases as -- as though they were a
14 doctrinal island, but I think it is worth
15 pointing out that school speech is only one
16 context in which participants in government
17 programs can be made to accept speech
18 restrictions that couldn't be imposed on the
19 general public. So if I, for example, posted a
20 message online that tracked the text of B.L.'s
21 Snap but instead of "school," "softball," and
22 "cheer," I put "DOJ," "law," and "the Supreme
23 Court," that would be constitutionally protected
24 speech.

25 But DOJ, as my employer, could

1 certainly take the position that that was
2 inconsistent with my job as a DOJ attorney, and
3 that would rest in part on the fact that my
4 employment at DOJ is -- is voluntary on my part,
5 but it would also rest on the fact that
6 communications like that would have a much
7 greater disruptive tendency coming from within
8 the department than from the outside. And the
9 same principle applies here. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Cole.

13 ORAL ARGUMENT OF DAVID D. COLE
14 ON BEHALF OF THE RESPONDENT

15 MR. COLE: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 At its core, the First Amendment
18 prohibits content discrimination. Its bedrock
19 principle is that a speaker can't be punished
20 because listeners object to his message.

21 Tinker announced a narrow exception to
22 those principles. It allows school officials to
23 punish speech based on its content if listeners
24 object or might object in a disruptive fashion.
25 But it is limited to school-supervised or

1 school-sanctioned settings.

2 This Court's school speech cases are
3 called that for a reason. The authority they
4 recognize is justified by and limited to the
5 special characteristics of the school
6 environment. So schools can prohibit pro-drug
7 messages at school, but not elsewhere. They can
8 ban profanity at school, but not at home. So,
9 too, they can punish disruptive speech at
10 school, but not at the convenience store on the
11 weekend.

12 Expanding Tinker would transform a
13 limited exception into a 24/7 rule that would
14 upend the First Amendment's bedrock principle
15 and would require students to effectively carry
16 the schoolhouse on their backs in terms of
17 speech rights everywhere they go.

18 It would also directly interfere with
19 parents' fundamental rights to raise their
20 children. A father shouldn't have to worry that
21 if he brings his daughter to a Black Lives
22 Matter protest about mistreatment of a black
23 student at school, and she posts a photo on
24 Facebook, she might be suspended based on
25 potential disruption at the school.

1 B.L. was punished for merely
2 expressing frustration with a four-letter word
3 to her friends outside of school on a weekend.
4 Her message may seem trivial, but for young
5 people, the ability to voice their emotions to
6 friends without fear of school censorship may be
7 the most important freedom of all.

8 I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: Mr. Cole, that
10 sharp line I think you're trying to draw between
11 on campus and off campus, how does that fit with
12 modern technology? I mean, it's -- it's -- if a
13 text or a Snap that you send, you send from the
14 park and it's read in the cafeteria, is that off
15 campus or on campus?

16 MR. COLE: So if you're -- what the --
17 our test is the test that this Court applied in
18 Morse versus Frederick, which is if you are
19 under the school's supervision or sanction, the
20 school has the authority that the school speech
21 cases give it. And if you're outside of the
22 school's supervision or sanction, then you --
23 the -- the same First Amendment rights apply to
24 you as apply to everybody else.

25 CHIEF JUSTICE ROBERTS: Well --

1 MR. COLE: The Internet doesn't -- the
2 Internet doesn't change that, Your Honor. The
3 Internet -- if anything, the Internet
4 underscores the importance of assuring that kids
5 outside of school have the right to speak freely
6 because that's where kids speak. They -- they
7 speak to their friends, they share their most
8 intimate thoughts, on the Internet with their
9 friends. If any time they do that and -- and --
10 and that means that somebody in the school at
11 some point might read it, the school can,
12 therefore, regulate it if it's -- if it's a
13 swear word or if it's -- if it's disruptive or
14 if -- or if people object to it at school in a
15 way that causes problems for the school, then
16 kids won't have free speech, period. They --
17 they will essentially be carrying the
18 schoolhouse with them wherever they go. It
19 would -- it would essentially reverse Tinker.

20 CHIEF JUSTICE ROBERTS: You say in
21 your -- your brief a fairly -- obviously strong
22 defense of the First Amendment, but then -- then
23 you say that the First Amendment rights adjusted
24 for youth in context. And at that point, I
25 suddenly think, well, we're just back in the

1 sort of multiplicity of -- of factors and nobody
2 can tell quite exactly where any clear lines
3 are. What -- what do you mean by "adjusted for
4 youth in context"?

5 MR. COLE: So this Court has said that
6 unprotected categories of speech can be adjusted
7 for youth in context. It's said this the
8 context of threats. It's said it in the context
9 of obscenity. So, for example, what is
10 threatening to a five-year-old is different from
11 what's threatening to an adult. What is
12 harassing to a 12-year-old girl is going to be
13 different from what's harassing to a
14 25-year-old. So those kind of adjustments, I
15 think the law already recognizes those sorts of
16 objections.

17 Our point is you don't need the
18 blunt instrument of Tinker to deal the problems
19 of off-campus behavior that might have an effect
20 in school because the First Amendment doesn't
21 stand in the way. It permits regulation of
22 threats. It permits regulation of bullying,
23 harassment, cheating, as long as those are
24 carefully confined by the existing First
25 Amendment doctrine.

1 CHIEF JUSTICE ROBERTS: I -- I -- you
2 said "the blunt instrument of Tinker." I'm not
3 sure it's -- sure it's so blunt. I mean, we've
4 -- we've had trouble so far, I think, in
5 figuring out exactly how it applies in -- in the
6 present situation. But just so I understand, no
7 matter how disruptive a particular speech
8 activity off campus or I gather, you know, on a
9 Snapchat is to the school, it has no choice but
10 to tolerate that because it can't take any
11 action against -- against the student?

12 MR. COLE: It can -- Your Honor, it
13 can take action based on Tinker. It can take
14 action if the First Amendment permits it to take
15 action. So if it is harassing, it is fear and
16 pervasive in a way that interferes with equal
17 access to education, they can take action,
18 consistent with the First Amendment. If it is
19 bullying that is severe or pervasive enough to
20 interfere with access to education, they can
21 take action, consistent with the First
22 Amendment. If it is aiding or abetting
23 cheating, they can take action, consistent with
24 the First Amendment.

25 The -- the simple rule is, when you're

1 inside the school when -- or when you are under
2 the school's supervision, the school has broad
3 authority based on disruption alone. But
4 outside of the school -- outside of the school
5 supervision, the First Amendment governs, and
6 the school has the same authority that the city
7 would have with respect to regulating speech
8 that is not under its supervision.

9 But that doesn't mean it can't take
10 action. It just means it has to do so
11 consistently with the First Amendment rather
12 than what I would say is a blunt instrument.
13 Just call it disruption and that's the end of
14 the matter.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Mr. Cole, you a number of times have
21 said -- you mentioned that -- the location of
22 the conduct or the speech at school, under the
23 school's supervision, et cetera.

24 Isn't that complicated by the Internet
25 and by social media? And you could send the

1 exact same messages that could cause problems
2 from your local 7-11 or you could send it to
3 classmates who happen to be in class. You could
4 send it over the weekend, but it still has a
5 permanence that would certainly allow it to be
6 used in class. So I don't know how you locate
7 the conduct in school versus out of school when
8 you have social media.

9 MR. COLE: Thank you, Justice Thomas.
10 I -- I think you -- you do it the way this Court
11 has done it in all the school speech cases. It
12 said, does the school exercise supervision over
13 the speaker? If it does, it can regulate it
14 subject to enhanced power. If it doesn't, it
15 can't. So Bong Hits 4 Jesus could be regulated
16 because it was at a school-supervised event.
17 But, if it was put on Facebook, it couldn't be
18 punished.

19 JUSTICE THOMAS: So do you -- does the
20 speech --

21 MR. COLE: Our first --

22 JUSTICE THOMAS: -- does the speech
23 occur when -- and I'm sorry to interrupt you,
24 but does it occur when it's written or posted or
25 when it's read or downloaded?

1 MR. COLE: It occurs when -- it's when
2 the speaker acts. And -- and -- and, of course,
3 schools are perfectly permitted to ban cell
4 phones, et cetera, in school, and, indeed,
5 Mahanoy High School does precisely that.

6 So the -- the question is, is the
7 speaker under the supervision of the school?
8 And if the speaker's under the supervision of
9 the school, you can stop him from swearing. If
10 the speaker's under the supervision of the
11 school, you can stop them from publishing an
12 article about teen pregnancy.

13 But, if the speaker is at home on the
14 weekend, you can't stop her from publishing a --
15 an article about teen pregnancy and you can't
16 stop her from swearing. Her parents could, and
17 it's her parents' job to -- to -- to regulate,
18 not the school's job, at that -- at that
19 location.

20 JUSTICE THOMAS: So, if the -- if --
21 if the speaker sends an e-mail that is opened,
22 sends an e-mail over the weekend, but it's
23 opened on Monday morning in math class, as far
24 as you're concerned, the speaker is not under
25 the supervision of the school?

1 MR. COLE: The speaker was not. When
2 the speaker spoke is the -- is the -- is the
3 relevant time.

4 JUSTICE THOMAS: Okay.

5 MR. COLE: And, again --

6 JUSTICE THOMAS: So let me -- let
7 me -- let me go to another area just briefly.

8 Is there any difference between the
9 regulation of athletes or participants in
10 after-school programs, as Justice Sotomayor
11 pointed out, is there any difference between
12 that organization, after-school organization or
13 activity regulating a student's conduct versus
14 the school regulating the overall student body
15 population?

16 MR. COLE: No, I think, with respect
17 to whether Tinker should apply, no, that is --
18 Tinker should apply in school supervised and
19 sanctioned settings, which would include at
20 practice or at a game, et cetera, on the bus to
21 the game, and not when a person is sitting in a
22 convenience store on the weekend out of season.

23 But I do think there's a separate
24 question, Justice Thomas, which is independent
25 of Tinker, and -- and the court of appeals

1 addressed this as a separate question. After it
2 decided Tinker doesn't apply, it didn't end the
3 decision, it went on and had a whole separate
4 section on whether the school can impose
5 conditions on voluntary participation in the
6 activity and -- and whether she violated those
7 conditions.

8 And it looked at that question, which
9 is a separate question, and it found that she
10 didn't violate any of the conditions that were
11 imposed upon her, and -- and that was the end of
12 the matter. And the Petitioners did not seek
13 appeal in this court of that part of the
14 question.

15 So I do think there's a -- a -- a -- a
16 serious question what sorts of conditions can
17 a -- can a team impose on voluntary
18 participation in that activity. But that
19 question's not posed here because it's not part
20 of the question presented, and it's not part of
21 the question presented because they lost on that
22 below. The court found she didn't violate any
23 of the rules that she agreed to follow, and they
24 didn't appeal on that matter.

25 JUSTICE THOMAS: So let me ask you one

1 last question. You mentioned that the
2 disruption -- I -- I think that's your term, the
3 term that we -- we've been using -- can be
4 regulated.

5 Why wouldn't -- would you allow under
6 your formulation a school to take preemptive
7 steps to prevent disruption, or does a school
8 have to wait -- await disruption before it can
9 respond?

10 MR. COLE: Oh, no. Absolutely, it can
11 respond to predictions of disruption, reasonable
12 predictions of disruption. That's what the
13 Court said in Tinker. You don't have to wait
14 for the disruption, but there does have to be a
15 reasonable prediction of disruption and as to --

16 JUSTICE THOMAS: What does that mean,
17 though?

18 MR. COLE: -- whether --

19 JUSTICE THOMAS: What's a reasonable
20 prediction?

21 MR. COLE: Well, so -- so -- so what
22 the courts have done is they've looked at
23 evidence of -- of whether or not the -- the --
24 the -- the speech itself might lead people to be
25 offended in a disruptive fashion, and so, if in

1 the past people have been offended in a
2 disruptive fashion, you can now silence the
3 speaker.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Thank you.

8 The difficulty I have I've already
9 mentioned. A few years ago, a superintendent of
10 schools, I think in San Francisco, said, you
11 know, schools have changed a lot, public
12 schools, since when I went there. He said,
13 today we don't just teach classical subjects.
14 We're there to help the child have adequate
15 health, in many cases, to see that he's
16 adequately fed. In quite a few cases, we become
17 a caretaker, and we don't want to send them home
18 immediately because there's nobody home, and we
19 have to plan after-school activities.

20 There are dozens of areas that didn't
21 used to be thought of as within the purview of
22 the public school. Today, in many places, they
23 are.

24 Now add to that the Internet and the
25 Internet not just listening to teachers but also

1 doing homework and also writing papers,
2 sometimes vaguely defined and sometimes and
3 sometimes.

4 How do I get a standard out of that?
5 I'm frightened to death of writing a standard.
6 And Tinker, after all, doesn't really write a
7 standard. It just says you can't regulate
8 school unless it substantially disrupts or hurts
9 somebody else.

10 It doesn't say if it does that you can
11 do anything you want. You still must use some
12 kind of test like proportionality or something
13 else, and I can mention that often outside of
14 school it's the parents' job, not the teachers'
15 if, by the way, there are parents in the house,
16 et cetera, and I can mention the differences and
17 say take those into account, but I do not see
18 how to go beyond that, and any suggestions you
19 have will be welcome.

20 MR. COLE: Sure, Justice Breyer. I --
21 I -- I think it's important that there be clear
22 lines. That's why the Third Circuit issued the
23 decision it did, to make sure that there were
24 clear lines.

25 Within the context of school

1 supervision, whether it's an after-school
2 program, whether it's a class trip, whether it's
3 in the classroom, Tinker applies, and Tinker
4 does mean that the school can shut down a
5 speaker if that speaker -- that -- those words
6 are going to lead to disruption, period.

7 Whether it's political, whether it's
8 religious, that's -- that's the state of the law
9 in -- in -- in -- in the cases below. I don't
10 know where the other side gets this exception
11 for political or religious speech. It just
12 doesn't exist based on the case law.

13 But outside of school, the priority is
14 not to give the school discretion to regulate
15 kids' speech. It's to protect people's freedom
16 of speech outside of school. So our -- our line
17 is -- is, I think, quite simple.

18 In school, you can apply Tinker. Out
19 of school, you can't. What does that mean? It
20 means you can't punish out-of-school speech
21 because listeners in school might be disrupted
22 by the message. It means you can regulate
23 threats, bullying, harassment, and cheating.
24 But it says that when you're doing that for
25 out-of-school conduct, you follow the same rules

1 that everybody else follows, with some, you
2 know, adjustment for the fact that it's kids
3 that are involved, but what we have then is a
4 tailored approach which deals with the specific
5 problems at issue, rather than a sledgehammer
6 approach, which says we're not going to try to
7 define bullying or harassment or cheating or
8 threats; we're just going to say, if the school
9 can call it disruption, they can punish it, even
10 if it occurs on the weekend.

11 I think that's a very, very dangerous
12 proposition in terms of young people's free
13 speech, and the Court should be very clear, as
14 the Third Circuit was.

15 JUSTICE BREYER: Thank you very much.

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: Mr. Cole, there is a
18 huge gap between the broad and very important
19 free speech issues that have been briefed and
20 discussed this morning and the particular
21 incident involved in this case. If we're going
22 to address the broad issues, then I, for one,
23 think we need clear rules that protect freedom
24 of speech.

25 On the other hand, if the Court,

1 having decided to take this case, wants to
2 decide it without addressing those broad issues,
3 of course, the Court could dismiss the case, and
4 I assume you wouldn't have an objection to that.

5 But, if the Court doesn't do that,
6 could the Court do something along these lines:
7 Say Tinker applies in school. It says nothing
8 one way or the other about what a school may or
9 may not do to student speech outside the school.
10 We look at the particular comments made here.
11 They're made in colorful language, but,
12 substantively, they boil down to something like,
13 I have no respect for the school, I have no
14 respect for the cheer squad, I hate the school,
15 I hate the cheer squad, I also hate my private
16 softball team.

17 A school can't discipline a student
18 for off-campus speech that does no more than
19 say, I hate the school, I have no respect for
20 the school?

21 MR. COLE: So, you know, we are --
22 we're satisfied, Justice Alito, with a ruling in
23 our favor, whether you dismiss as improvidently
24 granted, whether you say under no conceivable
25 circumstance, under no conceivable test is this

1 speech proper to -- to -- to punish.

2 But that -- that, of course, is not
3 the question that the Court took, and if you're
4 going to address the question that the Court
5 took, which is should Tinker and its broad-based
6 free-floating substantial disruption standard,
7 which has no safe harbor, as the government puts
8 it, for political speech or religious speech,
9 should that be applied to kids not only when
10 they're under the school's supervision and
11 they're captive and they're more vulnerable, but
12 should it apply to kids on the weekend in the
13 middle of summer when they're talking to their
14 friends on Snapchat? In -- in -- in essence,
15 should they -- should the -- the speech rights
16 of young people be constrained throughout their
17 lives as much as it is constrained in school?

18 Schools are areas of strict
19 discipline. They should be. They have to be.
20 But kids shouldn't have to carry that discipline
21 out with them when they're -- you know, when
22 they're hanging out with their friends on the
23 weekend. And that's the -- that's the approach
24 that both the Petitioner and the Solicitor
25 General would -- would put forth.

1 We're asking for a clear line, as the
2 Third Circuit said, that -- that furthers the
3 really, I think, critically important interest
4 outside of the school context that we protect
5 free speech, give kids the breathing space they
6 need to be able to talk candidly and honestly,
7 to share their emotions, to share their
8 feelings, even about school, without fear that
9 some administrator is going to say, oh, well,
10 that was disruptive, or that's going to lead
11 somebody else in school to be upset, and so we
12 -- we're going to punish you.

13 JUSTICE ALITO: You mentioned
14 bullying, and I'm concerned about comments that
15 do touch on important issues but relate directly
16 to a student. So is there anything that a
17 school can do about that? You say, I guess,
18 that they have -- the school has no more
19 authority in this area than other government
20 officials. So what can other government
21 officials do about that without violating the
22 First Amendment?

23 MR. COLE: Well, so there are -- there
24 are bullying codes throughout the country.
25 They're generally limited to the school

1 environment, just as, you know, sexual
2 harassment is generally limited to the
3 employment and educational contexts. So it --
4 it may be a context-specific concept.

5 But I think that what schools can do
6 is they can punish those who bully in ways that
7 violate a constitutional prohibition on
8 bullying. And we think a prohibition on
9 bullying that mirrors the prohibition on
10 harassment by being limited to severe or
11 pervasive interpersonal aggression that
12 interferes with access to education could well
13 satisfy the First Amendment. This Court hasn't
14 addressed that yet.

15 But what the Petitioner's approach
16 would do and what the Solicitor General's
17 approach would do is say we don't even have to
18 address the question of, you know, how you
19 define bullying because we'll just call it
20 disruption and -- and the school can regulate it
21 wherever it happens.

22 And that makes no distinction between
23 what's mean and what is bullying. And there are
24 -- there are important distinctions to be made
25 there, and I think --

1 JUSTICE ALITO: Yeah, thank you, Mr.
2 Cole.

3 MR. COLE: -- the First Amendment
4 requires them.

5 JUSTICE ALITO: My time is up.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Mr. Cole, the
9 problem with your line-drawing is we have
10 traditional categories: fighting words,
11 obscenity, true threats. We even have
12 definitions of what constitutes sexual
13 harassment. The level at which speech has to
14 arrive to meet those standards is very, very
15 high, and I'm dubious that most of the conduct
16 that teenagers engage in would fit any of our
17 traditional categories.

18 So let's talk about harassment, okay?
19 A common episode, I think I read it in a
20 newspaper, a young girl is subjected to -- each
21 time she goes out of the house, whether she's in
22 the playground, not the school playground, or
23 walking to school with a group of classmates
24 walking by and saying, you're so ugly, why are
25 you even alive?

1 That's not a true threat. They're not
2 threatening her with any bodily harm. It is not
3 harassment if that's all -- if they're just
4 speaking. So -- and they're not interfering
5 with her movement to or from school. Why --
6 that would be the kind of situation that I don't
7 see a First Amendment category fitting.

8 So, under your theory of this case,
9 would the school be powerless?

10 MR. COLE: Absolutely not. The -- the
11 school would be permitted to regulate that
12 conduct if it satisfies a First Amendment,
13 permissible definition of bullying. And we
14 think a First Amendment, permissible definition
15 of bullying, like a first --

16 JUSTICE SOTOMAYOR: Is what?

17 MR. COLE: -- is severe -- severe or
18 pervasive interpersonal aggression --

19 JUSTICE SOTOMAYOR: What's aggressive
20 about that?

21 MR. COLE: -- that interferes with
22 access to education --

23 JUSTICE SOTOMAYOR: What's --

24 MR. COLE: -- which is, in fact, the
25 standard that both of the --

1 JUSTICE SOTOMAYOR: I -- I -- counsel,
2 please, stop. What's aggressive about it?
3 Basically walking by someone and saying, you're
4 ugly, why are you around? There's a lot of
5 conduct that comes to the edge. You're now
6 asking schools to determine what is
7 constitutional in terms of misbehavior by
8 students that they can attempt to control or not
9 control?

10 MR. COLE: Your Honor, within the
11 school context, all they have to find is that
12 it's disruptive. You could be -- one student
13 could be being mean to or teasing a student next
14 to them, and the school can come in because it's
15 disruptive, period, end of -- end of story. And
16 that's what -- how --

17 JUSTICE SOTOMAYOR: But you're saying
18 they can't do it --

19 MR. COLE: -- how --

20 JUSTICE SOTOMAYOR: -- if the -- if
21 that's happening outside the school grounds?

22 MR. COLE: That's right. That's
23 right, because outside of the school, the -- the
24 school -- the school doesn't exercise
25 supervisory authority. The parents do. Outside

1 of the school, the child is -- has the
2 protection of its -- its parents; inside the
3 school, it doesn't. Inside the school, the --
4 the child is captive; outside the school, it's
5 not. And that doesn't mean you can't deal with
6 bullying and harassment.

7 JUSTICE SOTOMAYOR: All right.
8 Counsel, you said to me --

9 MR. COLE: You just have to do so --

10 JUSTICE SOTOMAYOR: -- you said to me
11 that there could be conditions to being a member
12 of a team, correct?

13 MR. COLE: Yes.

14 JUSTICE SOTOMAYOR: Could one of those
15 conditions be that you won't post foul language
16 on social media?

17 MR. COLE: I think the question would
18 be whether that's necessary or -- or even
19 reasonable in terms of the --

20 JUSTICE SOTOMAYOR: Well, let's --
21 let's look at --

22 MR. COLE: -- the purposes of team.
23 So, if it were, yes.

24 JUSTICE SOTOMAYOR: -- this school
25 code. It doesn't go far -- far enough away, but

1 it says: We -- we want the highest -- must earn
2 the right to represent the school by conducting
3 themselves in such a way that the image of the
4 -- of the school district would not be tarnished
5 in any way. Our cheerleaders are team members.
6 Using foul language on social media or at any
7 school function would be -- would be a
8 tarnishment. You can't -- you won't do it, or
9 you'll be punished.

10 Is that a contract that's enforceable?

11 MR. COLE: So I -- I -- I think the --
12 the -- the -- that is a -- again, that's --
13 that's a question that's outside of the scope of
14 the question presented because they did not
15 petition from the determination that she didn't,
16 in fact, violate those rules. She spoke out of
17 season. She did not speak at an event.

18 But, yes, I think teams have quite a
19 bit of leeway in terms of imposing conditions on
20 players as long as they're set out in advance
21 and the players agree to abide by them and
22 they're reasonably tied to -- to the -- you
23 know, the -- the needs of teenagers.

24 JUSTICE SOTOMAYOR: So why is it -- I
25 know that -- what the court found below, but one

1 of the things that it says here, the negative
2 information rule, or the cheerleading rules
3 provided, there will be no toleration of any
4 negative information regarding cheerleading,
5 cheerleaders, or case -- or coaches placed on
6 the Internet.

7 Why isn't what your client did a
8 violation, a clear violation of that part of the
9 code?

10 MR. COLE: The court of appeals found
11 that there was no information whatsoever in what
12 she presented, and, again, the Petitioners did
13 not appeal that determination.

14 CHIEF JUSTICE ROBERTS: Justice Kagan.

15 JUSTICE KAGAN: Mr. Cole, you're
16 making Tinker basically a -- a -- a
17 geographically -- a geographic test. And it's
18 possible to read it that way, but it's -- it's
19 also possible to understand Tinker as a decision
20 about what's necessary for a school's learning
21 environment.

22 And it might be that student speech
23 that occurs outside of school is sometimes going
24 to cause fundamental problems, disruption of the
25 school's learning environment, and I guess then

1 the question is why we shouldn't acknowledge
2 that and allow a school to deal with it.

3 MR. COLE: So, Justice Kagan, our test
4 is not a geographic test. It's a supervise --
5 supervision test. It's the test that this Court
6 has applied in all the school speech cases.

7 And I think there's two reasons. The
8 first is Tinker is an exception to the bedrock
9 principle that you can't punish a speaker
10 because the listeners objected, even if they
11 object disruptively. If you take away the line
12 between what happens under school supervision
13 and -- and what happens outside, you have
14 eliminate -- you have turned the exception into
15 the rule for 50 million public high school
16 students.

17 The second reason is that this Court's
18 school speech cases are contrary to that notion.
19 The preg -- the -- the -- the article about teen
20 pregnancy that this Court said in Hazelwood
21 could be censored because it was in a
22 school-supervised newspaper, if the student went
23 home and published the same teen pregnancy
24 article on her own private blog, it would have
25 the same concerns, the same effect, the concerns

1 that were about privacy of other students, and
2 yet the school couldn't regulate it.

3 Swearing, the -- the -- the -- or --
4 or -- or -- or Bong Hits 4 Jesus, the Bong Hits
5 4 Jesus sign, in terms of promoting drug use,
6 would have the same effect if it was put out of
7 the kid's bedroom window while the students
8 walked by on their way to school or put on his
9 Facebook page. And yet --

10 JUSTICE KAGAN: So -- so, Mr. Cole --

11 MR. COLE: -- the Court was very clear
12 you can't --

13 JUSTICE KAGAN: -- I mean -- I mean,
14 those are some easy cases, but you've also been
15 asked about bullying cases, harassment cases,
16 and -- and you've tended to say, well, sure,
17 don't -- don't worry, you can deal with that
18 because there may be constitutional codes that
19 are anti-bullying or anti-harassment. And --
20 and there may indeed.

21 But I think we have a general sense
22 that schools have more latitude over this kind
23 of speech than -- than other government
24 officials, so I'll just give you one example.

25 Suppose that there are boys in a

1 school who have a website and -- and -- and rank
2 all the girls in the school on -- on matters of
3 appearance and -- and -- and such things, or
4 maybe talk about their sexual activities. And
5 we wouldn't put people in jail for that, you
6 know, outside of a school context, but it seems
7 as though a school should be able to deal with
8 it. Why not?

9 MR. COLE: I think a school should be
10 able to deal with it. And I think that's what
11 -- the bullying laws actually reflect that
12 intuition. There's -- there's no prohibition on
13 bullying generally between adults.

14 JUSTICE KAGAN: Well, let's say that
15 this --

16 MR. COLE: So I don't think --

17 JUSTICE KAGAN: -- I mean, I'm just
18 stipulating that there are some categories of
19 speech that we could not punish outside the
20 school context and ask you if you can't imagine
21 cases where, even though we couldn't punish it
22 outside the school context -- and I think mine
23 is a good example, you can't -- you can't put
24 people in jail for commenting on other people's
25 appearance. But shouldn't a school be able to

1 deal with it?

2 MR. COLE: So, yes, a school should be
3 able to deal with it, but the -- but the way to
4 do that is with a test that addresses that
5 particular problem. As -- as Justice Alito's
6 opinion in the Saxe case for the Third Circuit
7 said: The mere fact that you call it harassment
8 doesn't mean the First Amendment goes away. You
9 still have to assess, is it narrowly tailored or
10 does it punish too much speech?

11 And -- and that question could well be
12 affected by the school environment, could well
13 be affected by the fact that kids are involved,
14 but you should ask that question and decide that
15 question with respect to a particular problem,
16 like bullying or harassment, rather than adopt a
17 broad-brush, free-floating disruption standard
18 that, yes, it might -- it might reach that, but
19 it also reaches political speech, it reaches
20 controversial speech.

21 JUSTICE KAGAN: Well, what do you
22 think about the SG's test, which basically says,
23 you know, when you get -- there is a distinction
24 between in school and out of school, and we --
25 we -- we -- we can't punish anybody for wearing

1 a confederate T-shirt outside of school, but,
2 once the outside-of-school speech is really
3 about the school and affects the operations of
4 the school, then it is subject to Tinker again?

5 MR. COLE: I think the -- the -- the
6 SG's test is -- is the vaguest test that's been
7 put before you. It would require schools to
8 distinguish between speech that is spoken to a
9 student as opposed to speech that is targeted at
10 a student, speech that is about a program as
11 opposed to speech that is targeted at the
12 program. It would allow schools to define in --
13 in an unreviewable fashion what is essential to
14 any school program. So suppose a school said --

15 JUSTICE KAGAN: Thank you, Mr. Cole.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: Yeah. I'd like to
20 follow up with where you left off with Justice
21 Kagan. I'm -- I'm struggling to understand the
22 delta or difference between your test and the
23 Petitioners at the end of the day with respect
24 to off-campus speech that results in a person on
25 campus being denied an educational opportunity,

1 which is what I understood your test for -- for
2 off -- off -- off-campus bullying to be.

3 What -- what is the difference between
4 that and -- and a substantial disruption
5 on-campus test?

6 MR. COLE: I think the difference -- I
7 think there's really two basic differences,
8 Justice Gorsuch. The first is that their test
9 is disruption covers anything that anybody says
10 off campus that might have an effect on campus.
11 So it would --

12 JUSTICE GORSUCH: Okay. So -- so let
13 me just pause there. I mean, I'm sorry to
14 interrupt, but let me just pause there and say,
15 rather than substantial disruption, you would
16 say it has to disrupt an individual's
17 educational opportunity. I -- I -- again, I'm
18 just --

19 MR. COLE: No.

20 JUSTICE GORSUCH: -- not sure what
21 that difference is.

22 MR. COLE: We would say -- so, no, no,
23 maybe I miss - misstated. Our position is that
24 bullying can be regulated, like harassment,
25 consistent with the First Amendment, where it is

1 defined as interpersonal aggression so severe or
2 pervasive as to interfere with access to
3 education.

4 All of that is critical to that
5 definition. It's not just had an effect on the
6 school, whereas their test is just had an effect
7 on the school, and, therefore, their test would
8 encompass someone who puts up a sign that says
9 "Blue Lives Matters More" or somebody who
10 criticizes the coach for physically abusing
11 players or somebody who organizes an off-campus
12 protest of the school's COVID policies.

13 All of those things could be
14 disruptive, but they wouldn't be bullying, they
15 wouldn't be harassment, they wouldn't be
16 threats. And under our rule --

17 JUSTICE GORSUCH: Why wouldn't --

18 MR. COLE: -- they would be protected.

19 JUSTICE GORSUCH: -- why wouldn't they
20 be bullying under your definition? With severe
21 interpersonal -- I'm sorry, I missed the rest of
22 it. It -- it strikes me as, you know, you could
23 -- you could easily take a lot of those examples
24 and put them in -- in that bucket.

25 MR. COLE: I -- I don't think so,

1 Justice Gorsuch. Putting up a sign that says
2 "Blue Lives Matter More" is not bullying under
3 any reasonable definition, nor is
4 whistleblowing about a coach's physical abuse,
5 or calling for a protest of a school's COVID
6 policies. But all of those things could be
7 disruptive in the school.

8 And under their test -- under their
9 test, they could therefore punish the speaker
10 for expressing those -- those messages.

11 The other difference between our test
12 and their test is that our test would require
13 careful definitions of bullying, harassment, and
14 the like, rather than just waving your hands,
15 calling it disruption, and -- and going away.
16 And the problem with that is then you're not
17 distinguishing between, you know, ordinary mean
18 comments or teasing and bullying and harassment.

19 And this Court in Davis and Justice
20 Alito in the Saxe decision said you have to make
21 those distinctions if you're going to be
22 consistent with the First Amendment.

23 JUSTICE GORSUCH: But you -- you would
24 agree if I understand it, though, that there
25 could be some school-specific First Amendment

1 regulations, right, I mean, as Justice Kagan
2 pointed out?

3 MR. COLE: Yes.

4 JUSTICE GORSUCH: Yeah. All right.

5 And then let me ask you just to turn to another
6 topic and back to the facts of this case. Why
7 doesn't it make a difference that the -- that
8 the speech here was addressed by -- in the
9 context of an extracurricular activity and that
10 the standards there may be different from,
11 higher than what may be required of all students
12 in the school environment?

13 MR. COLE: So I think it -- it can
14 make a difference, Justice Gorsuch. It doesn't
15 make a difference to the question presented,
16 which is simply whether Tinker applies --

17 JUSTICE GORSUCH: No, I understand
18 that. I'm moving now from the general to the
19 specific --

20 MR. COLE: Right.

21 JUSTICE GORSUCH: -- if we're going go
22 down the road of writing a narrow opinion.

23 MR. COLE: Right. So to the specific,
24 I think there are -- there are serious questions
25 about sort of what -- what sorts of -- because

1 extracurriculars are voluntary, schools can --
2 can require students to agree to certain kinds
3 of conditions on participation in the program as
4 long as they're set out in advance and
5 consistent with the First Amendment.

6 And so, for example, I think a school
7 could say if you're going to play on our team,
8 you can't personally demean other players. And
9 if they set that out in advance and the student
10 agrees to it and then the student does it, they
11 can punish the person -- student. If they don't
12 set that out in advance and the student says
13 something demeaning, they can bring the student
14 in and say, hey, that's not acceptable. The --
15 the condition for playing on this team is that
16 you don't demean others.

17 JUSTICE GORSUCH: So the -- the
18 outcome --

19 MR. COLE: Then -- then there is an
20 advanced rule.

21 JUSTICE GORSUCH: -- the outcome of
22 this case hinges on whether there was a policy
23 in advance?

24 MR. COLE: Well, it does if -- if, if
25 the justification for the regulation is

1 voluntary participation and agreement by the
2 person to a certain set of conditions that would
3 otherwise not be permissible. That's a -- but,
4 again, that is a separate issue. The -- the
5 Third Circuit addressed that issue after it
6 decided Tinker didn't apply. It didn't say the
7 case is over. It said there's a second issue.
8 It may be, even if Tinker doesn't apply, that if
9 she violated rules that she agreed to, that's a
10 permissible basis for her expulsion from the
11 team. And then they looked at it and they found
12 she didn't actually violate any of those rules.

13 JUSTICE GORSUCH: Okay.

14 MR. COLE: And, again, Petitioners did
15 not appeal on that question.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Thank you, Chief
20 Justice. Good morning, Mr. Cole.

21 I obviously think it's unfortunate
22 this spiraled, this case, the way it did, and I
23 completely understand the young woman's
24 reaction, to being upset with the decision. As
25 I mentioned to Ms. Blatt, I think that's

1 entirely typical and widespread for decades and
2 decades when -- when kids are disappointed by
3 something like that. And then the coach's
4 reaction, you know, it seems like an excessive
5 sanction. But we're not there, we don't know
6 all the circumstances, and don't want to
7 second-guess that too much.

8 But I guess I'll start where Justice
9 Gorsuch was discussing with you. It just seems
10 entirely different to be talking about a team
11 and not a school, and I'm just not sure -- and
12 I'm going to have some follow-up questions about
13 this. I'm really trying to figure out the
14 practical difference for courts in the wake of
15 this case between we adopt your test and Ms.
16 Blatt's test. So, team, and then move on to
17 that if you can.

18 MR. COLE: So our test is the Tinker
19 disruption standard applies within the
20 school-supervised settings, not outside. So
21 with respect to teams, if you're on the field
22 and if you're at practice, if you're at the
23 game, if you're on the way to the game, if
24 you're -- you know, then you are subject to
25 Tinker and disruption applies. If you're on --

1 at a convenience store on the weekend, Tinker
2 does not apply.

3 JUSTICE KAVANAUGH: So suppose the --

4 MR. COLE: End of story.

5 JUSTICE KAVANAUGH: Keep going. Keep
6 going.

7 MR. COLE: End of story. And the fact
8 that you're on a team doesn't change that
9 question, because there's nothing about your
10 involvement in the team that affects the Tinker
11 analysis. But there is, I think, a separate and
12 independent question, which is what sorts of
13 conditions can a school impose on a person if
14 they join, say, the football team or the pottery
15 club? And those conditions might be different,
16 and they were. The -- the -- and I think
17 reasonable permissions are going to be
18 permissible.

19 And here they set forth some
20 conditions. She agreed to abide by those
21 conditions, and she didn't violate any of those
22 conditions. This was -- this happened out of
23 season. She did not -- she did not do anything,
24 you know, while she was in her cheerleader
25 uniform. She did not post -- post any negative

1 information on the Internet. She basically
2 expressed her frustration, as I'm sure you did
3 when you, you know, had -- had disappointing
4 games, and as I did when I had disappointing
5 races. And that didn't violate any of the
6 rules, and that's the end of the matter because
7 they have not sought any review of that. So in
8 a separate case, you might take up the question,
9 what sorts of rules are reasonable to impose on
10 involvement in a team?

11 JUSTICE KAVANAUGH: So, suppose --

12 MR. COLE: What I will say is that --

13 JUSTICE KAVANAUGH: Sorry to
14 interrupt. Suppose in this case the Snapchat
15 had been a racial epithet about the coach.

16 MR. COLE: A racial epithet about the
17 coach? I think if they have a rule that says
18 you can't demean other players or the coach,
19 can't engage in insubordinate speech to the
20 coach or about the coach, then they could punish
21 her. If they don't have a rule, they could
22 bring her in, they could say that is totally
23 unacceptable.

24 JUSTICE KAVANAUGH: But they could not
25 punish her for racial epithets? I -- I guess --

1 MR. COLE: No. They --

2 JUSTICE KAVANAUGH: -- this goes to
3 Justice Gorsuch's question as well. Unless they
4 have a clear enough policy in advance, you can't
5 punish a student who uses racial epithets in a
6 Snapchat about the coach or other players --

7 MR. COLE: No, I think--

8 JUSTICE KAVANAUGH: -- in -- in your
9 view?

10 MR. COLE: No, I think -- here's what
11 you can do: I think you can bring that person
12 in and you could say that is unacceptable. If
13 you have not set that condition out in advance,
14 you then set it out. And then if they ever do
15 it again, they are off the team. So -- so you
16 can definitely deal with it in a way that
17 maintains the authority of the coach and the
18 unity of the team.

19 But if -- if the justification for
20 additional requirements on team involvement is
21 that you have chosen to join the team and,
22 therefore, you can be asked to sacrifice some of
23 your First Amendment rights in advance, well,
24 then you have to be told what you're -- what
25 you're sacrificing.

1 JUSTICE KAVANAUGH: I just to pick up
2 on Justice Breyer and Justice Alito, because
3 maybe I don't want to be misunderstood on what
4 I'm saying. I think you could answer the
5 question presented here very clearly without
6 writing a treatise, and that -- that's the point
7 I was trying to make. And the question
8 presented is just whether Tinker applies off
9 campus. We can answer that yes or no.

10 If we answer it yes, obviously that
11 will answer the question presented. If we
12 answer it no, here's the -- the point for you:
13 You still have all these exceptions that allow,
14 as I understand it, the First Amendment -- that
15 mean that the First Amendment does not
16 categorically prohibit public schools from
17 disappointing students for speech that occurs
18 off campus. So I think that's the point that
19 Justice Gorsuch was making. You just do it
20 differently than Ms. Blatt. She says Tinker
21 applies off campus. You say Tinker doesn't
22 apply off campus but, by the way, the First
23 Amendment still allows the schools to regulate
24 speech that occurs off campus in a number of
25 circumstances. I'm just wondering whether

1 that's worth the candle.

2 MR. COLE: Well, I think it's very
3 much worth the candle.

4 JUSTICE KAVANAUGH: Well, if it -- it
5 really creates different results. You're just
6 saying that as long as they write the policies
7 in advance, it'll be --

8 MR. COLE: No, not at all. Not at
9 all. I think -- look, there are hundreds of
10 Tinker cases. Virtually all of them involve
11 suspensions for things that kids do vis-à-vis as
12 students. There's about a handful of -- of --
13 of team cases. So that's a different category.
14 I don't think it's presented by this case for
15 the reasons I've -- I've indicated.

16 With respect to the basic question
17 presented, which is should Tinker apply off
18 campus, the delta between our position and --
19 and -- and theirs is that ours says -- ours
20 protects politically controversial speech. Ours
21 protects whistle blowing. Ours protects venting
22 frustration, you know, on the weekend. And ours
23 does not say that schools can't address
24 off-campus speech. It just says if it's off
25 campus, you have to address it consistent with

1 the First Amendment rules that govern that
2 particular problem.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 MR. COLE: And --

6 JUSTICE BARRETT: Mr. Cole, I want to
7 pick up where Justice Kavanaugh left off. I
8 want to make sure I understand your approach.
9 Let's talk about the harassment example that you
10 were discussing with Justice Sotomayor. Tinker
11 doesn't apply off campus, let's say, you know,
12 that we're in that world, and you say that the
13 school could, much like a city official, if I'm
14 understanding this correctly, prohibit
15 harassment that rises to the level of
16 interference with another student's educational
17 opportunities, and I assume that would be
18 judged -- if the -- if the school adopts it,
19 would you envision that in a bullying statute or
20 would you envision that in a school-adopted
21 policy? Let's start with that.

22 MR. COLE: So I think the schools have
23 generally adopted bullying policies. The states
24 have required them to adopt bullying policies.
25 And there are many, many such policies. And --

1 and -- and -- and our view is those are
2 constitutional --

3 JUSTICE BARRETT: Okay. So let me ask
4 you about the test. So the policy from comes
5 from the school. So the school adopts a policy,
6 say, about bullying, and then it gets challenged
7 when a student is disciplined for off-campus
8 bullying. Let's imagine Justice Sotomayor's
9 example of the, you know, you're so ugly, you're
10 so ugly. And it rises to the level where the --
11 the child just can't go to school anymore, or
12 the example about the disabled student who is
13 taunted with sexually graphic images on his way
14 home from school. That's subject to a First
15 Amendment challenge and what you're saying,
16 well, there's a compelling state interest, but
17 it's narrowly tailored.

18 Is -- is that what you're envisioning,
19 content discrimination but --

20 MR. COLE: Yeah. Our -- our view is
21 just as the sexual harassment law with respect
22 to hostile work environment is permissible in --
23 in terms of prohibiting severe or pervasive
24 harassment that interferes with equal access to
25 the employment place, so too a bullying law that

1 prohibits severe or pervasive interpersonal
2 aggression sufficient to interfere with access
3 to education would be constitutional.

4 I think it could be constitutional
5 under *Giboney*, as the Court -- this Court
6 suggested in *R.A.V.* with respect to sexual
7 harassment, or it would be narrowly tailored to
8 a compelling state interest.

9 But, if you define bullying, as some
10 of the -- the codes do, as anything that would
11 cause emotional harm, you know, without these
12 kinds of guardrails, I -- I think that's not
13 consistent with the First Amendment. And so the
14 Court ought to address that in appropriate -- in
15 an appropriate case and determine what the
16 appropriate definition of bullying is.

17 JUSTICE BARRETT: What -- what about
18 --

19 MR. COLE: This case, of course --

20 JUSTICE BARRETT: -- cheating?

21 MR. COLE: -- doesn't involve
22 bullying.

23 JUSTICE BARRETT: How does cheating
24 fare? Justice Kagan's example of the student
25 who goes home and e-mails out answers to

1 geometry homework.

2 MR. COLE: So -- so -- so Giboney
3 allows for the prohibition of speech integral to
4 prohibited conduct, and -- and -- and that
5 covers aiding and abetting. So aiding or
6 abetting cheating is just not protected at all
7 under Giboney.

8 JUSTICE BARRETT: Well, what -- what
9 about -- let's see, if you're thinking about
10 something that's a crime, right, aiding and
11 abetting is different, but --

12 MR. COLE: Right.

13 JUSTICE BARRETT: -- the school can
14 define in-school offenses. We can define
15 cheating as an offense, but what if it defines,
16 you know, demeaning classmates as an offense?

17 MR. COLE: Well, I think it has -- I
18 think -- what Giboney is -- is about is speech
19 integral to prohibited conduct.

20 JUSTICE BARRETT: Right. And what --

21 MR. COLE: So we're speaking around
22 sort of --

23 JUSTICE BARRETT: -- is the prohibited
24 conduct -- wait, but what -- what is to say --

25 MR. COLE: It's conduct versus speech.

1 JUSTICE BARRETT: Wait, I'm sorry, go
2 ahead.

3 MR. COLE: It's -- because the
4 difference is conduct versus speech. So the --
5 the -- the rationale in Giboney is, if you're
6 regulating conduct, the fact that there is some
7 speech integral to that conduct doesn't make it
8 a First Amendment problem. So if the -- and --
9 and schools --

10 JUSTICE BARRETT: So the cheating is
11 --

12 MR. COLE: -- obviously have broad --

13 JUSTICE BARRETT: -- your -- your
14 answer is that the cheating is conduct -- I
15 mean, the -- the circulation of the answers is
16 conduct?

17 MR. COLE: Cheating is -- cheating is
18 conduct however it's done, and if you aid or
19 abet cheating through the circulation of
20 answers, yes, it can be prohibited.

21 JUSTICE BARRETT: Okay. What would be
22 wrong with a test like this? One of your
23 problems is that it's difficult to define the
24 school environment and what constitutes the
25 school environment. What would be wrong with

1 saying that the school environment exists when
2 the student is relating -- not just supervisory.
3 I mean, that -- that's narrow. What about when
4 the student is relating to the school in the
5 student's capacity as a student?

6 So, if the student is directly
7 communicating with the school, sending e-mails
8 to the school, sending e-mails to a teacher at
9 the teacher's school e-mail account, would those
10 be within the school environment under your
11 definition?

12 MR. COLE: Yes, because you would
13 be -- you would be subjecting yourself to the
14 school's jurisdiction. If you're -- if you call
15 the school, if you send an e-mail to the school
16 account, you are now subjecting yourself to the
17 jurisdiction.

18 But if you send a -- a -- a text to
19 six of your friends who happen to be classmates
20 and you do it on the weekend, you're not
21 subjecting yourself to the school's jurisdiction
22 and you shouldn't be treated as if you're in
23 school.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: A minute to

1 wrap up, Mr. Cole.

2 MR. COLE: Thank you.

3 Everyone agrees off-campus bullying,
4 harassment, and threats properly defined can be
5 regulated. The difference between the other
6 side's test and ours is this: Ours would
7 protect political speech, whistleblowing, and
8 venting frustration outside school even if a
9 principal predicts it will lead to disruption.
10 Theirs would not.

11 Ours would preserve the rule against
12 content discrimination and acts of zeal outside
13 school. Theirs would not. Ours would provide
14 breathing room for free speech outside school.
15 Theirs would empower school officials to monitor
16 everything students say to each other anywhere.

17 And ours would require clear
18 definitions of off-campus bullying and
19 harassment consistent with First Amendment
20 principles. Theirs would cause disruption and
21 dispense with further definition.

22 The fact that Petitioner claims it can
23 punish B.L. for a momentary expression of
24 frustration on a weekend out of school and out
25 of season shows how sweeping its approach is.

1 Its rule would teach students they can never
2 speak candidly with their friends without
3 worrying that a school official will deem their
4 views potentially disruptive and suspend them or
5 otherwise punish them. That is exactly the
6 wrong lesson to teach.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Rebuttal, Ms. Blatt.

11 REBUTTAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF PETITIONER

13 MS. BLATT. Thank you, Mr. Chief
14 Justice.

15 There's some sort of twilight zone
16 going on when the head of the ACLU says that
17 schools allow hecklers' veto, punishment for
18 whistleblowing, any kind of reporting, any kind
19 of criticism, all that matters is someone is
20 offended. And you have the Biden administration
21 and the school districts saying that's not true.
22 That's not what Tinker allows.

23 Now Mr. Cole said the case law allows
24 us to act like Soviets and the North -- North
25 Koreans. But the -- since the Saxe opinion, the

1 Morse concurrence, Fillmore and Zalon Acts have
2 left clean -- clear lines for schools and that
3 hecklers' vetoes are not allowed.

4 And your choice is this: If you --
5 you could choose to either tighten Tinker or you
6 can say, well, we're going to assume Tinker is
7 out of control on campus, but we will leave open
8 season on schools and complete chaos as to what
9 their test allows.

10 Under their view, all 50 states define
11 bullying in terms of Tinker. You have the same
12 e-mail chain that would toggle on and off campus
13 and you would have the Tinker test applying when
14 there's some on-campus speech, and I don't know
15 what applies. I think Mr. Cole said it's the
16 Tinker test, but he's afraid to use the Tinker
17 word because it's scary, and it shouldn't be.
18 You're much better off cleaning this doctrine
19 up.

20 Justice Kagan, you had amazing
21 questions about school speech. Remember, our
22 test is the audience has to be the school, so
23 all of your speech, if it's to the press, the
24 police, your pastor, your family, et cetera,
25 none of that is school speech even if it

1 involves a school topic.

2 Justice Barrett, on threats, the facts
3 in Bethlehem, Pennsylvania, and Bell, nobody
4 knew whether that was a threat. The police were
5 sort of involved. It is not fair to the parents
6 of those other kids to have schools fumbling
7 around. Well, I don't know what this applies
8 before we had Tinker, part of the threats were
9 on campus, part were off, it was on the
10 Internet. Let's look at where she drafted it,
11 maybe she was to and from.

12 Now let's move to the school
13 supervision, madness, confusion, and chaos.
14 Please don't do this to schools. Mr. Cole said
15 you could prevent swearing to and from school.
16 That's nuts. You're in the dad's minivan.
17 That's school supervision under their view.

18 No one thinks Fraser applied there,
19 and yet all of a sudden, when you get out of the
20 minivan and I guess walking to it, it maybe
21 depends on how fair you park, Tinker is going in
22 and out of coverage, that rule makes no sense.

23 There's no case law on conduct that
24 aids and abets school speech. You will have a
25 school speech petition. You can keep denying

1 cert, but I guarantee the courts are going to --
2 they're going to freak out when Tinker has been
3 the law off campus for 20 years.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:52 a.m., the case
8 was submitted.)

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Official - Subject to Final Review

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