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

REPLY BRIEF FOR PETITIONER

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This Court's cases link schools' authority to regulate student speech to the pedagogical interests at stake. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), thus holds that schools' special needs justify regulation of speech causing a substantial disruption at school. Off-campus speech can inflict the same adverse effects on the school environment. Until the decision below, circuit courts took *Tinker* as the lodestar in permitting schools to protect against those on-campus harms. The Third Circuit rejected that approach, leaving instability in its wake.

Respondents (at 36-37) would amend the Third Circuit's definition of on-campus and limit *Tinker*'s application to the "school environment," including:

- schools and their immediate environs during and immediately before and after school hours;
- off-campus when schools are responsible for students (*e.g.*, lunches at nearby Burger Kings);
- traveling en route to and from school;
- all speech using school laptops or servers;
- during remote learning;
- during "activities taken for school credit"; and
- communicating to school email accounts or phones.

Outside the "school environment," respondents again distance themselves from the Third Circuit and concede that schools can address "a host of" off-campus speech, including threats; bullying; harassment; speech "aiding and abetting violations of school regulations of conduct," including "cheating, hacking … and the like"; and some student speech related to extracurricular programs. Resps' Br. 24-25, 27 & n.22. But respondents (at 27-28) would jettison *Tinker* in favor of a "nuanced, category-by-category approach" to such speech.

This Court should not burden schools with illogical, Rube Goldberg-esque decision trees just to reach the same off-campus speech that schools currently address under *Tinker*'s familiar substantial-disruption standard. Respondents' lines separating the "school environment" from the outside world are arbitrary, especially for online speech. It makes zero sense to apply *Tinker* to student tweets during last period, but some undefined standard to the student who tweets at 5 P.M. from a classmate's

house. And to what end? Respondents never explain how their approach to off-campus speech produces different results in any case where a substantial disruption exists. Schools face unprecedented challenges in educating and protecting 50 million public-school students. Forcing schools to traverse multiple First Amendment standards and assay the bounds of the "school environment" just to decide whether a coach can bench a pitcher for a weekend online tirade attacking the coach's competence would make routine disciplinary decisions impossibly complex.

Respondents defend their approach by denouncing *Tinker* as an Iron Curtain behind which schools punish students for expressing politically incorrect, unpopular, or critical views. But *Tinker*, the free-speech landmark, proclaims: "[S]chools may not be enclaves of totalitarianism." 393 U.S. at 511. The Tinkers won: They could wear Vietnam protest armbands. For the last 52 years, when schools have overstepped the line *on campus*, public shaming and courts have vindicated students' First Amendment rights.

Courts have long recognized schools' authority to discipline off-campus speech that satisfies *Tinker*'s substantial-disruption standard, yet schools have not become panopticons. Just because schools can regulate some off-campus speech based on its disruptive on-campus effects does not mean schools can discipline students off campus for any speech that would trigger discipline if uttered on campus. Speech that would reasonably upend order in a crowded school hallway may not provoke the same consequences when relayed to friends at a weekend party. Schools constantly make context-dependent judgments—which is all the more reason not to throw the baby out with the bathwater and force schools to apply undefined, unfamiliar rules when student welfare is at stake.

I. Schools May Regulate Substantially Disruptive Off-Campus Speech

Tinker did not disturb the pre-existing understanding that schools could reach off-campus student speech that inflicts on-campus harms.

A. History Supports Schools' Authority

A wealth of authority before, during, and after the ratification of the Fourteenth Amendment confirms that even after students returned home, schools retained authority to discipline student misbehavior that threatened school order. Br. 13-16; PSBA Br. 4-8. Today, state laws still empower schools to address off-campus speech or conduct when necessary to protect against serious disruptions.[1]

Respondents are wrong that nineteenth-century schools' authority extended only to students in school custody or in transit, and ceased when parents resumed custody. Resps' Br. 14 n.3; PDE Br. 5-11. The concept of *in loco parentis* was not so limited. A school could discipline children "as may be necessary to answer the purposes for which [it] is employed." 1 William Blackstone, *Commentaries* *453. One such purpose—preserving the school itself—necessitated disciplining off-campus speech detrimental to school order. Br. 14-15.

Respondents contest the uniformity of ratification-era law endorsing such off-campus regulation. But respondents' sole quibble (at 29 n.24) is that three New York superintendents limited their districts' authority to school grounds during school hours. Their citation portrays those superintendents as outliers against "abundant au-

[1] *E.g.*, Cal Educ. Code § 48900(r); N.J. Stat. Ann. 18A:25-2; N.J. Admin. Code 6A:16-7.5.

thority that [schools] may make rules to govern the conduct of pupils after school hours." C.W. Bardeen, *The New York School Officers Handbook: A Manual of Common School Law* 157-62 (9th ed. 1910). Amicus (PDE Br. 12-13) concedes "[s]ome courts went further," as in *Lander v. Seaver*, 32 Vt. 114 (1859), but dismisses *Lander* as an outlier.

Contemporaneous treatises, however, deemed *Lander* a seminal case, PSBA Br. 6 n.2, and explained: "[T]he authority of the schoolmaster extends" to off-campus conduct with "a direct and immediate tendency to injure the school or its discipline." Finley Burke, *A Treatise on the Law of Public Schools* 129 (1880); PSBA Br. 5 (surveying examples). Educators like Horace Mann agreed, *contra* PDE Br. 11, 13. Schools' jurisdiction "out of school hours and beyond school premises" rested on the "principle of necessity," and extended as far as necessary to attain the "great objects of discipline and of moral culture." 9 Horace Mann, *The Common School Journal* 196 (Fowle ed. 1847); *accord* B.E. Packard, *The Lawyer in the School-Room,* 7 Me. L. Rev. 176, 188-91 (1914).

Many courts endorsed *Lander*, holding that "the true test of the teacher's right and jurisdiction to punish for offenses … after the return of the pupil to the parental abode" is "not the time or place of the offense, but its effect upon the morale and efficiency of the school, whether it in fact is detrimental to its good order, and to the welfare and advancement of the pupils therein." *O'Rourke v. Walker*, 128 A. 25, 26 (Conn. 1925) (surveying nineteenth-century cases); Br. 14-16; PSBA Br. 6-8.

Take Missouri, the State amicus invokes most. Amicus omits the Missouri Supreme Court's punchline: "[I]t has *uniformly been held in this state* … that the domain of the teacher … ceases when the child reaches its home

unless its act is such as to affect the conduct and discipline of the school." *Wright v. Bd. of Educ. of St. Louis*, 246 S.W. 43, 45, 46 (1922) (emphases added) (citing *Dritt v. Snodgrass*, 66 Mo. 286 (1877); *Missouri ex rel. Clark v. Osborne*, 24 Mo. App. 309 (1887)) (endorsing *Lander*). Similarly, amicus (PDE Br. 9) elides the Iowa Supreme Court's conclusion: Off-campus conduct that "directly relates to and affects the management of the school and its efficiency is within the proper regulation of the school authorities." *Kinzer v. Dirs. of Indep. Sch. Dist. of Marion*, 105 N.W. 686, 687 (1906). Amicus's dueling citations (PDE Br. 14-15) merely reflect disagreement over whether particular off-campus behavior actually interfered with school order.

Respondents (at 29 n.24) ultimately dismiss pre-*Tinker* cases for "not address[ing] a speech claim" and mostly pre-dating the incorporation of the First Amendment. But States had First Amendment analogues, and "[i]f students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them." *Morse v. Frederick*, 551 U.S. 393, 411 & n.1 (2007) (Thomas, J., concurring).

Finally, respondents cannot explain how their historical account comports with their concession that schools can constitutionally reach various types of off-campus speech. Respondents (at 14 n.3, 18-19) argue that schools' jurisdiction has always ended when students leave school custody or cease transit. But respondents (at 24-28) insist that schools constitutionally can regulate off-campus speech (bullying, harassment, "and the like") even when students engage in that off-campus speech under parental custody. They never explain how or when the meaning of the First Amendment changed.

B. *Tinker* Applies to Off-Campus Speech

Tinker preserved schools' authority to discipline off-campus speech based on on-campus harms, but heightened the degree of on-campus harm that schools must establish. Students' First Amendment rights yield only when their speech would cause "material[] and substantial[] disrupt[ions to] the work and discipline of the school," 393 U.S. at 513, or violate others' rights "to be secure and to be let alone," *id.* at 508. Schools' authority to restrict student speech tracks schools' interests in preventing significant on-campus harms, not the location where student speech occurs. Br. 16-22; PSBA Br. 8-9.

1. Respondents (at 13-14, 19-22) interpret school-speech precedents as weakening students' speech rights within the school environment, but restoring them once students leave school supervision. That reading finds no support in First Amendment doctrine. No school speech case assigns talismanic significance to students' location, or even mentions the adequacy of students' off-campus channels for communication to justify restrictions within the school environment.

Tinker. Respondents (at 13-14) interpret *Tinker*'s mentions of "the schoolhouse gate," administrators' need to "control conduct in the schools," and "the special characteristics of the school environment," 393 U.S. at 506-07, as proof that *Tinker* is location-focused. *Tinker*, however, links students' First Amendment rights to schools' special need to avert harms. The relevant harm—"substantial[] interfere[nce] with the work of the school"—necessarily occurs at school, during school hours. *Id.* at 509. That same harm can arise from off-campus speech.

Because schools must avoid on-campus infernos to function, schools should be able to intercede regardless of where students light the match. Of course, schools cannot

regulate off-campus speech as if students said it in school. But when schools establish the same adverse effect under *Tinker*, the fact the speech originated off-campus should not deprive schools of the ability to act. The Internet makes swift action especially imperative; students can reach the whole school immediately, exacerbating disruptions. Respondents (at 37) agree schools need "to respond immediately when speech occurs while students are under [their] supervision and care." But that just underscores the perverseness of debarring schools from addressing the same harms if students inflict them immediately after school supervision ends.

Other School-Speech Cases. Other cases do not limit schools' authority to when "schools exercise supervisory responsibility" over students, *contra* Resps' Br. 14-17.

Grayned v. City of Rockford, 408 U.S. 104 (1972), upheld restrictions on adult speech—self-evidently outside school supervision—based on schools' need to prevent substantial on-campus disruptions. Respondents (at 29) claim "*Grayned* applied traditional First Amendment analysis, not *Tinker*." But *Grayned* did not invoke universal time-place-manner restrictions that would equally apply to hospitals. *Grayned* called *Tinker* its "touchstone," *id.* at 117, in upholding punishment of an adult protestor whose protest on a public sidewalk 100 feet from a school violated a noise-control ordinance, *id.* at 105. Citing schools' special needs, *Grayned* explained that the municipality could restrict adults', teachers', *and students' off-campus speech* "if it '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 anti-noise ordinance went "no further than *Tinker* says a municipality may go to prevent interference with its schools." *Id.* at 119; U.S. Br. 13-14.

Hazelwood School District v. Kuhlmeier likewise tethered schools' authority to regulate the content of school-sponsored newspapers to schools' interest in defining the curriculum. Under *Kuhlmeier*, schools can regulate the content of school newspapers even if students write the articles at home within eyeshot of their parents, because those publications are extensions of school. 484 U.S. 260, 273 (1988).

Similarly, the school in *Bethel School District No. 403 v. Fraser* could discipline a student who gave a lewd speech at a school assembly because schools are entitled to adopt basic rules of decorum. 478 U.S. 675, 683-84 (1986). *Fraser* does not suggest schools could discipline lewd speech anywhere within respondents' definition of the "school environment," like when kids drive together to school.

Morse v. Frederick holds schools can punish student advocacy of drug use at school-sponsored events because of the special dangers of glorifying drug use to minors. 551 U.S. at 397. *Morse* expressly reserved whether that holding would apply off campus. *Id.* at 401. And respondents (at 25, 27) recognize that schools can address off-campus speech that "aid[s] and abet[s]" or "incite[s]" unlawful activity (presumably including urging classmates to use drugs).

Respondents are wrong that reversal would subject students' off-campus speech rights to the same rules students face during school. Holding that schools can address off-campus speech that satisfies *Tinker*'s substantial-disruption standard does not export all on-campus rules into living rooms, malls, or cyberspace. Schools' authority to restrict student speech depends on the nature of the pedagogical interest, not where students are located, and those interests vary widely depending on context. James A. Rapp, 3 *Education Law* § 9.04[2][b][i]

(2020). Schools impose many time-place-manner restrictions that obviously do not extend outside the classroom, let alone off-campus. *Id.* § 9.04[8]. Students must raise their hands to speak in class, and cannot veer into extraneous topics. But students face no such restrictions at lunch or recess.

Conversely, schools routinely require students to engage in off-campus compelled speech—homework, group projects, summer assignments. But schools' regulation of some off-campus speech to serve particular special needs of the school environment does not mean that schools can transform the world into a giant schoolroom where class is always in session.

Captive Audience. Respondents (at 19) echo the Third Circuit's rationale that students are captive audiences only on campus. *See* Pet.App.32a. But students are *not* captive audiences in many places respondents (at 36-37) consider the "school environment," like when checking email on school-supplied laptops at home, or en route to school. Students voluntarily engage in social media, yet respondents would regulate cyberbullying or harassment wherever it occurs. Conversely, students *off* campus can be captive audiences, like when students gang up on a classmate on a weekend. Br. 21-22. If speech will ignite a substantial disruption on campus, whether students welcomed the speech or listened involuntarily should be irrelevant. Either way, schools should be able to protect "the work of the schools or the rights of other students." *Tinker*, 393 U.S. at 508.

Related Doctrines. Pegging schools' authority to "school supervision" would make school speech a doctrinal oddity. Respondents (at 29) do not dispute that other state actors can regulate extraterritorial activities based on effects within their boundaries. Br. 24-26. And respondents (at 30-31) agree that the First Amendment

does not impair schools' authority to restrict teachers' speech, regardless of where teachers speak. Respondents just say schools' authority as employers differs from schools' authority to preserve order and discipline.

That distinction misses the point. When the government administers special programs, participants' First Amendment rights yield if the restrictions directly relate to the programs and are necessary to prevent participants from undermining the programs' essential features. U.S. Br. 24-31. Thus, government employers restrict employees' speech *outside* the workplace when that speech interferes with the work environment. *E.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569-70 (1968); *Janus v. Am. Fed. of State, Cty., & Mun. Emps. Council 31*, 138 S. Ct. 2448, 2470-71 (2018) (citing examples). It would be anomalous to condition schools' ability to address their special needs on students' location or the degree of school supervision.

2. Under these principles, the First Amendment does not prohibit schools from addressing off-campus speech like B.L.'s. Team cohesion and discipline disintegrate when a cheerleader broadcasts her disdain for her coaches, a teammate's achievement, and the whole cheer program to an online audience of 250 classmates and friends.[2] J.A.20-21, 25, 101-02; Pet.App.23a n.10. B.L. knew that many teammates and classmates automatically received her messages. J.A.23, 28. Respondents unpersuasively suggest (at 4 & n.2, 33, 34) that B.L. could not have foreseen her speech would reach campus because a student who was not one of B.L.'s 250 recipients raised B.L.'s speech with a coach. But when someone sends messages on Saturday to 250 teammates, classmates, and

[2] Contrary to respondents' assertions (at 4 n.1), the principal considered both of B.L.'s snaps in affirming her discipline, J.A.55, 58. The Third Circuit also considered both posts. Pet.App.5a.

friends deriding the squad and coaches, it should be no surprise when teammates predictably react come Monday. Anyway, other students—including four cheerleaders—independently raised B.L.'s posts with the other coach. J.A.81-86.

Respondents' recitation of facts (at 4-5, 45-46 n.34) is misleading. As the Third Circuit noted, B.L. did not dispute that her messages undermined the morale and chemistry of her cheerleading squad by "openly criticiz[ing] the program and question[ing] her coaches' decisionmaking, causing a number of teammates and fellow students to be 'visibly upset' and to approach the coaches with their 'concerns.'" Pet.App.23a n.10; *see* Pet.App.51a-52a. Respondents' contention (at 5) that B.L.'s speech could not have substantially disrupted team cohesion and morale on the record presented mischaracterizes Coach Luchetta-Rump's testimony, which repeatedly explains why speech like B.L.'s would impair the team environment, morale, and cohesion. *See* J.A.64, 70-71, 75-76, 81, 83, 86-87.

Respondents (at 35, 47) object that disciplining B.L.'s speech amounts to discriminating against her viewpoint of f-word-laden contempt for school, cheer, her coaches' JV decisionmaking, and "everything." Pet.App.5a. But B.L. voluntarily enlisted in an extracurricular activity where viewpoint discrimination is built into the name: *cheer*leading. The sport aims to exemplify school spirit so enthusiastically that others join in. First Amendment values do not require coaches to retain cheerleaders who yell RAH-RAH-RAH at the game but scream F-U-U online at coaches and teammates afterwards. Telling a teammate "I hope you fall off the pyramid" expresses a viewpoint. But if coaches cannot respond, individual teammates could sabotage the team with impunity, defeating the point of team sports: There is no I in team. U.S. Br. 27.

C. *Tinker* Already Checks Schoolhouse Tyranny

1. Respondents urge curtailing schools' authority to regulate off-campus speech (at 1, 19-24, 35, 37) to prevent overreach into dinner-table conversations and Bible study. Respondents argued below (CA3 Br. 23) that "[s]ubstantial, material disruption is a high bar." They now present a Man-in-the-High-Castle version of *Tinker* as "vague" and a "stark exception to the First Amendment[]" that empowers schools to punish "controversial, critical, or politically incorrect" speech whenever "listeners are offended" in a disruptive way. Resps' Br. 1, 8, 13, 17-18.

Tinker is a free-speech landmark because the forces of freedom prevailed. *Tinker* forbids schools from disciplining speech based on the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. "[C]aus[ing] trouble," "inspir[ing] fear," and "start[ing] an argument or caus[ing] a disturbance" are not substantial disruptions. *Id.* at 508. The Tinkers could wear their Vietnam protest armbands, notwithstanding the school's discomfort, "warnings by other students," and Mary Beth Tinker's arguments with a teacher over her armband. *Id.* at 509-10; *see id.* at 517-18 (Black, J., dissenting).

Tinker thus establishes that hecklers cannot prompt schools to veto speech just because administrators, students, or parents are outraged. Rapp, *supra*, § 9.04[4][b][v] (citing cases); Robert Hachiya, et al., *The Principal's Quick-Reference Guide to School Law* 135 (3d ed. 2014). On campus or off, schools cannot punish students for opining about God, guns, or gender, even if other students threaten to riot. The disruption must be an objectively reasonable response. Rapp, *supra*, § 9.04[4][b][v]; *accord Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011). Schools

cannot silence students for criticisms that hurt teachers' feelings—but students cross the line by expressing dismay at an unfair history test by encouraging the whole class to harass the teacher on Twitter. The manner of conveying the message matters.

2. Respondents (at 20-22) parade examples where schools purportedly used *Tinker* to silence unpopular views. But on closer inspection, reports of the death of on-campus freedom have been greatly exaggerated.

Take respondents' suggestion (at 20, 22) that schools target pro-life and religious speech. Schools *cannot* discipline students for wearing an "Abortion is Homicide" shirt even if students get upset. *K.D. v. Fillmore Cent. Sch. Dist.*, 2005 WL 2175166, at *6 (W.D.N.Y. Sept. 6, 2005); Rapp, *supra*, § 9.04[8] n.74; *contra* Resps' Br. 22. Respondents complain (at 20) that the school in *Taylor v. Roswell Independent School District*, 713 F.3d 25 (10th Cir. 2013), disciplined students for "[q]uoting scripture and distributing small rubber dolls" representing 12-week-old unborn babies. But the school let students widely disseminate scripture-accompanied "affirmation rocks" and candy canes with religious messages. *Id.* at 30, 54. Respondents leave out why the rubber dolls prompted discipline: Students found them irresistible objects of chaos. Students doused the dolls with hand sanitizer, then lit them on fire. Doll-stuffed toilets overflowed. Boys beheaded the dolls and stuck them in pant zippers to "resemble penises." So, while the school allowed other religious speech, the school demurred at rubber-doll deluges. *Id.* at 30-31, 37-38.

Respondents (at 20) erroneously suggest *Tinker* allows blanket bans on Confederate flags or T-shirts commenting on slavery. Actually, schools concluded that students crossed the line by brandishing Confederate flags shortly after a white student urinated on a black student

and claimed "that is what black people deserve." *B.W.A. v. Farmington R-7 Sch. Dist.,* 554 F.3d 734, 736-37, 739-41 (8th Cir. 2009). Similarly, schools can send students home for carrying purses adorned with Confederate flags in the wake of dozens of racially-charged incidents, including comments by other students about "hanging minorities" accompanied by drawings of "nooses." *A.M. v. Cash*, 585 F.3d 214, 218, 222 (5th Cir. 2009). Schools rocked by racial violence may discipline speech that, in context, fans the flames. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d Cir. 2001) (Alito, J.).[3]

Similarly, a school did not punish a student for simply wearing T-shirts opposing homosexuality on religious grounds. Respondents (at 20) neglect key details, like the day the shirt was worn (the "Day of Silence" aimed at teaching tolerance), the school's concerns (a history of physical altercations over similar T-shirts between warring factions), and the school's response (asking the student to remove his shirt, then having him do his homework in a conference room and giving him full attendance credit when he refused). *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171-73, 1183 (9th Cir. 2006), *judgment vacated as moot,* 549 U.S. 1262 (2007).

Nor do schools muzzle students for rooting for the wrong sports teams, *contra* Resps' Br. 21. The Lakers are unobjectionable—except when high-school students don particular sports or college gear to signal violent gang affiliation. *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1462 (C.D. Cal. 1993). Students remain

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[3] *Accord Hardwick v. Heyward*, 711 F.3d 426, 438-40 (4th Cir. 2013); *Defoe v. Spiva*, 625 F.3d 324, 329, 333-36 (6th Cir. 2010); *Scott v. Sch. Bd.,* 324 F.3d 1246, 1247-49 (11th Cir. 2003); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1362, 1366-67 (10th Cir. 2000) (all unfolding against similar incidents).

free to protest immigration bills on or off campus, *contra* Resps' Br. 20. But a school prohibited students from wearing "We Are Not Criminals" shirts—and competing Border Patrol shirts—because the students wearing those shirts staged a 300-person walkout, wore them again to foment another walkout, and conceded "racial tensions existed and the t-shirts would have caused fights." *Madrid v. Anthony*, 510 F. Supp. 2d 425, 433, 435-36 (S.D. Tex. 2007).

Finally, respondents (at 21) oppose a school's dismissal of football players from the team for signing a petition stating "I hate Coach Euvard [sic] and I don't want to play for him" out of "dissatisf[action] with [his] coaching methods." *Lowery v. Euverard*, 497 F.3d 584, 585, 589 (6th Cir. 2007). Elsewhere (at 41-42), respondents concede that extracurriculars are highly-regulated programs where "schools may regulate what a team member can say as a representative of the school or team." It is hardly incipient Stalinism to acknowledge that coaches may discipline student athletes for insubordination and threatening team unity. U.S. Br. 26-28.

Respondents' news-headline examples (at 21-23) reveal that, in all but one instance, schools reversed disciplinary decisions.[4] In the lone exception, the school disciplined a student who exposed two classmates' private

[4] Mem. Op., *Conroy v. Lacey Twp. Sch. Dist.*, No. 3:19-cv-9452-MAS-TJB (D.N.J. Jan. 31, 2020), ECF 10; Karen Anderson, *Lynn Mayor, ACLU Defend Student Who Wore 'Lesbian' Shirt To School*, CBS Boston (Mar. 13, 2012), https://tinyurl.com/2tknujk7; Eric Sandy, *ACLU Says Suspensions Reversed for Two Shaker Heights High School Students Who Exposed Racist Comments*, Cleveland Scene (Nov. 17, 2016), https://tinyurl.com/4n9n399y; Laura

video asking who is "ready to go (N-word) hunting." Respondents omit the reason for disciplining the whistleblower: He posted the video to Twitter *during class*, violating school rules against classtime Internet usage.[5]

In short, K-12 schools have not run amok in silencing fledgling Winston Smiths on campus. Respondents (at 21) portray their examples as the tip of the iceberg because most students lack the resources to sue over school discipline. But *Tinker* has been the law for 52 years. Had *Tinker* opened the floodgates for schools to discipline students for any heterodox views, one would expect students—or at least parents of 50 million public school attendees—to unleash a torrent of exposés. Instead, if schools mistakenly overstep the line, courts invoke *Tinker* to *protect* students' First Amendment rights. Mass./States' Br. 22-23 & n.49; Alabama Schools Br. 9-11.

Circuits covering most of the country have long upheld schools' authority to regulate off-campus speech that threatens substantial on-campus disruptions. Br. 20. Students post online nonstop. Br. 37. Yet respondents identify no cases where courts blessed abusive off-campus censorship under the guise of *Tinker*. Instead, off-campus speech cases illustrate how swiftly off-campus speech can destroy school discipline and order. Alabama Schools Br. 11-15 & App.

3. Schools cannot regulate off-campus speech unless students intentionally direct speech at the school in a way that makes regulation foreseeable. Br. 27-29. Those

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Strapagiel, *A Georgia School Undid A Student's Suspension For Viral Hallway Photos*, BuzzFeed News (Aug. 7, 2020), https://tinyurl.com/53sf5das.

[5] Alissa Widman, *Racially Charged Video Leads to Discipline for 3 Pickerington Central Students*, Columbus Dispatch (Apr. 13, 2016), https://tinyurl.com/y3thv8fn.

guardrails—which numerous circuits have applied for decades—foreclose respondents' caricature (at 32-34) that schools could reach "*both* everything said to another student and everything said about school." Conversations about the election, climate change, or gay marriage have no nexus to the school. Similarly, students do not open the doors to school regulation just by complaining about their algebra teacher or soccer practice to their pastors. The topic, speaker, and audience must all closely relate to the school.

Respondents (at 24, 33-34) worry that *Tinker* invites "dragnet online surveillance" by school administrators. But most online speech has no connection to the school: Cat videos, opinions about Confederate statues, and pleas to boycott Major League Baseball are all off-limits. Meanwhile, respondents do not dispute that the Internet is a megaphone that allows students to immediately reach audiences of hundreds of classmates. NSBA Br. 14-20; NEA Br. 2. The Internet undoubtedly fosters beneficial free-for-all exchanges. But respondents gloss over the dangers. Relaying sexually inappropriate remarks about a teacher to a friend at a 7-Eleven on a weekend is unlikely to rock the school come Monday. But sending those same remarks to 250 Snapchat friends, many of whom have that teacher for homeroom, invites havoc. It is one thing to suggest staging an algebra-class walkout to four friends at a weekend party; quite another to blast-email the walkout plan to the whole school, thereby guaranteeing that the speech will reach campus and magnifying the probability of a substantial disruption.

4. Respondents (at 42-43 & n.32) contend at a minimum that schools should not be able to discipline off-campus speech if students did not specifically intend to cause a substantial on-campus disruption. As respondents con-

cede (at 43), lower courts have rejected such a requirement. Tinkering with *Tinker* by adding a specific-intent requirement risks bogging down schools and students in depositions about what students intended to accomplish.

II. Respondents' Alternative Approach Is Nonsensical

After contrasting students' gulag-like repression on campus with students' off-campus liberation, respondents retreat. Respondents (at 24-25, 41-42) concede that the First Amendment allows schools to address off-campus threats, harassment, bullying, "speech integrally related to" violations of school rules, and off-campus speech tied to extracurricular programs. So, even under respondents' approach, schools may prevent adult listeners from hearing some disruptive off-campus student speech. *Contra* Resps' Br. 23. Similarly, despite proclaiming (at 37) that "the First Amendment is not determined by effect," respondents (at 3) want to apply adulterated versions of "traditional First Amendment standards" to speech that "take[s] place off campus but ha[s] an effect on the school." This Court should not subject schools to mass confusion just to draw the same lines as *Tinker*. NSBA Br. 27-28.

1. Respondents (at 25) assert that the "true threats" doctrine could cover statements that other children would find threatening, even if adults would not. But courts rarely find true threats, even in the student-speech context. *E.g.*, *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851, 859, 869 (Pa. 2002); Rapp, *supra*, § 9.04[4][c][vii][B] & n.281. Either this Court must delineate what constitutes a "school-context threat," or respondents' approach leaves threatening off-campus speech off-limits, even if such speech guarantees classroom disorder. Respondents notably do not say whether students whose off-campus websites fantasize about killing their teacher could be

disciplined, Br. 43, or whether scores of state laws prohibiting students from intimidating school staff remain constitutional, Br. 40-42 & nn.7-8.

Respondents' treatment (at 26, 39) of bullying and harassing speech is incoherent. Respondents reason that because federal and state law prohibit discriminatory or harassing speech, the First Amendment must allow schools to regulate such off-campus speech. But, by definition, statutes do not trump the First Amendment. And if the First Amendment does not bar those laws, it should not bar dozens of state laws that expressly tether schools' authority over off-campus harassment and bullying to *Tinker*'s familiar formulation. Br. 31-35; *accord* Rapp, *supra*, § 9.04[4][b]. Respondent refuses to reveal the fate of those laws under its view.

Conversely, respondents (at 17-18) fear vague standards inviting viewpoint discrimination. Yet (at 25-26), respondents suggest schools should address off-campus bullying and harassment—*i.e.*, speech expressing a prohibited viewpoint—without defining what such speech entails, or whether that speech must "collid[e] with the rights of others," *Tinker*, 393 U.S. at 513. Then respondents (at 26 n.21) throw up their hands and say the facts here obviate any need to resolve how schools should address off-campus harassment and bullying. But the decision below clearly held that schools can no longer apply the *Tinker* standard to discipline such off-campus speech. Pet.App.31a, 35a. Schools cannot afford to play guessing games—or risk money-damages suits or violations of federal law—when students' welfare is on the line. Br. 35-36; U.S. Br. 15-17; NAPSA Br. 19-20; Cyberbullying Br. 13-16, 19-20; NSBA Br. 22-25; NWLC Br. 16-19.

Respondents (at 25-27 & n.22, 40 n.31) argue that because speech integral to illegal conduct may be prohibited,

schools can regulate "cheating, hacking, harassment, bullying, and the like" as "conduct" that laws or "school regulations" prohibit. What is "and the like"? School regulations prohibit everything from gum-chewing to insubordination. If schools can regulate speech inciting conduct that schools prohibit based on disruptiveness, respondents are just replicating *Tinker*. Respondents (at 26 n.21) caution that unspecified "statutory and First Amendment limits" cabin schools' authority. But it is no help to tell schools that they can regulate speech for provoking bad conduct, except when they cannot.

Finally, respondents leave open (at 41-42) whether schools have further leeway over students' off-campus speech when students participate in extracurricular programs. Respondents agree the First Amendment allows schools to impose "some conditions … on students who participate in extracurriculars," just not "conditions that would restrict participants' First Amendment rights *outside* the program." True enough. What schools can do—and what petitioner did here—is to address speech from a student participating in the program that trashed the activity in a way that sabotages team cohesion and respect for the coaches, the very goals of the program. U.S. Br. 24-27. Schools cannot ban basketball players from opining on politics just because they play basketball. But the First Amendment should not give the basketball player a federal case if coaches bench him for spending his weekends posting profanity-laden online rants about teammates and coaches. NAPSA Br. 26-27.

At bottom, the parties and the United States agree that the First Amendment should not forbid schools from addressing students' off-campus speech involving threats, bullying, or harassment of others in the school community; speech inciting hacking, cheating, circumvention of

drug testing, and other conduct; and some off-campus student speech in extracurricular programs. Br. 16-18, 27-30; U.S. Br. 7; Resps' Br. 24-27, 41-42. That is another way of saying that schools can address off-campus speech that inflicts a substantial on-campus disruption or interference with others' rights. This Court should not reinvent the wheel spoke-by-spoke just to get the results that *Tinker* already produces.

2. Respondents' proposal (at 36) to limit *Tinker* to "all times when the school is responsible for the student" does not align with the Third Circuit's definition of campus, which was itself novel. Pet.App.31a. Far from being easily applied, respondents' approach creates even more arbitrary line-drawing. Br. 44-46.

Respondents (at 36-37) would apply *Tinker* to anything students post online, so long as students use smartphones during the school day, while "engaged in … remote learning," or at a summer externship for school credit. But schools' interest in preventing substantial disruption is the same whether students press send while sitting in locked cars in the school parking lot just before the bell rings or while grabbing after-school snacks with classmates.

Or take respondents' stance (at 36) that schools are responsible for students "en route to or from school." How is the school "responsible" for the student sitting in the family minivan as Dad drives him home from school? What if Dad stops at CVS for school supplies? Or drops the student off at a classmate's house to work on their science project? Does *Tinker* govern student speech that occurs while kids wait at the school bus stop, or only once they board? If students drive themselves, should schools apply *Tinker* to students' tweets from the Starbucks drive-thru line, or do coffee breaks trigger other First Amendment doctrines?

Respondents (at 36) say *Tinker* controls when students engage in "school-sponsored remote learning" or use "a school laptop for schoolwork." Does that mean schools revert to other First Amendment doctrines the minute the Zoom schoolday ends? Does the doctrinal switcheroo happen when students turn video on and off?

Respondents (at 36-37) are wrong that schools already draw these lines under *Fraser*, *Kuhlmeier*, and *Morse*. Those cases hold that the scope of schools' authority tracks the pedagogical interest at stake, not students' location. Schools presumably cannot ban profanity or impose dress codes on students traveling to or from school, even though respondents say the "school environment" encompasses transit, school-adjacent locations, and immediately before and after school hours. Likewise, it is far from obvious that schools could penalize a student who wears a "Bong Hits 4 Jesus" shirt to the college astrophysics seminar "taken for school credit," Resps' Br. 37.

Forcing schools to ascertain whether *Tinker* or some other First Amendment doctrine applies based on arbitrary definitions of the "school environment" would transform time-sensitive school disciplinary questions into an unworkable nightmare. Schools would face all the same litigation risks from failing to address off-campus student speech that jeopardizes other students' welfare, *see* La./States Br. 3-5, plus the added risks of navigating a doctrinal mess.

CONCLUSION

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

Respectfully submitted,

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