No. 20-255

In the Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
PETITIONER,

v.

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

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

REPLY BRIEF FOR PETITIONER

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Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), ever allows schools to address off-campus speech presents a quintessential issue for review. In five circuits and under the law of the Pennsylvania Supreme Court, schools can discipline substantially disruptive off-campus speech that is closely linked to the school environment. But the decision below disempowered 5,800 schools within the Third Circuit from addressing this same speech. Rejecting other circuits' approaches as "unsatisfying" and "overbr[oad]," Pet.App.27a, 30a, the Third Circuit became "the first Circuit Court to hold that *Tinker* does not apply to off-campus speech." Pet.App.46a (Ambro, J., concurring in the judgment).

Commentators called the decision a "bombshell"; respondents' counsel dubbed it a "landmark." Pet. 3. For *amici* representing thousands of school districts and 1.7 million teachers, the decision is a disaster. NSBA Br. 1-2, 9-10; PSBA Br. 3, 12. Relying on *Tinker*, several States within the Third Circuit passed laws *requiring* schools to address off-campus cyberbullying or harassment with a close nexus to the school. Absent this Court's intervention, schools within the Third Circuit cannot protect student welfare without risking damages suits.

Respondents' arguments against review are pure obfuscation. Rather than acknowledging the circuit split, respondents (at 10) mischaracterize the decision below as "largely consistent" with other decisions. But courts of appeals do not gratuitously own up to creating circuit splits by "forg[ing] [their] own path." Pet.App.31a. Within the Third Circuit, *Tinker* never applies to off-campus, school-connected speech. In Pennsylvania state courts and the Second, Fourth, Fifth, Eighth, and Ninth Circuits, *Tinker* applies to the same speech. That blatant disparity explains the universal consensus that the decision below creates a circuit split. Pet. 3, 16-17.

Respondents seek to erode this mountain into a molehill by contending (at i, 14-17) that B.L.'s speech was not substantially disruptive and thus not subject to discipline even had she spoken out at school. But the Third Circuit rejected that argument, reserving the substantial-disruption question after acknowledging that B.L.'s posts undisputedly upended the cheerleading program. *See* Pet.App.22a-23a & n.10. Not only was the off-campus question dispositive below; the question presented recurs constantly and has become even more urgent as COVID-19 has forced schools to operate online. Only this Court can resolve this threshold First Amendment question bedeviling the Nation's nearly 100,000 public schools.

I. The Decision Below Creates an Acknowledged Split

Respondents' denial (at 1, 8, 9, 11, 13, 18) of the circuit split blinks reality. Five other circuits and the Pennsylvania Supreme Court allow schools to discipline disruptive off-campus speech under *Tinker*. Pet. 11-15. The Third Circuit does not. Within that circuit, schools can no more proscribe students' off-campus speech than they can proscribe speech of "citizens in the community at large." Pet.App.31a (internal quotation marks omitted). That is why the Third Circuit said it was parting ways with other circuits to hold that "*Tinker* does not apply to off-campus speech"—period. Pet.App.31a. And everyone—including 500 Pennsylvania school districts, thousands of teachers and administrators, and respondents' counsel in press releases—has taken the Third Circuit at its word, portraying the decision below as opening a stark circuit split. Pet. 16-17; NSBA Br. 6-10; PSBA Br. 1-3.

1. Respondents (at 1, 9-10, 13-14) contend the Third Circuit and other courts "look to the same set of factors" to determine whether schools can regulate off-campus speech. But as the decision below observed, the Second, Fourth, Fifth, Eighth, and Ninth Circuits apply *Tinker* to off-campus speech with a sufficiently strong connection to the school environment. Pet.App.25a-27a; *see* Pet. 11-15. So does the Pennsylvania Supreme Court. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 & n.12 (Pa. 2002). As the Third Circuit noted, those approaches reflect "broad rule[s] governing all off-campus expression," and interpret *Tinker* as allowing schools to regulate disruptive off-campus speech that is "reasonably foreseeable" to reach the school environment, or has a sufficient "nexus" to the school. Pet.App.25a-28a; *see* Pet. 11-15.

The Third Circuit bucked that consensus, deeming other circuits' approaches "overbr[oad]" and unable "to

provide clarity and predictability." Pet.App.30a. The majority thus adopted a bright-line rule that "*Tinker* does not apply to off-campus speech," no matter the connection to the school or level of disruption. Pet.App.31a, 36a. Not only would five other circuits evaluate B.L.'s speech under a different standard that allows schools to discipline certain off-campus speech. The same off-campus speech would be subject to different standards depending on whether Pennsylvania schools faced suit in state or federal court. Pet. 15.

Respondents (at 9-10) try to muddy the Third Circuit's rule into a multifactor test, claiming that the decision below only bars schools from disciplining "off-campus speech that (1) does not constitute harassment or a threat of violence," (2) occurred off-campus "outside of school hours," (3) "was not disseminated" through school channels, and (4) "did not bear the school's imprimatur." But the Third Circuit held that *Tinker* never allows schools to discipline even harassing or threatening off-campus speech. Pet.App.35a ("disagree[ing] with the *Tinker*-based theoretical approach that many of our sister circuits have taken in cases involving students who threaten violence or harass others"). Respondents' remaining factors recap the Third Circuit's definition of off-campus speech. *See* Pet.App.31a (defining "off-campus speech" as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur"). As respondents concede (at 13), other courts agree with that definition of off-campus speech. Other courts just disagree and allow schools to apply *Tinker* to regulate off-campus speech. Pet. 11-14.

Respondents (at 9) accuse petitioner of "oversimplif[ying]" the decision below. But the Third Circuit itself touted the "clarity" of its bright-line ruling and claimed it would be "much more easily applied." Pet.App.33a. The

majority even said it was removing the "significant obstacle" of qualified immunity by creating an unmistakable rule that would subject schools that punish off-campus speech to damages suits. Pet.App.25a.

Notably, respondents' counsel previously described the Third Circuit majority's holding exactly as the petition does, saying the court held "that public schools do not have the power to discipline students for off-campus speech even if the speech causes or is likely to cause a disruption on campus." ACLU of Pennsylvania, *Federal Appeals Court Upholds and Expands Students' Free Speech in Schuylkill County Case* (June 30, 2020), https://tinyurl.com/yxe7xqr6. Counsel stressed that this "important decision … recognizes that students who are outside of school enjoy full free speech rights, not the diluted rights they have inside the schoolhouse." *Id.*

2. Respondents (at 11-13) argue that unlike here, most other circuits' cases involved threatening or harassing speech. But as the Third Circuit observed, other circuits do not limit schools' authority under *Tinker* to off-campus speech that threatens or harasses. *See* Pet.App.26a ("the 'reasonable foreseeability' standard spread far and wide" beyond threat and harassment cases); Pet.App.28a (other circuits' approaches "govern[] all off-campus expression," not just threats or harassment). And respondents' brief belies their claim (at 18) that no "court has extended *Tinker* to allow public schools to punish students for" off-campus speech that "involved no threat or harassment." Br. in Opp. 12 n.1 (citing *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), an off-campus speech case that "involves no direct threat of violence or harassment"); *see C1.G v. Siegfried*, 2020 WL 4582715, at *6 (D. Colo. Aug. 10, 2020) ("adopt[ing] the majority view that *Tinker* applies to off-campus speech" and upholding school's discipline of student for sending off-campus anti-

Semitic Snapchat to classmates); *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010) (applying *Tinker* to off-campus Facebook post criticizing teacher); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107-08 (C.D. Cal. 2010) (applying *Tinker* to off-campus speech criticizing classmate).

Similarly, respondents (at 10, 13) suggest that other doctrines remain available for schools within the Third Circuit to regulate some threatening or harassing off-campus speech. Respondents' hedging does not diminish the split or its dire consequences. Unlike in other circuits, schools within the Third Circuit cannot employ a "*Tinker*-based" approach to threatening or harassing off-campus speech, and thus cannot reach most incidents. Pet.App.35a. The Third Circuit only suggested that schools might regulate off-campus speech if it is unprotected under the "true threat" doctrine, or when schools' actions satisfy strict scrutiny. *Id.* But those exceedingly high standards do not cover much of the threatening or harassing off-campus speech that schools routinely encounter. *E.g.*, *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (setting extraordinarily high bar for true threats); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (speech restrictions "rare[ly]" survive the "demanding standard" of strict scrutiny).

No school can afford to test whether the Third Circuit might recognize some unstated other theory for addressing specific threats or harassment. *See* Pet.App.35a. The decision below avowedly subjects school administrators to money damages for regulating off-campus speech. Pet.App.25a. Schools would be in an intolerable position even if the Third Circuit left schools' authority over off-campus threats or harassment unclear. As the nation's largest groups representing school administrators explain, uncertainty as to schools' authority over such

speech is unacceptable because the costs of non-intervention "cannot be overstated." NSBA Br. 4; *see id.* at 7-8.

Respondents (at 9) contend "no other court of appeals would have held that *Tinker* applies" to B.L.'s speech. But, based on the close nexus to school events and the near-certainty that B.L.'s posts would permeate the school environment, the Second, Fourth, Fifth, Eighth, and Ninth Circuits and the Pennsylvania Supreme Court would plainly conclude that schools have jurisdiction over B.L.'s speech. *See* PSBA Br. 10-11.

And respondents are wrong (at 13) that B.L. "did not *mention*, much less target, the school" or intend disruption. Using vulgar language, B.L. sent two posts condemning how her coaches run the cheerleading program. Pet. 5-6. Respondents omit B.L.'s second post, which the Third Circuit said "openly criticized the [cheerleading] program and questioned her coaches' decisionmaking, causing a number of teammates and fellow students to be 'visibly upset.'" Pet.App.23a n.10. B.L. blasted these messages to a 250-person audience, including classmates and fellow cheerleaders—making it foreseeable that many students would see her messages, react, and involve the coaches. Pet.App.5a. No court has adopted respondents' suggestion (at 15) that off-campus speech must name the school, teachers, or classmates to create a nexus to campus. Regardless, any quibbling over whether B.L. would prevail elsewhere is no reason to deny review. The Third Circuit adopted a diametrically different rule by holding that *Tinker* never extends to off-campus speech.

II. The Question Presented Is Important, Recurring, and Squarely Presented

Respondents do not dispute the importance of the question presented, which routinely arises for thousands

of schools and millions of students, teachers, and administrators—especially in the COVID-19 era. Pet. 3, 10, 16-18; NSBA Br. 5, 23; PSBA Br. 12. *Amici* representing millions of teachers and hundreds of thousands of administrators stress the grave consequences of disempowering schools within the Third Circuit from addressing even off-campus speech with a close nexus to the school environment that jeopardizes the learning environment or student well-being. NSBA Br. 4, 7-8, 21-22. And Pennsylvania's school districts and principals emphasize that the Third Circuit has placed them in "the untenable position of being responsible for more and more student conduct" under state law, "while possessing less and less leeway to maintain order." PSBA Br. 12.

Respondents identify no obstacles to review, but dismiss this case as a poor vehicle. Respondents (at 1-2, 3, 13, 14-17) contend that even if *Tinker* applies off-campus, B.L.'s speech was too "harmless" and "ephemeral" to be disruptive. But, as respondents concede, the sole basis for the Third Circuit's opinion was that "*Tinker* did not apply to B.L.'s speech," so the majority "did not have to answer the 'disruption' question." Br. in Opp. 16; *see* Pet.App.22a-23a & nn.9-10. Thus, if the Third Circuit is wrong and *Tinker* applies to off-campus speech, this Court would vacate for further consideration of the substantial-disruption question on remand. The two questions are entirely independent.

And while respondents (at 14-15) consider their substantial-disruption argument a slam dunk, the Third Circuit majority called a timeout, deeming that question too "complex" to resolve. Pet.App.22a-23a & nn.9-10. Respondents (at 16) say B.L.'s case is easy because school officials did not believe B.L.'s speech would "create any substantial disorder." But as the Third Circuit observed,

disorder in the classroom "is not the School District's argument." Pet.App.23a n.10. Rather, petitioner has always argued that B.L.'s speech "undercut the 'team morale' and 'chemistry' on which the cheerleading program depends." *Id.*[1]

Nor was B.L.'s speech so innocuous or fleeting. As the Third Circuit majority observed, "B.L. does not dispute that her speech would undermine team morale and chemistry … in the context of a sport in which team members rely on each other for not only emotional and moral support, but also physical safety." *Id.* Because school athletics inherently implicate team morale, safety, and sportsmanship, coaches need a freer hand to maintain order and cohesion. NSBA Br. 11-14; PSBA Br. 13-14. In all events, this Court routinely grants review even if alternative arguments are open on remand. The salient fact is that the Third Circuit decided a case-dispositive issue of staggering importance that clearly divides the circuits.

III. The Decision Below Is Wrong

The Third Circuit held that *Tinker* categorically does not apply to off-campus speech based on three flawed policy concerns that respondents do not defend. First, the

[1] Respondents err in asserting (at 2, 14-15, 18) that petitioner conceded a lack of substantial disruption in district court. Petitioner's answer to B.L.'s complaint denied her allegation that there was no substantial disruption. Def.'s Answer to Compl. ¶ 39, Nov. 17, 2017, ECF No. 16, No. 3:17-cv-1734 (M.D. Pa.). The coaches' deposition testimony stressed that B.L.'s posts risked "chaos within our squad" and destroyed team cohesion. Luchetta-Rump Dep. 30:6, Oct. 10, 2018, ECF No. 40-13, No. 3:17-cv-1734 (M.D. Pa.). Petitioner's summary-judgment briefing argued that "a potential disruption of team cohesion in extracurricular sports precludes protection for speech under *Tinker*." Def.'s Br. in Opp. to Pls.' Mot. for Summ. J. 14, Feb. 8, 2019, ECF No. 51, No. 3:17-cv-1734 (M.D. Pa.). The district court thus understood petitioner to "rely on *Tinker*." Pet.App.73a.

majority reasoned that reactions to off-campus speech uniquely depend on "others' choices and reactions." Pet.App.32a. But many *on*-campus incidents likewise involve voluntary listeners, many off-campus incidents involve captive listeners, and the disruptiveness of any incident depends on how others will foreseeably react. Pet. 22. Second, the majority cited an illusory pre-Internet "consensus" against regulating off-campus speech, Pet.App.32a, which respondents do not try to rehabilitate. Pet. 22-23. Third, the majority lauded the "clarity" of its rule that *Tinker* never allows schools to discipline off-campus speech, and the benefits of money-damages suits against school officials. Pet.App.25a, 33a. Respondents (at 9-10) now dispute the clarity of the majority's holding, but they do not dispute that a rule that *Tinker* never applies to off-campus speech will upend school disciplinary procedures throughout the Third Circuit. Pet. 23-25; NSBA Br. 9-10; PSBA Br. 3-4.

Respondents (at 18) fault petitioners for "focus[ing] on one aspect of the Third Circuit majority's reasoning—its conclusion that *Tinker* ought not to apply to this speech." But it is hardly strange to focus on the question presented, which respondents elsewhere admit (at 16) was the dispositive basis for the decision below. Respondents (at 18-19) reiterate that "the ultimate decision is correct," portraying B.L.'s speech as non-disruptive and no different from "voic[ing] her frustration to a group of friends" at a weekend gathering. But again, the majority expressed serious qualms on that score, bypassing the subsidiary substantial-disruption issue because of strong arguments under other circuits' precedents that B.L.'s speech *did* substantially disrupt an extracurricular activity. *Supra* pp. 2, 8-9; Pet.App.22a-23a & nn.9-10.

Respondents (at 18-19) praise the Third Circuit's separate holding that school districts cannot discipline off-campus speech like B.L.'s under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and add that such speech is not subject to discipline under *Morse v. Frederick*, 551 U.S. 393 (2007), or *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), either. But schools' inability to rely on other First Amendment doctrines to address disruptive off-campus speech underscores why *Tinker* is the only real tool at schools' disposal in five other circuits—and why the Third Circuit's holding that *Tinker* never applies to off-campus speech is so earth-shattering. As *amici* note, "[m]any … state laws" requiring schools to address cyberbullying "are based on the generally-accepted principle that the *Tinker* framework allows schools to address speech that occurs off-campus" but is substantially disruptive. NSBA Br. 9. The Third Circuit's *Tinker* ruling thus throws New Jersey, Pennsylvania, and Delaware laws into question—and threatens student welfare. *Id.* at 8-10; PSBA Br. 3.

At bottom, respondents (at 19) object that allowing schools to regulate off-campus speech that happens outside school hours and has "no specific connection to the school" would unacceptably compromise students' free-speech rights. But respondents just beg the question: What about speech that *is* inextricably linked to the school environment? That is the very speech that the Third Circuit placed beyond schools' purview, even as schools within other circuits can and routinely do discipline such off-campus speech if it risks substantial disruption. Petitioner does not seek to regulate off-campus speech untethered from the school environment. On campus or off, all agree that schools have no business "suppress[ing] speech on political and social issues based on disagreement with the viewpoint expressed." Pet. 23 (quoting

Morse, 551 U.S. at 423 (Alito, J., concurring)). But by disempowering schools from addressing off-campus speech inextricably linked with the school environment, the Third Circuit took a radical further step at odds with its sister circuits and the Pennsylvania Supreme Court. The undisputed, far-reaching consequences of that error warrant immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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