No. 20-255

In the Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
PETITIONER,

v.

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

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. The petition for a writ of certiorari was filed on August 28, 2020, and granted on January 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT

School administrators entrusted with the operation of public schools "have a difficult job, and a vitally important one." *Morse v. Frederick*, 551 U.S. 393, 409 (2007). Schools' doors open early so that students who depend on school-provided breakfasts do not start the day hungry. The bell rings; students amble into homeroom. They attend classes and congregate in hallways. Fifth-graders head off for a field trip to a local museum. High-schoolers walk off campus during lunch. Kindergartners enjoy recess. An entire grade goes to do community service at a nursing home. The bell rings again. Students meet up in parking lots, or at nearby bus stops. The chess team packs their boards for an all-city tournament. The basketball team heads to an away game. School buses ferry kids home to complete homework.

On the good days, kids learn, follow the rules, engage, exercise, get fed, and stay safe. Schools help students find their paths to becoming athletes, lawyers, electricians, senators, or social workers; more fundamentally, schools equip students for the challenges of adulthood. And schools save lives, whether by reporting signs of abuse or supplying free mental-health services.

This case is about how schools address the bad days. A swollen-eyed student breaks down during English class; her teacher discovers that her classmates are calling her worthless on social media and urging her to kill herself. The science teacher goes on leave after his students create a fake email account that impersonates him and spews invective about other students, prompting outrage from parents. Five students cheat on a test because another student, who took the test the day before, posted her answers online. Students upset with the gymnastics coach's tryout regimen crank-call her all night; she resigns, leaving the team without a coach. Older students follow a disabled student home and describe sexual acts in such graphic terms that he cannot face returning to school.

Every day, schools face hard calls about how to address such off-campus speech, which requires balancing students' First Amendment rights with the "special needs" that "inhere in the public school context." *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 829 (2002) (quotation marks omitted). But the answer under the First Amendment should not be to force schools to ignore student speech that upends the campus environment simply because that speech originated off campus, which is the rule the Third Circuit adopted below. Since the dawn of public education, schools have exercised authority to discipline speech that disrupts the campus or harms other students, whether that speech originates on campus or off.

Fifty years ago, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), this Court held that schools cannot regulate student speech based on its disruptive effects unless the speech would "materially and substantially disrupt the work and disci-

pline of the school" or would "inva[de] the rights of others." *Tinker* thus recognized that schools can constitutionally discipline student speech that risks significantly harming the campus community. Nothing in *Tinker* deprived schools of their longstanding authority to prevent such harms whenever students move off campus to speak.

Treating the First Amendment as a territorial shield that insulates all off-campus student speech would place students on different footing from other speakers—exactly the kind of speaker-based discrimination that the First Amendment ordinarily prohibits. The First Amendment does not immunize off-campus speech by school employees or even members of the public when that speech impairs school functions. The same rule should apply to students. And in other contexts, schools and other state actors retain authority to regulate conduct that happens outside their property lines but creates substantial effects inside. This Court should not interpret the First Amendment alone as a territorial on/off switch.

Placing off-campus speech off limits is unnecessary to prevent schoolhouse tyranny. Under familiar concepts of due process and notice, no off-campus speech is within schools' ambit unless students direct their speech at the school community. And schools cannot use their authority over school discipline as a backdoor route to censorship. The backstop is *Tinker*. Schools can *never* punish speech solely because of disagreement with the student's message, no matter where that speech happens. Students can express pro- or anti-Israel views, praise atheism or urge prayer, or offend their classmates.

This Court should not replace a century's worth of school practice with a territorial approach that is doctrinally rudderless, counterproductive, and irrational. Confining schools' authority to on-campus student speech would gut scores of state and federal laws, which prohibit

off-campus speech that materially interferes with the school environment or effectively denies other students an education. A territorial approach also begs questions about what "on-campus" means. If a student stands just off school grounds, but shouts at classmates from a megaphone on the sidewalk, is that on campus or off? If a student on the weekend uses her private email to blast harassing messages to school email accounts, where did the speech happen? The ubiquity of smartphones, plus the added complexity of the COVID remote-learning environment, makes the decision below even less justifiable. Drawing lines between "on" campus and "off" inevitably produces arbitrary results, undermining the perceived fairness of school discipline. Wherever student speech originates, schools should be able to treat students alike when their speech is directed at the school and imposes the same disruptive harms on the school environment.

Students do not check their First Amendment rights at the schoolhouse gate. But the First Amendment is not a territorial straitjacket that forces schools to ignore speech that disrupts the school environment or invades other students' rights just because students launched that speech from five feet outside the schoolhouse gate.

A. Factual Background

Respondent B.L. made the Mahanoy Area High School junior varsity cheerleading team as a rising freshman. As a rising sophomore, B.L. hoped to make varsity, but was disappointed to again make JV. Meanwhile, an incoming freshman made the varsity squad, skipping JV entirely. Pet.App.4a-5a.

B.L. was "visibly upset" when the coaches announced the results. J.A.33. The day after tryouts, she texted the cheerleading coach, "do you have to d[o] a year of jv before you could make varsity?" When the coach responded

"No," B.L. replied, "That's stupid[,] [b]ut okay[.] [My mom] was just wondering how [redacted, the rising freshman] made varsity." J.A.19.

The next day was a Saturday. From off campus, B.L. posted two messages on Snapchat, a social media application that allows users to send text, photo, and video messages to other users, or "friends." Pet.App.5a n.1. These messages are visible on Snapchat for 24 hours. *See* B.L. Br. in Opp. 1, 3; *Privacy By Product*, Snap Inc., https://tinyurl.com/59ydqd8l. But Snapchat warns users of the obvious: "[O]ther Snapchatters can always take a screenshot," a virtual photograph that can last forever. *Our Privacy Principles*, Snap Inc., https://tinyurl.com/3xyqabo4.

B.L.'s first message consisted of a photo in which she and a classmate raised their middle fingers at the camera, with the caption: "Fuck school fuck softball fuck cheer fuck everything." B.L.'s second message, posted shortly thereafter, consisted of the text: "Love how me and [another student, whom B.L. identified by her name] get told we need a year of jv before we make varsity but that[] doesn't matter to anyone else? 🙃." Pet.App.5a (some alterations in original); J.A.20-21. B.L. sent these messages to 250 friends, including classmates and cheerleading teammates. Pet.App.5a; J.A.28. B.L. conceded that viewers would understand the references to "school" to mean Mahanoy Area High School and "cheer" to mean the school's cheer team. J.A.101-02.

"Word of B.L.'s [s]naps spread through the school," prompting "[s]everal students, both cheerleaders and non-cheerleaders, [to] approach[]" the cheerleading coaches throughout the school day "to express their concerns" about B.L. staying on the team. Pet.App.52a (cleaned up); J.A.85-86. "Students were visibly upset" and "repeatedly for several days" brought B.L.'s messages up with the coaches. Pet.App.52a. During the ensuing week,

one coach, who also teaches algebra, saw her class "disrupted quite a bit" because students kept raising B.L.'s posts, which meant "taking class time away from [other] students." J.A.82-83.

The coaches determined that B.L.'s posts "could impact students in the school," J.A.81, and had violated team rules that B.L. had agreed to follow, Pet.App.51a, including that cheerleaders "have respect for [their] school, coaches, teachers, [and] other cheerleaders" and avoid "foul language and inappropriate gestures." Pet.App.50a-51a. The rules also stated: "There will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Pet.App.51a.

The coaches disciplined B.L. "to avoid chaos and maintain a team-like environment." Pet.App.52a (cleaned up). The coaches explained that "posting negative information" can create "chaos within our squad." J.A.70-71. Team cohesion is especially crucial on a cheer squad, where, as B.L. acknowledged, cheerleaders "depend on each other" for physical safety during routines. J.A.99.

The coaches removed B.L. from the cheer team for the school year, but informed B.L. that she could try out again as a rising junior. No other disciplinary action was taken. B.L. and her parents appealed to the athletic director, the principal, the superintendent, and the school board, all of whom stood by the coaches' decision. Pet.App.6a. B.L. and her parents responded by filing a federal lawsuit under 42 U.S.C. § 1983.

B. Procedural History

1. B.L. and her parents sued petitioner, Mahanoy Area School District, in the U.S. District Court for the Middle District of Pennsylvania. Pet.App.6a. They alleged that the school district violated B.L.'s First Amendment rights by disciplining her off-campus speech. *Id.*

They sought an injunction compelling reinstatement of B.L. to the cheerleading squad and expungement of her disciplinary record, declaratory relief, and money damages. *See* Pet.App.77a-78a.

The district court granted a preliminary injunction, reinstating B.L. onto the JV squad, J.A.39, and reigniting the disruption on the team, J.A.84-85. Nearly half the squad approached the coaches to express concern that B.L. could denigrate the team with impunity, and tensions lingered. J.A.85-86.

The district court granted B.L. summary judgment, holding that B.L.'s dismissal from the cheerleading team violated her First Amendment rights. The court held that even if *Tinker* extended to off-campus student speech, B.L.'s off-campus messages were insufficiently disruptive for the school to discipline B.L. under *Tinker*'s substantial-disruption standard. Pet.App.73a-74a. The court awarded B.L. nominal damages, ordered the school district to expunge any disciplinary record, declared that B.L.'s removal from the team violated her First Amendment rights, and awarded attorney's fees. Pet.App.77a-78a.

2. A divided Third Circuit affirmed on different grounds. The majority declined to resolve whether B.L.'s speech was substantially disruptive, noting that B.L. "does not dispute that her speech would undermine team morale and chemistry." Pet.App.23a n.10. B.L. "openly criticized the program and questioned her coaches' decisionmaking, causing a number of teammates and fellow students to be visibly upset." *Id.* (quotation marks omitted). Moreover, B.L. did so "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.*

And the court noted that other circuits have held that disruptions to the unity and cohesion of school athletics programs can qualify as substantial disruptions. *Id.*

Instead, breaking with every other circuit court to consider the question, the majority held that *Tinker* categorically "does not apply to off-campus speech," even if the speech creates a substantial disruption on campus. Pet.App.31a. The majority acknowledged that only an *amicus* brief supporting respondents had advanced this position. Pet.App.21a n.8.

The majority explained that under its holding, schools can never invoke a substantial-disruption rationale to punish off-campus speech, which the court defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Pet.App.31. The majority elaborated that schools cannot invoke *Tinker* even to address "off-campus student speech threatening violence or harassing particular students or teachers." Pet.App.34a; *see* Pet.App.35a.

Judge Ambro concurred in the judgment but "dissent[ed] from the majority's [*Tinker*] holding." Pet.App.42a. He faulted the majority for holding "that *Tinker* categorically does not apply to off-campus speech," Pet.App.46a, noting that "the majority does not give guidance" on what constitutes "school-supervised channels" or "speech that carrie[s] the school imprimatur," Pet.App.44a. Judge Ambro would have affirmed the district court's judgment because, in his view, insufficient evidence existed of substantial disruption. Pet.App.45a.

SUMMARY OF ARGUMENT

I. The First Amendment does not prevent schools from regulating off-campus student speech that targets

the school environment and substantially disrupts school activities or interferes with other students' rights.

A. Public schools have always disciplined off-campus student speech to prevent on-campus disruption. Public schools historically stood *in loco parentis*, possessing near-plenary authority over student discipline. Courts uniformly understood this authority to extend to off-campus speech when necessary to maintain school order or discipline.

B. *Tinker* did not eliminate schools' pre-existing authority to regulate off-campus student speech. Students retain First Amendment rights in and out of the classroom, but as *Tinker* reiterated, those rights must be applied in light of the special needs of the school environment. By adopting the substantial-disruption standard, *Tinker* tied schools' disciplinary authority over speech to schools' interest in preventing material on-campus harms. Later cases and common sense confirm that *Tinker* should not limit schools' authority based on *where* disruptive speech originates. Thus, until the decision below, every circuit to consider the issue held that schools can regulate off-campus speech that causes significant on-campus disruption.

C. Analogous doctrinal contexts confirm that schools can regulate off-campus speech based on its on-campus effects. Schools' authority to regulate teachers' off-campus speech based on its on-campus effects is well established, and does not depend on where the teacher spoke. Students' Fourth Amendment rights also apply differently in the school context, even when a student's off-campus conduct is implicated. Similar principles establish other state actors' authority to regulate outside their borders based on effects within those borders.

D. Fears of school censorship do not justify treating the First Amendment as a stark on/off switch that confines schools to addressing only on-campus student speech. Other legal principles already stop schools from engaging in viewpoint discrimination or intruding on students' private lives. Schools must exercise their authority consistent with due-process and fair-notice considerations. Schools can address off-campus student speech only when students direct that speech at the school environment. Further, *Tinker* bars schools from punishing speech—whether on campus or off—based on disagreement with the message expressed.

Under these principles, B.L's off-campus speech was not beyond the school's authority. B.L. intentionally sent a vulgar message regarding her cheer team and criticizing her coaches to classmates and teammates. The only issue for remand is whether the school satisfied *Tinker*'s substantial-disruption standard.

II. Abrogating schools' authority to regulate off-campus speech with on-campus effects would upend school operations and invalidate scores of state and federal laws in all 50 States as applied to off-campus speech.

A. Schools in every State and the District of Columbia regulate off-campus student speech. The laws in the District of Columbia and at least 25 States *require* schools to address off-campus harassment or bullying that substantially disrupts the school environment or interferes with other students' rights. School districts in all other States have promulgated codes prohibiting students' off-campus harassment and bullying. And federal laws require public schools to address discrimination or pervasive student-on-student harassment that blocks students' access to educational benefits, without any limitation on *where* that harassment happens.

These laws reflect the reality that students' ubiquitous access to the Internet and social media have blurred any on-campus/off-campus distinction. A rule that the First Amendment immunizes off-campus student speech would invalidate these laws and policies in many applications and compromise their effectiveness.

B. The Third Circuit's rule would undermine schools' ability to protect basic school functions. Forbidding schools from addressing off-campus speech would create a blueprint for students to engage in highly disruptive speech with impunity: just wait to target the school community until stepping one foot off campus. The Third Circuit's rule would also tie schools' hands in protecting educators from students' off-campus harassment and abuse, weakening state laws that safeguard teachers and school staff.

C. Far from offering up-front clarity, a territorial approach would guarantee confusion. The court defined "campus" as (1) school grounds, (2) any "context owned" by the school, (3) any school-controlled setting, (4) any school-sponsored setting, and (5) speech "that is reasonably interpreted as bearing the school's imprimatur." These categories would spawn years of litigation over their contours while putting administrators and teachers at risk of money damages for guessing wrong. The decision below would replace the relatively stable status quo with a new regime that would tie schools' authority to property-based factors that have nothing to do with *Tinker*'s focus on the special needs of the school environment.

ARGUMENT

I. The First Amendment Does Not Bar Schools from Regulating Off-Campus Speech When It Is Directed at Campus and Is Substantially Disruptive

For well over a century, schools have disciplined off-campus student speech that inflicts on-campus harms. *Tinker* preserved that authority, but required schools to show substantial disruption to the school environment or interference with the rights of others. This Court should not deprive schools of their longstanding authority to address disruptive off-campus speech. Ordinary principles of notice and due process, as well as *Tinker*'s substantial-disruption requirement, already prevent censorship and protect students' private lives.

A. Public Schools Have Always Disciplined Off-Campus Speech To Prevent On-Campus Disorder

Public education has been the "*sine qua non* of the existence of the American republics." Noah Webster, *On the Education of Youth in America*, *in A Collection of Essays and Future Writings on Moral, Historical, Political and Literary Subjects* 1, 24 (1790). *In loco parentis* was the rule for much of the Nation's history: Public schools possessed coterminous authority with parents, and exercised near-plenary authority over student discipline. *Morse*, 551 U.S. at 413-16 (Thomas, J., concurring); *see* William J. Reese, *America's Public Schools: From the Common School to "No Child Left Behind"* 40-42, 63-65 (2011). Schools accordingly retained enormous discretion to discipline disruptive student speech, notwithstanding States' adoption of state constitutional analogues to the First Amendment. *Morse*, 551 U.S. at 411 n.1 (Thomas, J., concurring).

Schools' authority did not disappear when students stepped off campus. From the nineteenth century

through *Tinker*, schools disciplined off-campus student speech that threatened on-campus order. Horace Mann, America's most famous educator, summed up the prevailing rule in 1847: While "there is certainly some limit" to schools' jurisdiction, it was "equally plain, if their jurisdiction does not commence until the minute for opening the school has arrived, nor until the pupil has passed within the door of the schoolroom, that all the authority left to them, … would be but of little avail." *Tenth Annual Report of the Board of Education, Together with the Tenth Annual Report of the Secretary of the Board to the Massachusetts Legislature* 189 (1847). Such "jurisdiction, out of school hours and beyond school premises, is claimed … because the great objects of discipline and of moral culture would be frustrated without it." *Id.* at 190.

Schools "consistently followed" the principle that "any act of a pupil detrimental to the orderly discipline or well-being of the school, regardless of where committed, is of legitimate concern to the school." M. R. Sumption, *The Control of Pupil Conduct by the School*, 20 L. & Contemp. Probs. 80, 85 (1955). Schools could discipline "offenses committed out of school hours and off school grounds, which have a tendency to influence the conduct of other pupils while in the school room, [or] to set at naught the proper discipline of the school." Clifford L. Hilton & James M. McConnell, *Laws of Minnesota Relating to the Public School System Including the State Teachers Colleges and the University of Minnesota* 53 (1923); *accord* Sumption, *supra*, at 86-87.

Courts repeatedly endorsed schools' authority to discipline students for off-campus speech that threatened on-campus disruptions. C.W. Bardeen, *The New York School Officers Handbook: A Manual of Common School Law* 157-59 (9th ed. 1910) (listing cases); Beirne Stedman, *Regulation & Punishment of Conduct out of School*, 4 Va. L.

Reg. 415-18 (1918) (same). As the Iowa Supreme Court explained, schools could address matters "wholly outside of the school room" if the behavior "directly relate[d] to and affect[ed] the management of the school and its efficiency." *Kinzer v. Dirs. of Indep. Sch. Dist. of Marion*, 105 N.W. 686, 687 (1906). The Wisconsin Supreme Court found "abundant" authority for this proposition and none to the contrary. *State ex rel. Dresser v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232, 235 (1908).

For instance, the Vermont Supreme Court upheld punishment of a student who referred to his teacher as "Old Jack Seaver" *after* the school day ended, and on a street near his teacher's house, but within earshot of his classmates and his teacher. *Lander v. Seaver*, 32 Vt. 114, 115 (1859). Because the student's speech "ha[d] a direct and immediate tendency to injure the school and bring the master's authority into contempt" by virtue of occurring "in the presence of other scholars and of the master, and with a design to insult him," the incident fell within the school's purview. *Id.* at 120; *see Morse*, 551 U.S. at 414-15 (Thomas, J., concurring).

Similarly, the Missouri Supreme Court upheld a teacher's discipline of a student for using profanity, quarrelling, and fighting, after school hours and "one-half or three-fourths of one mile from the school house," citing the behavior's effects in the schoolroom. *Deskins v. Gose*, 85 Mo. 485, 487 (1885). The Wisconsin Supreme Court upheld a school's suspension of high schoolers who convinced the local newspaper to run a poem parodying the school's rules, after the poem "found its way into the homes of many [classmates] … who would be as much influenced thereby as if the writing had been printed and posted in the schoolroom." *Dresser*, 116 N.W. at 235; *accord Magnum v. Keith*, 95 S.E. 1 (Ga. 1918).

Courts continued recognizing schools' authority over off-campus speech through *Tinker*. In 1958, a Pennsylvania court upheld a student's expulsion for behavior that included, in part, swearing at his teacher at the teacher's home. *Hollenbach v. Elizabethtown Sch. Dist.*, 18 Pa. D. & C.2d 196, 197 (Ct. Com. Pl. 1958). The Oregon Attorney General summarized the landscape in 1956: Teachers could discipline off-campus student misbehavior when "such misconduct is detrimental to good order and the best interests of the school or affects school discipline." 28 Or. Op. Att'y Gen. 3, 1956 WL 59197, at *2 (Or. A.G. July 2, 1956). And in 1969, less than 10 months after this Court decided *Tinker*, a California district court upheld under *Tinker* school discipline of high school students who distributed an off-campus newspaper "by handing copies to students just outside the main gate to the campus" before classes convened. *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 519 (C.D. Cal. 1969).

B. *Tinker* Did Not Divest Schools of Their Authority To Regulate Off-Campus Speech

1. *Tinker* famously observed that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and rejected the notion that schools "possess absolute authority over their students." 393 U.S. at 506, 511. That conclusion built on a line of cases holding that students retain First Amendment rights in and out of the classroom. *See id.* at 506-07 (citing, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

But *Tinker* did not disturb the settled principle that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Charged with administering a vast

"school environment," educators face special needs, particularly where school discipline and order are concerned. *Tinker*, 393 U.S. at 506; *see, e.g.*, *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). Schools must be able to avoid "interference, actual or nascent, with the schools' work," and protect "the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. Accordingly, students' First Amendment rights must be "applied in light of the special characteristics of the school environment." *Id.* at 506.

Tinker struck that balance by holding that schools can discipline speech that school officials reasonably conclude would "materially and substantially disrupt the work and discipline of the school" or "colli[de] with the rights of others to be secure and to be let alone." *Id.* at 508, 513; *see Morse*, 551 U.S. at 403-04. *Tinker* involved a school policy prohibiting students from wearing armbands protesting the Vietnam War. 393 U.S. at 504. Because the school's basis for the policy was no more than the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," the Court held that the school's actions violated the First Amendment. *Id.* at 509; *see Morse*, 551 U.S. at 404. The students' speech "was entirely divorced from actually or potentially disruptive conduct." *Tinker*, 393 U.S. at 505.

The *Tinker* standard thus heightened the showing that schools must make to discipline student speech, whether on or off campus; historically, schools had more leeway to proceed against any perceived disruptions. *Supra* pp. 13-16. But it does not follow that *Tinker*'s higher bar to regulate student speech disturbed schools' longstanding authority over off-campus speech. Instead, *Tinker* tied schools' authority to their interest in preventing on-campus *harm,* namely whether "the work of the

schools or any class was disrupted" or the speech "intrude[d] upon … the rights of other students." 393 U.S. at 508. And *Tinker* reiterated that the First Amendment does not insulate student conduct "which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

2. This Court's later school-speech cases confirm that governmental authority to restrict students' speech depends on the severity of the on-campus harm that schools seek to avert, not *where* the speech occurs. That conclusion flows directly from *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which applied *Tinker* to uphold restrictions on *off-campus* speech that substantially disrupted the on-campus school environment.

In *Grayned*, a municipality punished an adult protestor for violating an anti-noise ordinance prohibiting "willfully mak[ing] … any noise or diversion which … tends to disturb the peace or good order of [a] school session or class thereof." *Id.* at 108 (quotation marks omitted). The defendant protested a school's lack of racial integration "on a sidewalk about 100 feet from the school building," distracting students and causing "uncontrolled lateness." *Id.* at 105. The Court concluded that schools' special needs justify restricting both adults' and students' speech, and held that municipalities can protect schools where adults' "expressive activity … 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513).

The Court rejected the notion that "students, teachers, or anyone else has an absolute constitutional right" to expression off campus, in the "immediate environs" of the school. *Id.* at 117-18; *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). If adults may be

punished for off-campus speech that disrupts the school, no conceivable basis exists for immunizing student speech that inflicts the same on-campus harm.

This Court's other school speech cases tailor schools' authority to restrict student speech to additional pedagogical purposes. *Bethel School District No. 403 v. Fraser* upheld a school's decision to discipline a student who used vulgar language during a school assembly, even though that language did not substantially disrupt the school environment. 478 U.S. at 683-84. Because of schools' discrete interest in "teaching students the boundaries of socially appropriate behavior," schools can dictate rules of decorum for speech in the school setting, just as Congress prescribes rules for legislative debate. *See id.* at 681-82. And under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988), schools can "exercis[e] editorial control over … school-sponsored expressive activities" based on schools' pedagogical interests in controlling the curriculum and supervising students in school-sponsored speech.

Similarly, in *Morse v. Frederick*, the Court held that schools can discipline "[s]tudent speech celebrating illegal drug use at a school event" based on schools' special need "to safeguard those entrusted to their care." 551 U.S. at 397. Because "part of a school's job is educating students about the dangers of illegal drug use," schools need leeway to restrict speech advocating drug use, which poses a "serious and palpable" threat to students' health. *Id.* Again, the Court linked schools' authority to specific pedagogical interests.

Experience and common sense reinforce the wisdom of tethering schools' authority to legitimate pedagogical needs. Schools routinely regulate off-campus speech and conduct for compelling reasons. As the name suggests, "homework" is work from "home," the off-campus place

where students complete assignments. The First Amendment does not stop teachers from compelling students to write essays on prescribed subjects or to read books over the summer. Nor does the First Amendment prevent teachers from prohibiting discussion of test answers among classmates after school. And schools can restrict students' off-campus associational rights by assigning them to group projects requiring off-campus work. Against this backdrop, it would be inexplicable to fashion a new constitutional rule barring schools from addressing fundamental harms to school order and safety simply because the disruptive speech originates off campus.

3. Until the decision below, every circuit to consider the issue had upheld schools' authority to regulate off-campus speech that would cause significant on-campus disruption.[1] The Third Circuit majority erred in finding a purported pre-Internet "consensus … that controversial off-campus speech was not subject to school regulation." Pet.App.32a. The majority's two cited cases do not establish any such consensus. *Thomas v. Board of Education*, 607 F.2d 1043, 1052 n.17 (2d Cir. 1979), in fact said the court could "envision a case in which a group of students incites substantial disruption within the school from some remote locale." But the court did not need to consider whether *Tinker* applied to off-campus speech because the student speech at issue had no "impact" on the school and thus the school could not show a substantial disruption under *Tinker*. *Id.* at 1046; *see id.* at 1052 n.17.

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[1] *See, e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 48-49 (2d Cir. 2008); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573-74 (4th Cir. 2011); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068-69 (9th Cir. 2013); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392-93 (5th Cir. 2015) (en banc).

The Third Circuit also cited *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004), but that case stated the opposite proposition by citing cases "[r]efusing to differentiate between student speech taking place on-campus and speech taking place off-campus." *Id.* at 615 n.22. And *Porter* held that "something more than … accidental and unintentional exposure to public scrutiny must take place" for "[p]rivate writings made and kept in one's home" to come within the school's jurisdiction, *id.* at 617-18—a proposition with which petitioner agrees. *Infra* pp. 27-29.

The Third Circuit's other rationales for breaking with other circuits rest on a misreading of *Tinker*. The Third Circuit cast *Tinker* as a "narrow accommodation" of schools' special need to regulate speech that risks a substantial disruption. Pet.App.32a. But that observation does not explain why schools would lack authority to discipline off-campus speech satisfying the substantial-disruption threshold.

The Third Circuit further reasoned that "*Tinker*'s focus on disruption makes sense" only "when a student stands in the school context" where peers are a "captive audience." Pet.App.32a. The majority thought that "any effect on the school environment" from off-campus speech "will depend on others' choices and reactions," Pet.App.32a, which the court considered "downstream" effects. Pet.App.29a n.11.

But *Tinker* rejects the idea that students are always captive audiences on campus, or that substantial disruptions to the school environment arise only when students expose a captive audience to disruptive speech. The Court refused to "confine[]" its reasoning "to the supervised and ordained discussion which takes place in the classroom," observing that schools foster "personal intercommunica-

tion among the students." 393 U.S. at 512. Neither students' First Amendment rights nor schools' authority depends on whether students are captive audiences at any given moment. Rather, schools can address speech "which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513.

In any event, it defies reality to think that on-campus speech always involves a captive audience, but off-campus speech never does. School officials, teachers, and students are a captive audience if they are harassed going to and from school, or receive crank calls at their house or on their mobile phones outside school hours, or are targeted online. Similarly, disabled students targeted by older bullies as they walk to and from school have no escape. *See C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1146 (9th Cir. 2016).

Meanwhile, many on-campus disruptions arise from students' voluntary interactions. Students are free to mingle (or not) with others during recess and free periods. It makes no sense to allow schools to intervene if a student encourages school shootings at a mandatory school assembly, but not if he says the same thing to 25 classmates who voluntarily congregate outside at lunch. And, whether on campus or off, students often access their smartphones and post messages directed at their classmates and the school community. It is hard to fathom how classmates who voluntarily look at those messages during the school day are a captive audience, yet classmates who wait until after school to check social media are not.

C. Closely Related Doctrinal Contexts Confirm that Schools Can Regulate Off-Campus Speech Based on Its On-Campus Effects

1. *Tinker* grouped students and teachers together, concluding that for First Amendment purposes, both students' and teachers' rights must be "applied in light of the special characteristics of the school environment." 393 U.S. at 506; *see Morse*, 551 U.S. at 403. Thus, the Court has relied on *Tinker*'s analysis of schools' special needs when balancing public employers' similar special needs with public employees' First Amendment rights. *E.g.*, *Perry*, 460 U.S. at 44 (recognizing that teachers do not have an "absolute constitutional right to use all parts of a school building or its immediate environs for … unlimited expressive purposes" and relying on *Tinker* and *Grayned*). Given the doctrinal overlaps, it would be incongruous to categorically prohibit schools from punishing off-campus student speech while avoiding any analogous territorial limitation on schools' authority over teachers' speech.

With respect to teachers, the Court looks to the substance of what teachers say, not where they speak. Courts assess whether the teacher spoke on matters of public concern, and balance that right against the school's need to protect its operations from disruption. Thus, in *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968), the Court did not ask where the teacher had written his letter to the newspaper. The Court instead concluded that the school could not discipline a teacher because the letter concerned a tax issue of public concern and did not disrupt the school environment. *Id.* at 572-73; *accord Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 458-59, 466 (3d Cir. 2015) (upholding teacher discipline for her online blog denigrating students, which hindered school order).

Of course, teachers accept limitations on their speech as a condition of public employment. But that employment relationship does not justify a rule that would allow schools to freely discipline disruptive off-campus teacher speech, yet disempower schools to address identical off-campus student speech. Suppose a student and teacher engaged in off-campus text messages denigrating another student, and the student at night forwards the whole conversation to the rest of the school using a private email address. It would hardly promote school discipline if the school could punish the teacher, but not the student whose off-campus speech deliberately magnified the disruptive effects of an inappropriate conversation.

2. Interpreting the First Amendment as a territorial limit on schools' authority over student speech would also drive a wedge between schools' authority in the First and Fourth Amendment contexts. This Court has treated students' Fourth Amendment rights as a close analogue to the student-speech context. *E.g.*, *Morse*, 551 U.S. at 406. "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere." *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995)). Schools' special needs require "some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)).

But in the Fourth Amendment context, schools' authority to subject students to random drug tests does not depend on whether the school is targeting only on-campus drug use, or where the drug tests physically take place. Rather, schools can generally subject students to random, suspicionless drug testing as a condition of participating in extracurricular activities. *Earls*, 536 U.S. at 829-30. Schools, in other words, can conduct searches to determine whether students engaged in drug use *off campus*,

and can penalize students for doing so due to on-campus effects, like "disciplinary problems," "outbursts of profane language" in class, and increased "risk of sports-related injury" on school teams. *Vernonia*, 515 U.S. at 648-49; *see id.* at 656 (recognizing that schools prohibit students from enrolling unless they receive required vaccinations, *i.e.*, off-campus medical care). The First Amendment alone should not impose territorial limits on school authority.

3. Tying schools' authority to regulate student speech to on-campus harms, rather than the arbitrary happenstance of where that speech originates, also accords with basic concepts of state authority.

States have long asserted "the power to legislate concerning the rights and obligations of [their] citizens with regard to transactions [o]ccurring beyond [their] boundaries." *N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (Cal. 1916). Such state laws are ubiquitous. *See* Gillian Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1521-22 (2007).

This Court thus has rejected strict territorial limits on States' authority, for instance upholding state taxation of out-of-state conduct when "the tax applies to an activity with a substantial nexus with the taxing State." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018). And the federal government possesses similar authority to regulate extraterritorial conduct that "produce[s] some substantial effect in the United States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (approving extraterritorial regulation under Sherman Act).

Or take the military, which—like schools—has a "special character" that modifies the exercise of various constitutional rights. *Brown v. Glines*, 444 U.S. 348, 354, 360

(1980). The military retains authority to discipline enlisted men and women regardless of whether they are on a military base. The Uniform Code of Military Justice "applies in all places." 10 U.S.C. § 805; *Solorio v. United States*, 483 U.S. 435, 436 (1987). This Court accordingly deemed it irrelevant that a Coast Guard member committed sexual abuse within "his privately owned home" in a civilian community, instead of on a military base. *Solorio*, 483 U.S. at 437, 439. The military's need to maintain a high standard of conduct within its ranks justified disciplining conduct occurring off the base. *Id.* at 439-41.

Likewise, Title VII prohibits public employers from engaging in workplace discrimination. 42 U.S.C. §§ 2000e(b), 2000e-2. But employers do not have a license to discriminate so long as supervisors reserve their sexual harassment or racial barbs for after-hours drinks. This Court has specifically considered conduct outside the workplace as relevant to whether prohibited workplace harassment exists. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986). It would make no sense to recognize this general rule for all these other state actors, but to disable schools alone from regulating off-campus speech that risks immense on-campus harms.

D. Existing Law Already Prohibits Viewpoint Discrimination and Intrusions into Students' Private Lives

The Third Circuit justified its territorial rule as necessary to prevent over-regulation of student speech. Pet.App.32a. But *Tinker* already recognizes that schools do not have free rein over students' private lives: Schools "may not be enclaves of totalitarianism." 393 U.S. at 511. Nor can schools "suppress speech they consider inappropriate, uncouth, or provocative." Pet.App.32a. Principles of due process and fair notice, along with the substantial-disruption test, ensure that schools cannot misuse their authority and stifle students' private expression.

1. Whenever state actors regulate conduct occurring outside their physical territory, familiar principles of due process and fair notice require that the regulated party have purposefully acted in such a way as to make such regulation foreseeable. Schools' regulation of off-campus student speech is no exception. Schools cannot automatically regulate all off-campus speech just because that speech satisfies the *Tinker* substantial-disruption standard. Baseline due-process protections also apply: Students must have intentionally directed their off-campus speech at the school environment, and their speech must foreseeably reach that environment. Before the decision below, every court of appeals to address the question of schools' authority over off-campus speech had endorsed similar guardrails.[2]

This Court's personal-jurisdiction precedents are instructive. There, too, "physical presence in the forum is not a prerequisite to jurisdiction." *Walden v. Fiore*, 571 U.S. 277, 285 (2014). When an out-of-state defendant "purposefully direct[s] his activities at residents of the forum," the defendant cannot insulate himself from a court's jurisdiction simply because he has not physically stepped

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[2] *See, e.g.*, *Doninger*, 527 F.3d at 48 (upholding discipline for off-campus speech directed at classmates that "foreseeably" reached campus and caused disruption at school); *C.R.*, 835 F.3d at 1150-51 (allowing regulation of off-campus speech "closely tied to the school" or where effects foreseeably "spill[ed] over into the school environment"); *Kowalski*, 652 F.3d at 567 (upholding suspension for off-campus speech "targeted" at classmate and "sufficiently connected to the school environment" to implicate school's interest in avoiding on-campus disruption); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) (allowing discipline of off-campus speech "targeted at" school that foreseeably created effect at school); *Bell*, 799 F.3d at 394 (school could discipline off-campus speech "intentionally direct[ed]" at school).

foot in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 476 (1985).

The out-of-state magazine employees in *Calder v. Jones*, for instance, could not escape California's jurisdiction simply because they lacked physical contacts with California. They had "intentionally directed" and "expressly aimed" their wrongdoing at California, given the magazine's large circulation there and the foreseeable "devastating impact" of an allegedly libelous article. 465 U.S. 783, 789-90 (1984); *see Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774, 781 (1984) (similar). Similarly, when students direct speech at the school community—for example, by referring to school affairs or sending speech directly to classmates—the fact that students pressed "send" off campus should not be dispositive.

Further, under this Court's personal-jurisdiction cases, defendants must reasonably foresee that their conduct would subject them to the forum's courts. *See Calder*, 465 U.S. at 789; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). A defendant's connection with the forum cannot be "random, fortuitous, or attenuated." *Walden*, 571 U.S. at 286. In the school context, students must reasonably foresee that their off-campus speech would reach the school. Schools, for instance, cannot expel a student for creating a violent, school-related sketch at home that the student's younger brother "wholly accidental[ly]" brought to school two years later, even if the sketch prompted panic on campus. *See Porter*, 393 F.3d at 615, 617-18. Such accidental transmission to the school environment is anything but foreseeable or purposeful. *See id.* at 615 & n.22.

Thus, much off-campus speech is beyond the school's purview, even aside from whether it would trigger a substantial on-campus disruption. Ordinary conversations with family or neighbors are not intentionally directed at

the school. Creating sexually explicit avatars of classmates may be morally questionable, but will not foreseeably reach the school environment if the student does not share them with anyone and saves the images on his home computer—even if the images make their way online when the student gets hacked. But if a student emails classmates over the weekend to plot a mass biology class walkout, the school should be able to address it. At that point, the student has not only directed her speech at school, but has sought a foreseeable, disruptive effect on campus.

2. Schools, moreover, may not "suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Morse*, 551 U.S. at 423 (Alito, J., concurring); *see Barnette*, 319 U.S. at 642; *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967). The premise of the substantial-disruption test is that schools cannot silence student speech anywhere because the school disagrees with the student's viewpoint. Schools must target the disruption, not the viewpoint. *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 212 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

Thus, a student may not recite *O Captain! My Captain!* when the teacher is talking, but only because the recitation disrupts the class and prevents others from learning. *Cf. Dead Poets Society* (Touchstone Pictures 1989). But schools cannot single out spontaneous Whitman recitations for punishment while giving Frost fans a free pass, any more than the Des Moines school district could prohibit students from wearing armbands to protest the Vietnam War, but allow political buttons or "the Iron Cross, traditionally a symbol of Nazism." *Tinker*, 393 U.S. at 510.

The disruption under *Tinker* must be "substantial" to warrant discipline. That means more than the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Morse*, 551 U.S. at 403-04 (quoting *Tinker*, 393 U.S. at 509). "No one would suggest that a school could constitutionally ban" speech simply because other students find the speech unwelcome or offensive. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.). "Any departure from absolute regimentation may cause trouble," and "[a]ny variation from the majority's opinion may inspire fear." *Tinker*, 393 U.S. at 508. Only when that speech crosses the line and "creates a sufficient threat" to school order can school authorities act. *C.H.*, 226 F.3d at 212 (Alito, J., dissenting).

While drawing the line between merely offensive and substantially disruptive speech requires close judgment calls, that difficulty is not unique to the question presented and is true regardless of where the speech originates. If an Internet post directed at the school otherwise satisfies *Tinker*, the First Amendment should be indifferent to whether the sender is standing two feet on or off school property or presses send on her smartphone two minutes before or after the school bell rings.

3. Under the foregoing principles, B.L.'s off-campus speech fell squarely within the school's purview. B.L. sent two messages that referred to her school and her school's cheer team, and mentioned another classmate by name. *See* J.A.20-21, 101-02. B.L.'s messages expressed disdain and anger toward the school and cheer team and condemned her coaches' decision-making about the varsity roster. J.A.20-21, 25; Pet.App.23a n.10. She plainly targeted her speech at campus. Underscoring the point, B.L. blasted these messages to a school audience, namely 250

of her Snapchat friends who included many fellow students and teammates. J.A.28. B.L. thus knew that her messages would reach a school-wide audience, especially her cheerleading squad. B.L. did "not dispute that her speech," including her criticisms of her coaches and the promotion of a younger student, "would undermine team morale and chemistry." Pet.App.23a n.10.

II. Abrogating *Tinker* for Off-Campus Speech Risks Potentially Calamitous Consequences

The Third Circuit's territorial approach would mark a sea change in school operations. Since *Tinker*, it has only become clearer that schools need the authority to discipline off-campus student speech that meets the substantial-disruption standard or invades the rights of other students. Scores of state and federal laws have been enacted in reliance on *Tinker*. In all 50 States, school districts prohibit off-campus speech with particularly pernicious on-campus effects. Federal law similarly requires schools to address off-campus speech to protect vulnerable children. It defies credulity that *Tinker* 50 years ago stripped schools of their longstanding authority to regulate off-campus speech, without Congress or any state legislature noticing. The Third Circuit's approach also would upend schools' operations by creating arbitrary and easily evaded rules for when schools can address speech.

A. The Third Circuit's Rule Would Undercut State and Federal Laws Protecting Students

1. In every single State, whether by state law or school district policy, schools regulate off-campus student speech that causes on-campus disruptions or interferes with the rights of other students. The laws in the District of Columbia and at least 25 States *require* schools to address off-campus harassment or bullying that materially

harms the school environment.[3] California thus requires schools to prohibit on- and off-campus communications that "substantial[ly] interfer[e] with [a] pupil's ability to participate in or benefit from the services, activities, or privileges provided by a school." Cal. Educ. Code § 48900(r), (s). Texas similarly compels schools to prohibit online student harassment, even when such speech "occurs off school property," if the speech "substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity." Tex. Educ. Code Ann. § 37.0832. Those two States alone account for 11.7 million public school students—over 20% of the Nation's total. *See* Nat'l Ctr. for Educ. Stats., U.S. Dep't of Educ., *Digest of Education Statistics*, tbl. 203.20 (2020), https://tinyurl.com/1ubikkkb. The 26 jurisdictions together comprise 32.9 million students—more than 64% of the Nation's total. *See id.*

Laws in seven other States authorize schools to address off-campus bullying. For instance, Pennsylvania schools "shall not be prohibited from defining bullying in such a way as to encompass acts that occur outside a

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[3] Ala. Code §§ 16-28B-3, 16-28B-4; Ark. Code Ann. § 6-18-514; Cal. Educ. Code § 48900; Conn. Gen. Stat. Ann. § 10-222d; 14 Del. Admin. Code 624; D.C. Code Ann. §§ 2-1535.01, 2-1535.03(a); Fla. Stat. Ann. § 1006.147(2)(d); Ga. Code Ann. § 20-2-751.4(a); 105 Ill. Comp. Stat. Ann. 5/27-23.7(a); Ind. Code Ann. §§ 20-33-8-0.2, 20-33-8-13.5; Ky. Rev. Stat. Ann. § 158.148; La. Stat. Ann. § 17:416.13(b)-(c); Me. Rev. Stat. Ann. tit. 20-A, § 6554; Md. Code Ann., Educ. § 7-424; Mass. Gen. Laws ch. 71, § 37O; Minn. Stat. Ann. § 121A.031; N.H. Rev. Stat. Ann. §§ 193-F:3, 193-F:4; N.J. Stat. Ann. §§ 18A:37-14, 18A:37-15.3; N.M. Admin. Code §§ 6.12.7.7, 6.12.7.8A; N.Y. Educ. Law §§ 11, 13; Okla. Stat. Ann. tit. 70, §§ 24-100.3, 24-100.4; 16 R.I. Gen. Laws Ann. §§ 16-21-33, 16-21-34; Tenn. Code Ann. §§ 49-6-4502, 49-6-4503; Tex. Educ. Code Ann. § 37.0832; Utah Code Ann. §§ 53G-9-601(d), 53G-9-602(2); Vt. Stat. Ann. tit. 16, §§ 11(a)(32), 570, 570c.

school setting" if the bullying is "directed at another student," is "severe, persistent or pervasive," and "substantially disrupt[s] the orderly operation of the school." 24 Pa. Stat. and Cons. Stat. Ann. § 13-1303.1-A; *accord* Iowa Code Ann. § 280.28(3)(a); Mo. Ann. Stat. § 160.775; N.C. Gen. Stat. Ann. §§ 115C-407.15, 115C-407.16; S.D. Codified Laws §§ 13-32-14, 13-32-18, 13-32-19; W. Va. Code Ann. § 18-2C-3; Wyo. Stat. Ann. § 21-4-314. School districts in all of these States have adopted policies requiring schools to address off-campus harassment or bullying that substantially disrupts the school environment.[4]

Laws in the remaining 18 States require schools to address on-campus bullying, but do not bar schools from adopting similar rules for off-campus speech.[5] School districts have filled the gap in all of these States, adopting

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[4] *E.g.*, Cedar Rapids (IA) Cmty. Sch. Dist., *Anti-Bullying/Harassment Policy 612* (2016), https://tinyurl.com/3hph1zyz; Springfield (MO) Bd. of Educ., *Policy JFCF: Bullying* (2016), https://tinyurl.com/34duw2db; Wake Cty. (NC) Pub. Sch. Sys., *Policy Code: 1710/4021/7230 Prohibition Against Discrimination, Harassment, and Bullying* (2020), https://tinyurl.com/12l55c95; Phila. (PA) Sch. Dist., *Student Code of Conduct* 5, 16 (2020-2021), https://tinyurl.com/10f1qo22; Sioux Falls (SD) Sch. Dist., Policies and Regulations, *JFCE – Student Bullying* (2017), https://tinyurl.com/yjhcu3ex; Raleigh Cty. (WV) Bd. of Educ., *Policy D.3.20: Bullying, Harassment, and Intimidation* (2018), https://tinyurl.com/3jp3822p; Natrona (WY) Cty. Sch. Dist., *Student/Parent Handbook* 30, 39-41 (2019-2020), https://tinyurl.com/h22wtx6k.

[5] Alaska Stat. Ann. §§ 14.33.200(a), 14.33.250; Ariz. Rev. Stat. Ann. § 15-341(36); Colo. Rev. Stat. Ann. § 22-32-109.1(b), (k); Haw. Admin. Code §§ 8-19-2, 8-19-6(a); Idaho Code Ann. § 18-917A(a); Kan. Stat. Ann. § 72-6147; Mich. Comp. Laws Ann. § 380.1310b; Miss. Code Ann. §§ 37-11-67(1), 37-11-69(1); Mont. Code Ann. §§ 20-5-208, 20-5-209; Neb. Rev. Stat. Ann. § 79-2,137; Nev. Rev. Stat. Ann. §§ 388.122, 388.135; N.D. Cent. Code Ann. §§ 15.1-19-17, 15.1-19-18; Ohio Rev. Code Ann. § 3313.666; Or. Rev. Stat. Ann. §§ 339.351, 339.356(2)(d); S.C. Code Ann. §§ 59-63-120, 59-63-140(A); Va. Code Ann. §§ 22.1-

codes prohibiting students' off-campus harassment and bullying that substantially interferes with campus.[6]

276.01, 22.1-279.6(D); Wash. Rev. Code Ann. § 28A.600.477; Wis. Stat. Ann. § 118.46.

[6] *E.g.*, Anchorage (AK) Sch. Dist., *2020-2021 High School Student Handbook* ¶ II.A.12.b, https://tinyurl.com/qkgwllvd; Chandler (AZ) Unified Sch. Dist., Governing Bd., *Policy JICK: Student Bullying/ Harassment/ Intimidation* (2019), https://tinyurl.com/3zrzmegz; Denver (CO) Pub. Schs., Bd. of Educ. Policies, *Policy JICDE: Bullying Prevention and Education* (2013), https://tinyurl.com/1xm7b1by; Haw. State Dep't of Educ., *Bullying Prevention Work*, https://tinyurl.com/1sgoksel; Boise (ID) Sch. Dist., *Policy 3231: Bullying, Hazing and Harassment* (2017), https://tinyurl.com/1fwdm3xr; Lawrence (KS) Pub. Schs., Bd. of Educ., *Policy Manual, JGECA – Hazing and Bullying* (2016), https://tinyurl.com/3fwtt3p2; Detroit (MI) Pub. Schs. Cmty. Dist., *Policy 5517.01: Bullying and Other Aggressive Behavior* (2019), https://tinyurl.com/2fobbysz; Jackson (MS) Pub. Sch. Dist., *Student Handbook: Rights, Responsibilities, and Code of Conduct* 41-42 (2020-2021), https://tinyurl.com/dwtop7m7; Billings (MT) Sch. Dist. 2, *Policy 3210: Harassment, Intimidation, and Bullying* (2013), https://tinyurl.com/1odaji62; Papillion-La Vista (NE) Cmty. Schs., *Board Policy 5203: Bullying and Harassment* (2012), https://tinyurl.com/4ea8mhpt; Elko Cty. (NV) Sch. Dist., *Policy JDB: Student Discipline: Rules of Behavior* (2007), https://tinyurl.com/4hkgzlyz; Elko Cty. (NV) Sch. Dist., *Policy JDAB: Student Discipline; Safe & Respectful Learning Environment; Bullying & Cyber-Bullying of Students Prohibited Rules of Behavior* (2020), https://tinyurl.com/4hkgzlyz; Fargo (ND) Pub. Sch., *AP 6061: Anti-Bullying Policy* (2019), https://tinyurl.com/1g1w3ebk; Cleveland (OH) Metro. Sch. Dist., *Student Rights and Responsibilities: Student Code of Conduct* 21 (2020-2021), https://tinyurl.com/1ox7i41q; Portland (OR) Pub. Schs., Bd. of Educ., *Policy 4.30.060-P: Anti-Harassment* (2015), https://tinyurl.com/3q4txzxz (referring to Policy 4.30.020-AD); Portland (OR) Pub. Schs., Bd. of Educ., *Policy 4.30.020-AD: Student Discipline Procedures* 2 (2016), https://tinyurl.com/bub83v4j; Greenville Cty. (SC) Sch. Dist., Bd. of Educ., *Behavior Code JCDA* (2019), https://tinyurl.com/ys3m9wnh; Prince William Cty. (VA) Pub. Schs., Bd. of Educ., *Policy 733: Bullying and Harassment of Students* (2019), https://tinyurl.com/4wvmsz6p;

The decision below would invalidate major components of the laws and policies of schools in every State and the District of Columbia. Although the Third Circuit left open the possibility of some other approach to off-campus speech that "harass[es] particular students or teachers," Pet.App.34a-35a, the majority never explained what that approach would be, or what "harassment in the school and social media context" entails. Pet.App.15a n.4; *see* Pet.App.44a-45a (Ambro, J., concurring in the judgment). That undefined standard would not save these state laws and school policies, which have tied the scope of schools' authority to *Tinker*'s familiar substantial-disruption test.

2. Many federal laws presuppose that schools will regulate pernicious forms of off-campus speech that reverberate on campus. The Third Circuit's territorial approach would hamstring those laws. Schools would be forced to risk on-campus harm to their students—and federal lawsuits for money damages—if schools do not act in time to fulfill federal obligations to protect students' ability to obtain an education.

The Individuals with Disabilities Education Act requires schools to ensure that students with disabilities have access to free appropriate public education services. 20 U.S.C. §§ 1400-1482. Other federal statutes prohibit certain schools from tolerating discrimination against students on the basis of disability. *See* 29 U.S.C. § 794(a)

Prince William Cty. (VA) Pub. Schs., Bd. of Educ., *Regulation 733.01-1: Bullying of Students* (2019), https://tinyurl.com/4wvmsz6p; Tacoma (WA) Pub. Schs., Policy Manual, *Policy 3207R - Student Prohibition of Harassment, Intimidation, and Bullying* (2011), https://tinyurl.com/4bvztuvj; Green Bay (WI) Area Pub. Sch. Dist., Bd. of Educ., *Policy 411.1: Harassment and/or Bullying By or Toward Students* (2017), https://tinyurl.com/1jq721gx.

(Section 504 of the Rehabilitation Act); 42 U.S.C. § 12132 (Title II of the Americans with Disabilities Act).

Schools must address student-on-student harassment or bullying that denies core educational services to disabled students—even if those episodes happen off campus. *See, e.g.*, U.S. Dep't of Educ., Off. for Civil Rights & Off. of Special Educ. & Rehab. Servs., Dear Colleague Letter on Prohibited Disability Harassment (July 25, 2000), https://tinyurl.com/hewjaoit; *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 873, 876 (2d Cir. 2016) (mix of on- and off-campus bullying). If schools cannot consider off-campus incidents as part of a pattern of harassment, schools have to sit and watch while the child suffers, until enough on-campus incidents cross the high threshold for harassment.

Other federal laws require schools to investigate and address harassment on the basis of sex, race, color, national origin, and other characteristics, without regard to *where* that harassment happens. *See* 42 U.S.C. § 2000d (Title VI); 20 U.S.C. § 1681(a) (Title IX); U.S. Dep't of Health & Human Servs., *Federal Laws*, stopbullying.gov, https://tinyurl.com/snjfafxa. If the effect of discrimination anywhere is that students lose educational benefits or cannot participate in extracurricular programs, schools can face federal lawsuits. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278, 284 (1998). In short, federal law requires schools to protect their students' on-campus learning environment and opportunities, regardless of whether the harassment originates outside the schoolhouse gate. The Third Circuit's decision throws the operation of these laws into doubt by forcing schools to ignore incidents past the school boundary line.

3. The above laws reflect a practical necessity. Students who encourage classmates to kill themselves, target black classmates with photos of lynchings, or text the

whole class photos of fellow students in compromising positions, do not limit their invective to school hours. Meanwhile, teachers or coaches may be the only adults in whom vulnerable students confide, and can spot warning signs that other adults miss. *See* Justin W. Patchin, *Student Experiences with Reporting Cyberbullying*, Cyberbullying Rsch. Ctr., https://tinyurl.com/2b49advy. To create a safe learning environment, schools must be able to address off-campus speech before tragedy strikes.

Preserving schools' existing authority to address pernicious off-campus speech is essential to safeguarding the wellbeing of the Nation's more than 50 million public schoolchildren. Nat'l Ctr. for Educ. Stats., *supra*, tbl. 203.20. The omnipresence of the Internet and social media means there is no "escape for the victim, which can severely damage a child's mental health." U.S. Dep't of Health & Human Servs., *Law Enforcement's Reminder: the Negative Effects of Cyberbullying*, stopbullying.gov, https://tinyurl.com/1han8i7v. Smartphones are "a nearly ubiquitous element of teen life: 95% of teens now report they have a smartphone or access to one." Pew Rsch. Ctr., *Teens, Social Media & Technology 2018* (May 31, 2018), https://tinyurl.com/uzcepg3. And 45% of teens also report being "online on a near-constant basis." *Id.* Going online is the primary way teens now spend time with their friends. Monica Anderson & Jingjing Jiang, *Teens, Friendships and Online Groups, in* Pew Rsch. Ctr., *Teens' Social Media Habits and Experiences* (Nov. 28, 2018), https://tinyurl.com/h9swk9zu. Students constantly use multiple social media platforms to instantaneously speak to hundreds of classmates.

Schools have no practical way to stop students from accessing the Internet or social media during the school day, because smartphones have become a daily necessity. Schools nationwide allow students to keep phones in their

lockers, backpacks, or pockets; some teachers incorporate phones into lesson plans. Edward C. Bang, *Should You Let Your Kids Have a Cellphone in School?*, USA Today (Feb. 5, 2020), https://tinyurl.com/hlru3a3h. Students use their smartphones to communicate during class, even in schools that prohibit phones. Robert Earl, *Do Cell Phones Belong in the Classroom?*, The Atlantic (May 18, 2012), https://tinyurl.com/9n2wqexk. Students use their Internet-enabled phones in the locker room, bathroom, lunchroom, and playground.

As a result, classmates are all but certain to access or recirculate online messages within the school community. Exchanges that would take hours in person happen at warp speed online, where a gaggle of classmates can simultaneously instant-message the student they are harassing. Classmates can capture the speech (for instance, by copying a post or taking a screenshot with a phone) and send the speech far and wide. *See* Christine Elgersma, *Parents' Ultimate Guide to Snapchat*, Common Sense Media, https://tinyurl.com/12d9ey8q. And, unlike transient in-person conversations, the messages are often out there for everyone to see—creating a "permanent public record" and amplifying the communicative and destructive effect. U.S. Dep't of Health & Human Servs., *What Is Cyberbullying*, stopbullying.gov, https://tinyurl.com/h3k62brm.

In short, "[t]he pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction." *Bell*, 799 F.3d at 395-96. "For better or worse," digital technologies "give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650

F.3d 205, 220-21 (3d Cir. 2011) (en banc) (Jordan, J., concurring). Faced with these realities, it is impossible for school administrators to resort to the equivalent of tag jurisdiction, waiting to catch a student surreptitiously sending or accessing a disruptive message on her smartphone during the school day or on school property. By then, the message would have long since permeated the school, yet its author—the student who lit the fuse—could stay outside school authority by speaking entirely off campus.

B. The Third Circuit's Rule Would Prevent Schools from Protecting Basic School Operations

1. The Third Circuit's approach would rescind schools' authority to address other types of off-campus student speech that threaten schools' ability to function. Take a student who, from off campus, creates a website explaining how her classmates could cheat or hack the school's computer system. The student's speech would be beyond the school's authority, even if the end result was that another student released students' and teachers' private communications or erased the grading system. *Cf. Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 822 (7th Cir. 1998).

Or a student could publish a YouTube video explaining how her fellow classmates could circumvent the school's suspicionless drug-testing program, which could lead to greater drug use or injuries on the athletic fields. Or a student could post a series of tweets explaining how to evade the school's metal detectors. Just the fact of such messages could ignite panic among students, parents, and teachers, even if no one actually exploited the school's purported vulnerabilities.

Artificially cabining schools' authority to the school property line would create an absurd loophole whereby a student could "engineer egregiously disruptive events

and, if the trouble-maker were savvy enough [to publicize] the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators … would be left powerless to discipline the student." *Layshock*, 650 F.3d at 221 (Jordan, J., concurring). Six judges on the Third Circuit similarly described as "untenable" the notion that schools could be powerless to protect against "malicious speech … directed at school officials and disseminated online to the student body." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 951-52 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

2. Absent some undefined exception to the decision below, *see supra* pp. 35, the Third Circuit's territorial approach would also undermine schools' ability to protect their staff. If school officials are harassed to the point of being unable to perform their job functions, schools cannot operate. "[S]peech that attacks a teacher or administrator has the potential—depending on its content and tone—to severely upset its target, with spillover effects on the larger school community." Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 Wm. & Mary Bill Rts. J. 591, 592 (2011). Accordingly, many States have enacted laws that address teacher harassment by regulating students' off-campus harassment that substantially disrupts the school environment. *Id.* at 635-37.

Arkansas, Florida, Georgia, and Utah prohibit students from using the Internet to severely harass school employees "at any time or in any location," if the harassment would substantially disrupt the school environment. Utah Code Ann. §§ 53G-9-601, 602(2); *see* Ark. Code Ann. § 6-18-514; Fla. Stat. Ann. § 1006.147(2)(d); Ga. Code Ann. § 20-2-751.4(a). Delaware authorizes schools to regulate

students' off-campus harassment of teachers. Del. Code Ann. tit. 14, §§ 4161, 4164. Two States—Arkansas and North Carolina—have criminal laws that additionally prohibit the severe harassment or intimidation of school officials. Ark. Code Ann. § 5-71-217; N.C. Gen. Stat. Ann. § 14-458.2(b).

The District of Columbia and 20 States have generally applicable laws prohibiting anyone—including students—from intimidating or otherwise materially interfering with teachers, administrators, or other public employees in ways that hinder them from performing their jobs.[7] Finally, all 50 States prohibit communications intended to harass the victim, regardless of where those communications originate.[8] If schools categorically lack authority under *Tinker* to regulate any off-campus speech, it is not

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[7] Ala. Code § 13A-10-2(a); Ariz. Rev. Stat. Ann. §§ 13-2402(A), 13-2911(A); Ark. Code Ann. § 5-54-102(a); Cal. Penal Code § 71(a); Colo. Rev. Stat. Ann. § 18-8-102; D.C. Code Ann. § 22-851; Haw. Rev. Stat. Ann. § 710-1010; Iowa Code Ann. § 718.4; Ky. Rev. Stat. Ann. § 519.020; Mo. Ann. Stat. § 576.030; Mont. Code Ann. § 45-7-302; Neb. Rev. Stat. Ann. § 28-901; N.H. Rev. Stat. Ann. § 642:1; N.J. Stat. Ann. § 2C:29-1(a); N.M. Stat. Ann. § 30-20-13; N.Y. Penal Law § 195.05; N.C. Gen. Stat. Ann. § 14-288.4(a); Ohio Rev. Code Ann. §§ 2921.01(A), 2921.31; 18 Pa. Stat. and Cons. Stat. Ann. § 5101; S.D. Codified Laws § 22-11-3; Utah Code Ann. § 76-8-301.

[8] Ala. Code § 13A-11-8(a)(1), (b)(1); Alaska Stat. Ann. § 11.61.120(a); Ariz. Rev. Stat. Ann. §§ 13-2916, 13-2921; Ark. Code Ann. §§ 5-71-208, 5-71-209; Cal. Penal Code § 653m; Colo. Rev. Stat. Ann. § 18-9-111; Conn. Gen. Stat. Ann. § 53a-181; Del. Code Ann. tit. 11, § 1311; D.C. Code Ann. § 22-3133; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90, 16-11-39.1; Haw. Rev. Stat. Ann. §§ 711-1106, 711-1106.5; Idaho Code Ann. § 18-7906; 720 Ill. Comp. Stat. Ann. 5/26.5-2, 5/26.5-3; Ind. Code Ann. § 35-45-2-2; Iowa Code Ann. § 708.7; Kan. Stat. Ann. § 21-6206; Ky. Rev. Stat. Ann. § 525.080; La. Stat. Ann. §§ 14:40.3, 14:285; Me. Rev. Stat. Ann. tit. 17-A, §§ 210-A, 506; Md. Code Ann., Crim. Law §§ 3-803, 3-804; Mass. Gen. Laws ch. 265, § 43A; *id.* ch. 269 § 14A; Mich. Comp. Laws Ann. § 750.411h; Minn. Stat. Ann. §§ 609.748,

clear how any of these laws are constitutional as applied to students (absent true threats).

And if schools categorically cannot discipline disruptive off-campus student speech, schools can never penalize off-campus student harassment that targets teachers, even if that speech seriously compromises teachers' ability to perform their duties. Students might impersonate a teacher, posting inappropriate speech in an effort to humiliate her, undermine her ability to control her class, or even get her fired. Under the Third Circuit's approach, if such speech occurs off campus, the school cannot address it, even though such speech obviously harms the school.

For example, in 2013, Amy Sulkis, a teacher with 16 years' experience, discovered a student-created Twitter account impersonating her, which engaged in sexually suggestive—and public—messages with other students' accounts. Students posted pictures of a gun alongside vulgar threats directed at Sulkis and of her face alongside a link to a pornographic website. Sulkis's students effectively hounded her out of school and into a year-long leave

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609.79, 609.795; Miss. Code Ann. §§ 97-3-107, 97-45-15; Mo. Ann. Stat. §§ 565.090, 565.091, 565.225, 565.227; Mont. Code Ann. §§ 45-5-220, 45-8-213; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. §§ 200.571, 200.575; N.H. Rev. Stat. Ann. § 644:4; N.J. Stat. Ann. §§ 2C:12-10, 2C:33-4.1; N.M. Stat. Ann. §§ 30-3A-2, 30-20-12; N.Y. Penal Law § 240.26; N.C. Gen. Stat. Ann. §§ 14-196, 14-196.3(b); N.D. Cent. Code Ann. §§ 12.1-17-07, 12.1-17-07.1; Ohio Rev. Code Ann. § 2917.21; Okla. Stat. Ann. tit. 21, § 1172; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. §§ 2709(a), 2709.1; 11 R.I. Gen. Laws Ann. §§ 11-52-4.2, 11-59-2; S.C. Code Ann. §§ 16-3-1710, 16-3-1730; S.D. Codified Laws §§ 22-19A-1, 22-19A-4; Tenn. Code Ann. § 39-17-308; Tex. Penal Code Ann. § 42.07; Utah Code Ann. §§ 76-5-106, 76-5-106.5; Vt. Stat. Ann. tit. 13, §§ 1027, 1062; Va. Code Ann. §§ 18.2-152.7:1, 18.2-427; Wash. Rev. Code Ann. §§ 9A.46.020, 9A.46.110, 9.61.230; W. Va. Code Ann. §§ 61-2-9a, 61-3C-14a, 61-8-16; Wis. Stat. Ann. § 947.0125; Wyo. Stat. Ann. § 6-2-506.

of absence, relying entirely on off-campus speech. *Downey Teacher Sues District Claiming They Allowed Students To Harass Her On Twitter*, CBS L.A. (June 4, 2015), https://tinyurl.com/m5ieejzv.

Students could also create websites dedicated to forcing a teacher to quit. In one case, a student created a website attacking his algebra teacher, for instance illustrating the teacher as Hitler, a witch, or a character in a vulgar cartoon. One part, titled "Why Should She Die?," featured a drawing of the teacher beheaded. The harassment provoked such severe anxiety that the teacher had to take a leave of absence. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851-52 (Pa. 2002). Teachers should not have to hope that students reserve some of their harassment for the school day so that schools can act.

Likewise, if schools had authority only over on-campus student speech, schools could penalize students for crank-calling teachers from school, but not from home at 3AM. Schools could discipline students for making sexually suggestive statements to the school nurse while school is in session, but not if the student waited until the weekend to email the nurse graphic messages. And students could harass teachers, staff, and administrators with impunity even though parents and other adults would face punishment for similar harassment.

C. The Third Circuit's Rule Would Produce Extreme Arbitrariness

The Third Circuit believed that a categorical, territorial rule barring schools from regulating off-campus speech would be "easily applied and understood" and offer "up-front clarity to students and school officials." Pet.App.33a. Declining to address the "exact boundaries" of on-campus speech, the majority declared that the campus includes (1) school grounds, (2) any "context owned"

by the school, (3) any school-controlled setting, (4) any school-sponsored setting, and (5) speech "that is … reasonably interpreted as bearing the school's imprimatur." Pet.App.31a; *see also* Pet.App.11a-12a, 14a-15a & n.4, 33a-34a. But those categories raise more questions than they answer. This Court should reject purported bright-line rules that produce dim results.

Start with the physical bounds of campus. If students go to the school playground on a weekend, is their speech on campus? What if students disrupt a public community meeting held at the school auditorium? What if a student texts from inside her own car but parks on school property? Is an adjacent private lot where students park their cars on campus? The school pickup and drop-off line? The public sidewalk? The whole area covered by "school zone" signage? Something has gone haywire if schools can punish the student who stands on the school's front lawn to harass the school crossing guard, but must give a free pass to the student who does the same thing when crossing the street en route to school.

The Internet and social media further blur the majority's categories. Does it matter whether the student drafted a message at school but scheduled the message for delivery after the school day ends? The pandemic has likewise exacerbated these line-drawing problems. Schools that cannot hold in-person classes have switched to remote learning "through a jumble of methods." Heather Kelly, *Kids Used to Love Screen Time. Then Schools Made Zoom Mandatory All Day Long*, Wash. Post (Sept. 4, 2020), https://tinyurl.com/1gzggyc5. When students attend school virtually, does their "on-campus" expression include all the posters in their bedroom visible from their webcam? Is school in session if students temporarily log off for lunch? And do students subject themselves to school jurisdiction whenever they turn on pre-

recorded lectures and simultaneously text classmates or visit social media?

Trying to define "school-owned" settings is equally befuddling. If schools can address speech that arises in any "context owned" by the school, Pet.App.33a, does that category apply to speech occurring via school-owned laptops that students take home for the year? What about students' personal diaries or unsent draft emails stored on school-owned laptops? Do schools presumptively extend their regulatory reach by providing students with access to school-owned servers or email domains? What about students who harass the school secretary by calling the school's front office from their personal cellphone off campus? If a student uses her personal email but sends the message to another student's school account, is her message "on campus"? Does the recipient bring that message "on campus" by replying to the email from her school account? And if schools do not disclose that they own nearby fields or woods, do students still subject themselves to school regulation whenever they cross the property line and open their mouths?

Pegging schools' jurisdiction to whether the student speech occurred within "school-sponsored" or "school-controlled" contexts also raises hard questions. What happens when a high school gives seniors off-campus lunch privileges without teacher supervision—does every nearby restaurant or home suddenly become a "school-sponsored" venue? Are school buses still "school-controlled" if the school district outsources school bus operations to a private contractor? If school buses count, why not school bus stops? If a school gives credit for students to get work experience through internships, would all student speech during the internship come within the school's jurisdiction? What if the school offers extra

credit to students who attend a weekend play, and the student engages in disruptive speech there? Does the school's jurisdiction extend to disruptive student speech during mandatory community service at a local food bank?

These imponderables prompted Judge Ambro, in his separate opinion below, to predict that the Third Circuit's rule would "sow further confusion" by failing to provide any "clear and administrable line." Pet.App.44a-45a, 48a. And to what end? A test that turns on *where* speech occurs inevitably creates insoluble line-drawing problems because it misses the point. Both the First Amendment and schools' pedagogical missions focus on people, not property. What matters is whether the speech involves the school community, not whether a student is three feet on or off campus.

* * *

Respondents have argued that this case should be resolved on the alternative grounds, adopted by the trial court but not the court of appeals, *see* Pet.App.23a n.10, 73a, that the school failed to show a substantial disruption under *Tinker*. That issue is open for remand. But this Court should not be fooled by any attempt to conflate this issue with the question presented. As to the question presented, *all* that matters under the Third Circuit's territorial approach is that B.L. sent her Snapchat from an off-campus store over the weekend. Under that view, B.L. could have sent Snapchat messages harassing her coaches and teammates, suggesting that she would stop catching her fellow cheerleaders, or calling for teammates to boycott practices, and her coaches would be powerless to address this speech. Conversely, under the decision below, her coaches could have at least considered B.L.'s vulgar

Snapchats had B.L. sent them during the lunch period or from the school's parking lot.

This Court should not transform disputes over the inner workings of school sports and extracurricular activities into section 1983 lawsuits for money damages. "By choosing to 'go out for the team,' [athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Vernonia*, 515 U.S. at 657. Coaches and school administrators, not federal courts, should decide whether the coach can bench someone or ask a player to apologize to teammates. *See, e.g.*, *Lowery v. Euverard*, 497 F.3d 584, 593-94 (6th Cir. 2007); *Wildman ex rel. Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 769-72 (8th Cir. 2001). Students retain significant First Amendment protections wherever they go. But the First Amendment is not a tool for micromanaging school determinations about whether a student's character renders her unfit for the National Honor Society, the position of team captain, or student government, or about whether teachers can refuse to write a glowing college recommendation after a student's verbal abuse.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

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