No. 20-255

In the
Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF NATIONAL ASSOCIATION OF PUPIL SERVICES ADMINISTRATORS, PENNSYLVANIA ASSOCIATION OF PUPIL SERVICES ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER B. GILBERT
Counsel of Record
STEPHANIE A. HAMM
THOMPSON & HORTON LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027
(713) 554-6744
cgilbert@thompsonhorton.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

I.
INTEREST OF *AMICI CURIAE*[1]

Amicus National Association of Pupil Services Administrators (NAPSA) is the only national organization that focuses its efforts on the development of administrators and programs designed to serve the academic, social, emotional, and physical needs of all students.

NAPSA is a national association of student services administrators with members across the United States. NAPSA is committed to the cultivation of leadership, advocacy, and professional development in the field of pupil services. The job of today's pupil services administrator requires a broad knowledge of many fields within student services including special education, psychology, social work, and counseling.

Pupil services administrators must also have the ability to effectively integrate these student support services within a school district's instructional program. Most education organizations are discipline-specific in their approach to professional development, service delivery, and advocacy. In contrast, NAPSA members enjoy the unique benefit of being part of a progressive and nationally recognized organization that supports the implementation of a well-integrated and multidisciplinary configuration of student support services.

---

[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Amicus Pennsylvania Association of Pupil Services Administrators (PAPSA) is a statewide organization of pupil services administrators with nearly 350 members from among the 600 local educational entities in the Commonwealth of Pennsylvania. PAPSA members include central office administrators with such titles as Director of Pupil Services, Supervisor of Special Education, Assistant Superintendent for Student Services, as well as Superintendents, and many variations that comprise the coordination of programs in the areas of counseling, psychology, nursing, social work, attendance, special education, gifted education, student assistance, and other related fields.

Amici are concerned that the decision below will hamper school administrators' ability to address serious student issues arising from off-campus, online speech, such as cyberbullying and sexual harassment. Schools must be able to discipline students for such speech, when it impacts the school community, at least some of the time and under some circumstances, and the test set forth by this Court in *Tinker v. Des Moines Indep. Comm. Sch. Dist.,* 393 U.S. 503 (1969) sets forth the basics for a workable rule.

Based on the foregoing, Amici submit that the U.S. Court of Appeals for the Third Circuit ("Third Circuit") incorrectly found that the Mahanoy Area School District violated the First Amendment rights of B.L. Amici urge the Court to consider this case to resolve issues of considerable interest and import to the entire public education community.

II.
INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici, NAPSA and PAPSA, file this brief in support of the Mahanoy Area School District, because they believe that the Third Circuit has created a rule that will make it extremely hard, if not impossible, for school administrators to address serious speech-related issues such as sexual harassment or cyberbullying, simply because the speech originates off-campus or online. School administrators need to be able to discipline students for off-campus speech that impacts the school community and that targets other students. Schools also need some authority to address student speech that, like that of B.L., targeted a school activity or organization, and was reasonably likely to cause disruption in that activity or organization.

III.
ARGUMENT

"Bad facts make bad law." *B.L. by and through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 187 (3rd Cir. 2020). While the lower court meant this as a cautionary warning that what might seem appropriate in extreme cases should not create rules that overcompensate in more moderate situations, the opposite is also true: courts addressing comparatively minor student speech disputes should not establish sweeping rules that prejudice a school district's ability to handle a wide range of other serious speech-related issues. Yet, in deciding that Mahanoy Area High

School cannot apply the well-established *Tinker* rule[2] to a cheerleader who posted a picture of herself on Snapchat with her middle finger raised, with the caption "Fuck school fuck softball fuck cheer fuck everything," the Third Circuit has created an unnecessarily broad rule that will make it extremely hard, if not impossible, for school administrators to address much more serious issues like sexual harassment or cyberbullying, simply because the student chooses to launch a "virtual" attack from the other side of the schoolhouse gates. A blanket holding that "*Tinker* does not apply to off-campus speech," *id.* at 189—a conclusion that Judge Ambro recognized below as unique among circuit courts, *see id.* at 196 (Ambro, J., concurring in the judgment)—may protect students like B.L. from perceived overreaching by school officials, but only at the very real cost of endangering countless other students.

As organizations whose members frequently are responsible for handling student discipline issues and other student-related issues—including the ever-increasing threat of cyberbullying and sexual harassment— NAPSA and PAPSA write to stress three points to this Court:

1. Schools need to be able to discipline students for off-campus speech, particularly online speech, that impacts the school community, at least some of the time and under some circumstances;

---

[2] *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

2. In particular, schools need to be able to address off-campus or online student speech that targets other students; and

3. Schools need some authority to address student speech that, like here, targeted a school activity or organization, and was reasonably likely to cause disruption in that activity or organization.

To meet these goals, school administrators desperately need a clearly-articulated standard to guide them on when and under what circumstances they may discipline students for off-campus and/or online speech. NAPSA and PAPSA urge this Court to decline to follow the traditional doctrine of avoiding difficult constitutional questions in favor of simpler resolutions, which both the lower court here and the Fifth Circuit in a very similar case (that will be discussed below) recognized has deprived school officials of much-needed guidance on these very issues. *See B.L.*, 964 F.3d at 185-86; *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 267 (5th Cir. 2019).

A. Schools need to be able to discipline students for off-campus speech, particularly online speech, that impacts the school community, at least some of the time and under some circumstances.

In a press release issued by the ACLU about this case, B.L.'s father suggested that off-campus student speech should only be addressed by parents, not schools:

> As a parent, I know that sometimes kids do foolish things. But when my daughter is on her own time and out of school, it's my role as a parent to address her behavior. In this situation, I did that and felt that the school overstepped its bounds. We're in this case because we don't want to see schools have the power to discipline students for what they do on their own time. Leave that authority to parents.

See ACLU-PA Statement on Mahanoy Area School District's Decision to Appeal Ruling in B.L. (April 12, 2019), *available at* https://www.aclupa.org/en/press-releases/aclu-pa-statement-mahanoy-area-school-districts-decision-appeal-ruling-bl. Frankly, many school administrators would like nothing more than to agree with B.L.'s father and rely on parents to handle these types of issues. But, in this day and age, the sad truth is that parents often do not discipline their children, either because they do not believe that discipline is warranted, do not fully know what their children are doing (particularly online), or are not even present in their children's lives.

Also, a common problem facing school administrators is that there are often ***two*** sets of parents in the mix: the parents of the accused student who, like B.L.'s parents, want school officials to "stay out of it," and the parents of the victimized student(s), who are demanding with equal fervor that the school "do something about it." Given that the legal standard for school and administrator liability in many situations is "deliberate indifference"—*see*, *e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (Title IX

plaintiffs must show that "the district was deliberately indifferent to the harassment."); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994) (*en banc*) ("A municipality, with its broad obligation to supervise all of its employees, is liable under § 1983 if it supervises its employees in a manner that manifests deliberate indifference to the constitutional rights of citizens. We see no principled reason why an individual to whom the municipality has delegated responsibility to directly supervise the employee should not be held liable under the same standard.")—there is enormous pressure on schools to "do something."

But under the lower court's decision in this case, schools will be forced to do nothing, even when students are in dire need of help. The majority below ruled that *Tinker*—which allows schools to discipline students for speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school"—does not apply, at all, to off-campus speech. *B.L.*, 964 F.3d at 189. As noted by Judge Ambro, the Third Circuit's position has been *entirely* rejected by all other circuits. *Id.* at 196 (Ambro, J., concurring in the judgment) ("[O]urs is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech.").

"Bad facts make bad law," and it is easy in this case to scoff at the need for the school to take any action against B.L., because it was "just cheerleading," and the student was only "blowing off steam." But the categorical rule adopted by the Third Circuit below will prevent school officials from helping students who have much more serious needs. Take, for example, the sad case of Shay N. *See Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011). When Kara

Kowalksi was a senior, she created a MySpace page called "S.A.S.H.," which Kowalksi claimed stood for "Students Against Sluts Herpes," but which was largely dedicated to ridiculing her fellow student Shay (another male student involved with the website testified that the second "S" in "S.A.S.H." actually stood for Shay, and not for "Sluts"). *Id.* at 567. The male student uploaded several pictures of Shay that were captioned to suggest she had herpes, and Kowalksi responded favorably to at least one of the photos. A few hours after the pictures were posted, Shay's father called the male student to complain, and he and Kowalksi tried to delete the website, but were not entirely successful. Shay and her father went to school the next morning to complain, and school officials suspended Kowalksi for ten days, later reduced to five, and issued her a 90-day "social suspension," which prevented her from attending school events in which she was not directly involved. She also was not allowed to crown the next "Queen of Charm" as the incumbent in that position, and she was kicked off the cheerleading squad for the rest of the year. But under the Third Circuit's decision in this case, the school would have been unable to help Shay and protect her from being cyberbullied, even though the Fourth Circuit concluded that the plaintiff's behavior was "not the conduct and speech that our educational system is required to tolerate…." *Id.* at 573.

Or what about the multiple students that twin brothers decided to target in *S.J.W. v. Lee's Summit R-7 School District*, 696 F.3d 771 (8th Cir. 2012)? The brothers created a website that contained a variety of offensive and sexually explicit comments about female classmates, whom they identified by name. There

were also several racist comments about a fight at the high school that mocked black students. School officials testified that the website caused substantial disruption, as school officials fielded numerous phone calls from the media and parents about bullying and harassment, and teachers had difficulty managing their classes because students wanted to talk about the website.[3] After the school determined that the brothers were responsible for the website, they were immediately suspended for ten days and then, after a hearing, for 180 days (though they were allowed to enroll in another school in the district during their suspension). But again, under the lower court's decision here, the school would not have been able to address the racist and harassing statements the two brothers made about their fellow students, and the victims of their harassment likely would have suffered further torment.

Both the Fourth Circuit and the Eighth Circuit recognized the difficulty of dealing with off-campus, online speech by students, but they did not simply wash their hands of the issue: they addressed it head on. Kowalksi's lawsuit did not really defend the substance of her speech, but focused on challenging the school's ability to punish a student for off-campus, non-school related speech. The Fourth Circuit noted that her argument "raises the metaphysical question of where her speech occurred when she used the Internet as the medium." *Kowalski*, 652 F.3d. at 573. Although she "pushed her computer's keys in her

---

[3] At least two teachers testified that the day everyone found out about the website was the most disrupted day of their teaching careers. *S.J.W.*, 696 F.3d at 774.

home," the court noted that her target and audience were all students, and concluded that Kowalksi should have reasonably anticipated that the speech would reach the school or impact the school environment. The court found that it was foreseeable that the speech would reach the school "via computers, smartphones, and other electronic devices, given that most of the 'S.A.S.H.' group's members and the target of the group's harassment were Musselman High School students." *Id.* at 574. And while the court cautioned that there was surely a limit as to how far school officials could reach beyond the schoolhouse gates, it was "fully satisfied that the nexus of Kowalksi's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being." *Id.* at 573.

In *S.J.W.*, the Eighth Circuit rejected the brothers' argument that they could not be disciplined for speech occurring off campus, relying on cases like *Kowalski* to hold that "*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting." *S.J.W.*, 696 F.3d at 777. The district court found that the website had "caused considerable disturbance and disruption," that the "greatest school wide problem" was caused by the racist posts (the worst of which was definitely authored by one of the twins), and that the website "targeted" the high school. *Id.* at 775. The Eighth Circuit had no issue finding that the school had jurisdiction over the brothers' speech, noting that "the location from which the Wilsons spoke may be

less important than the District Court's finding that the posts were directed at Lee's Summit North." *Id.* at 778. Because the lower court had found that the website "caused considerable disturbance and disruption," the Eighth Circuit also concluded that disciplining the brothers was permissible under *Tinker*.

Additionally, although unrelated to online speech, the Ninth Circuit addressed off-campus speech in *C.R. v. Eugene School District 4J*, 835 F.3d 1142 (9th Cir. 2016), and similarly held that *Tinker* applies "if the speech might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, or, alternatively, if the speech collides with the rights of other students to be secure and to be let alone." *C.R.*, 835 F.3d at 1152. In *C.R.*, a seventh-grade student was disciplined for off-campus, sexually harassing speech directed towards two disabled sixth-graders (one boy, one girl). C.R., along with a few other seventh-grade students, followed the disabled students home from school over the course of several days, and engaged in teasing behavior that quickly escalated to vulgar and sexually harassing statements and jokes. *Id.* at 1146. Among other things, the older boys asked the younger students if they watched pornography, gave them vulgar fake names and insisted that they repeat them, and made suggestive jokes about oral sex. *Id.* One day, an instructional aide rode past the group of students on her bike, and noticed that one of the sixth-grade students looked "a little scared." *Id.* She told the older boys to leave, walked the younger students home, and talked to them about what was happening. *Id.* After interviewing all of the students involved, school administrators determined that the incident

fell within the school district's definition of harassment, and suspended C.R. for two days. C.R.'s parents later sued, arguing that the school district had violated C.R.'s First Amendment rights. The district court granted summary judgment in favor of the district, and the Ninth Circuit—after analyzing not only C.R.'s free speech rights but also the rights of his victims to feel safe at school—affirmed:

> Sexual harassment also implicates the rights of students to be secure. Such harassment is harmful because it positions the target as a sexual object rather than a person, threatening the individual's sense of physical, as well as emotional and psychological security . . . The facts of this case illustrate the point. Both of the targeted students were unable to return home from school without being subjected to questions about sex acts and whether they were dating—inappropriate and unsettling questions for students just out of elementary school. Unsurprisingly, A.I. reported feeling scared and uncomfortable after the encounter. The school could therefore reasonably expect that those feelings would cause A.I. to feel less secure in school, affecting her ability to perform as a student and engage appropriately with her peers. Moreover, the harassment had already begun to escalate from the repetition of curse words to sexual comments directed at the victims. The school could reasonably expect the harassment to escalate

> further if allowed to continue unchecked. Without intervening administrative action, the younger students would be deprived of their right to be secure at school.

Id. at 1152–53. As aptly noted by the Ninth Circuit, but for the school district's ability to discipline C.R.'s off-campus speech under *Tinker*, C.R.'s harassment likely would have escalated even further, and would have continued to negatively impact his victims' ability to succeed in the school environment.

Furthermore, school administrators like NAPSA and PAPSA members not only have to deal with student-on-student threats, but also student threats to teachers or staff members—which was the subject of *Bell v. Itawamba County School Board*, 799 F.3d 379 (5th Cir. 2015) (*en banc*). There, Taylor Bell, a high-school senior and aspiring rap artist, recorded a song that accused two coaches at his school of engaging in sexual misconduct with female classmates. The song's lyrics contained several threats, such as:

- "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack;"
- "Run up on T–Bizzle / I'm going to hit you with my rueger;"
- "you fucking with the wrong one / going to get a pistol down your mouth / Boww;" and
- "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga."

Id. at 384. Bell was suspended and later sent to an alternative school. Although Bell claimed that he did

not mean that he was going to shoot anyone, but that he was only "foreshadowing that something might happen," *id.* at 386, the en banc Fifth Circuit saw the song in a whole different light: "there is no genuine dispute of material fact that Bell threatened, harassed, and intimidated the coaches by intentionally directing his rap recording at the school community, thereby subjecting his speech to *Tinker*." *Id.* at 396-97. The court noted that while students do retain some right to freedom of speech, that right must be tempered in light of a school's duty to "teach [] students the boundaries of socially appropriate behavior." *Id.* at 390 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

Although the Fifth Circuit began by noting that all four of this Court's student speech cases were limited to "speech inside the 'schoolhouse gate'," *id.* at 392,[4] the court recognized that a school district's duties and responsibilities have changed in the Internet era:

---

[4] While many courts say this when summarizing this Court's four student speech cases, it isn't really true: the students holding the "BONG HiTS 4 JESUS" banner were standing "across the street from the school to watch the event," *Morse v. Frederick*, 551 U.S. 393, 397 (2007)—so definitely not "inside the schoolhouse gates." And while other courts have temporized by describing *Morse* as involving speech at a school-sanctioned and school-supervised event, *see*, *e.g. Longoria*, 942 F.3d at 268 ("The Court's four school speech cases, including *Morse*, all pertain to on-campus speech or speech conducted during a school-sponsored activity."), letting students walk outside to watch the Olympic torch run by is hardly the kind of formal off-campus school activity, like an away football game or a debate tournament, where you would expect strict supervision of students by school officials.

> Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.

Id. at 392. Students can now communicate instantaneously and from virtually any location via the Internet, and such speech can be accessed anywhere, by anyone, at any time. Accordingly, the court agreed that "off-campus threats, harassment, and intimidation directed at teachers create a tension between the student's free-speech rights and a school official's duty to maintain discipline and protect the school community." *Id*.

The Fifth Circuit also agreed that this issue has been greatly affected by the recent rise of incidents of violence against school communities, noting that "[s]chool administrators must be vigilant and take seriously any statements by students resembling threats of violence, as well as harassment and intimidation posted online and made away from campus." *Id*. at 393 (internal citations omitted). All of these issues, concluded the court, "have drawn into question the scope of school officials' authority." *Id*.

So, there is already some precedent, even at this Court, for expanding the school's jurisdiction beyond its strict physical boundaries or outside of formal activities.

The Fifth Circuit readily rejected Bell's position that *Tinker* did not apply to speech which originated and was disseminated off-campus, without the use of school resources:

> Bell's position is untenable; it fails to account for evolving technological developments, and conflicts not only with our circuit's precedent, but with that of every other circuit to have decided this issue.

Id. at 393. After reviewing the decisions of other circuits, the court concluded that "based on our court's precedent and guided by that of our sister circuits, *Tinker* applies to off-campus speech in certain situations." *Id*. The court then held:

> The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by Bell, making any effort to trace First Amendment boundaries along the physical boundaries of the school campus a recipe for serious problems in our public schools. Accordingly, in light of our court's precedent, we hold *Tinker* governs our analysis, as in this instance, when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.

Id. at 394 (internal citations omitted). The court had no trouble determining that Bell met this standard—he admitted that he produced and disseminated the rap song knowing that students would listen to it, and hoping that administrators would as well.

School administrators also have to deal with threats against the school itself. Consider *Wynar v. Douglas County School District*, 728 F.3d 1062 (9th Cir. 2013), in which Landon Wynar sent a series of increasingly violent and threatening MySpace instant messages from his home computer to his friends, bragging about his weapons, threatening to shoot specific classmates, suggesting that he would "take out" others during a school shooting on April 20 (Hitler's birthday and the anniversary of the Columbine massacre), and invoking the specter of the Virginia Tech massacre.[5] One message read "ill probly only kill the people i hate?who hate me / then a few random to get the record." *Id.* at 1065. Although Landon's friends joked with him at first, they became increasingly concerned and finally went to talk to a trusted coach, who took them to the principal. Landon was eventually taken into custody and admitted to writing the messages, but claimed they were a joke. Landon was suspended for 10 days and, after a hearing, expelled for 90 days.

The Ninth Circuit first considered whether schools can discipline students for off-campus speech that consisted of off-campus communications among students involving a safety threat to the school

[5] Wynar wrote, "that stupid kid from vetch, he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted." *Id.* at 1066.

brought to the school's attention by another student, and not by the speaker. After reviewing caselaw from other circuits, the Ninth Circuit perceived two distinct tests: that of the Fourth Circuit, which required that the speech have a sufficient "nexus" to the school, *id.* at 1068 (citing *Kowalski,* 652 F.3d at 573), and that of the Eighth Circuit, which required that it be "reasonably foreseeable that the speech will reach the school community." *Id.* (citing *S.J.W.,* 696 F.3d at 777). The Court concluded that Wynar's speech both had a direct nexus to the school (*Kowalski*) and was reasonably foreseeable to have reached school grounds (*S.J.W.*), and held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Id.* The Court then held that "[i]t is an understatement that the specter of a school shooting qualifies under either prong of *Tinker*." *Id.* at 1070.

School officials must have some leeway to address speech like that at issue in the cases discussed above, because sometimes the parents cannot or will not do it. Increasingly, and specifically with regards to student speech on the Internet, the unique nature of student interactions and social media speech sometimes means that there is no other government entity that can address the speech, especially when (like in *Kowalski* and *S.J.W.*), it is not overtly criminal in nature. Many NAPSA and PAPSA members can share stories of telling parents that they should go to the police because the speech "sure seems threatening," only to have the police tell the parents they can do nothing (or, worse yet, just refer the parents back to the school district). When speech is made in the virtual world of

the Internet, who (other than schools) is there to protect the students the speech targets?

NAPSA and PAPSA note that when it comes to harassment or bullying, the court below hedged its bets a little:

> Nor are we confronted here with off-campus student speech threatening violence or harassing particular students or teachers. A future case in the line of *Wisniewski*, *D.J.M.*, *Kowalski*, or *S.J.W.*, involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law.

B.L., 964 F.3d at 190. But what does this mean? If *Tinker* does not give school officials jurisdiction to address off-campus student speech, at least under certain circumstances, what "other line of First Amendment law" would? The Third Circuit mentions the "true threat" doctrine, which is a very narrow exception to the First Amendment, and then falls back on *Morse*. *Id*. at 190-91. But as Justice Thomas noted in *Morse*, "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not—a standard continuously developed through litigation against local schools and their administrators." *Morse*, 551 U.S. at 418 (Thomas, J., concurring). Saying "there may be other legal avenues to address online speech by students, but we are not going to tell you what they are" is precisely what

causes school administrators (and courts like *Longoria*) to throw up their hands in frustration.

Although certain people (including a respected First Amendment professor) have offered exaggerated opinions about this subject, allowing school administrators to discipline students for off-campus, online speech will not "empower schools to reach into any student's home and declare critical statements verboten, something that should deeply alarm all Americans." *See* Adam Liptak, *A Cheerleader's Vulgar Message Prompts a First Amendment Showdown*, N.Y. Times (Dec. 28, 2020), *available at* https://www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html (quoting Professor Justin Driver). Contrary to oft-popular belief, school administrators do use common sense when confronting these issues, and serious discipline—such as expulsions—still require that students be provided due process under *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Decisions like *Kowalski*, *S.J.W.*, and *Bell* provide thoughtful guidance to school administrators seeking to discipline students for online speech, requiring (in various words) that the speech have either a sufficient "nexus" to the school community,[6] or that it be "reasonably foreseeable that the speech will reach the school community."[7] And the *Bell* Court zeroed in on a student's *intent* that his or her speech reach the school community:

> [A] speaker's intent matters when determining whether the off-campus speech

---

[6] *Kowalski,* 652 F.3d at 573.

[7] *S.J.W.,* 696 F.3d at 777.

> being addressed is subject to *Tinker*. A speaker's intention that his speech reach the school community, buttressed by his actions in bringing about that consequence, supports applying *Tinker*'s school-speech standard to that speech.

Bell, 799 F.3d at 395 (citing *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 618, 620 (5th Cir. 2004)). The Fifth Circuit also derived from various cases the following factors that school officials should take into consideration when addressing online speech:

- the nature and content of the speech, the objective and subjective seriousness of the speech, and the severity of the possible consequences should the speaker take action;[8]

- the relationship of the speech to the school, the intent of the speaker to disseminate, or keep private, the speech, and the nature, and severity, of the school's response in disciplining the student;[9]

- whether the speaker expressly identified in educator or student by name or reference, and past incidents arising out of similar speech;[10]

---

[8] *See Wynar*, 728 F.3d at 1070-71.

[9] *See Doninger v. Niehoff*, 527 F.3d 41, 50-52 (2nd Cir. 2008).

[10] *See Kowalski*, 652 F.3d at 574.

- the manner in which the speech reached the school community;[11]
- the intent of the school in disciplining the student;[12]
- the occurrence of other in-school disturbances, including administrative disturbances involving the speaker, such as "school officials having to spend considerable time dealing with these concerns and ensuring that appropriate safety measures were in place."[13]

Guidelines like these should mollify at least some of the concerns about school administrators becoming a "super-censorship board" for online student speech.

B. In particular, schools need to be able to address off-campus or online student speech that targets other students.

The court below was concerned that the "reasonable foreseeability" test and the nexus test would sweep too much student speech under the school's authority, due to the expansive reach of technology:

> In the past, it was merely a possibility, and often a remote one, that the speech of a student who expressed herself in the

---

[11] *See Boim v. Fulton Cnty. Sch. Dist.,* 494 F.3d 978, 985 (11th Cir. 2007).

[12] *See J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,* 650 F.3d 915, 926, 929 (3rd Cir. 2011).

[13] *See D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d 754, 766 (8th Cir. 2011).

> public square would "reach" the school. But today, when a student speaks in the "modern public square" of the internet, *Packingham*, 137 S. Ct. at 1737, it is highly possible that her speech will be viewed by fellow students and accessible from school. And in some situations, it is a virtual certainty: Depending on the settings favored by that student's "friends" or "followers," her message may automatically pop up on the face of classmates' phones in the form of notifications from Instagram, Facebook, Twitter, Snapchat, or any number of other social platforms. Implicit in the reasonable foreseeability test, therefore, is the assumption that the internet and social media have expanded *Tinker*'s schoolhouse gate to encompass the public square.

B.L., 964 F.3d at 187. This can be a legitimate concern: no school official really wants to become the Arbiter of All-Things Student Speech.

However, as noted above, the Fifth Circuit's "intent requirement"—*i.e.,* requiring that the speaker intended his or her speech to reach the school community—is one way to address such concerns. *See Bell*, 799 F.3d at 395. Another would be to focus on whether a student's online speech targets another student or school employee. Distinguishing between speech that addresses a broader issue and speech that targets a specific student underlays the thoughtful—if unpublished—decision in *Glowacki v. Howell Public School District*, 2013 WL 3148272 (E.D. Mich. 2013).

When students wore purple shirts to recognize Anti-Bullying Day, a student (Daniel) got into an argument with his teacher about why students and teachers could wear the purple shirts and display rainbow flags, but a different student could not wear a Confederate flag belt buckle. The argument culminated in Daniel telling his teacher (and the class), "I don't accept gays because I'm Catholic." *Id*. at *3.

In the subsequent lawsuit, the teacher argued that Daniel's statement "I don't accept gays" was a bullying statement that intruded upon the rights of at least one homosexual student in the classroom. Noting that the law does "not establish a generalized hurt feelings defense to a high school's violation of the First Amendment rights of its students," and that there is little authority interpreting what *Tinker*'s "invasion of the rights of others" prong really entails, the court determined that Daniel did not violate that portion of *Tinker*, at least where there was no evidence that Daniel had specifically named or targeted a particular individual in the class, or even knew that there was a homosexual student in the class:

> Given that the speech did not identify particular students for attack but simply expressed a general opinion-- albeit one that some may have found offensive-- on the topic of homosexuality, the court finds that Daniel's expressive conduct did not impinge upon the rights of others.

Id. at *8. In reaching its conclusion, the court relied on a law review article by Professor Emily Gold Waldman, in which she suggested distinguishing between

speech that specifically targets others and speech that primarily comments on political, social, or religious issues:

> *Morse* points toward a useful distinction between student speech that identifies particular students for attack, and student speech that is primarily commenting on political, social, or religious issues. Building on that distinction, I argue that restrictions as to the first category should generally be constitutional, just as restrictions on speech advocating illegal drug use now are under *Morse*. Restrictions as to the second category, by contrast, should trigger *Tinker*, and be presumptively unconstitutional unless there is a real likelihood of substantial disruptions to at least one other student's educational performance. In further explicating and applying this "substantial disruption" standard, courts should be guided by *Morse's* recognition that protection of students' expression of political, social, and religious opinions *and* their psychological well-being are both important interests.

Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & Educ. 463, 502-03 (2008). A test that focuses on whether the speaker is targeting another person from the school community (*i.e.*, "I don't like you because you are gay") will help ensure that harassment and bullying are addressed, while protecting a student's ability to speak on the broader

topic (*i.e.*, "I don't approve of gay marriage because of my religion").

C. Schools need some authority to address student speech that, like here, targeted a school activity or organization, and was reasonably likely to cause disruption in that activity or organization.

While focusing on speech that targets another student or school employee (as recommended by Professor Waldman) is one way to address concerns about regulatory overreaching, schools must also have some ability to address off campus speech that targets a school activity or organization. Again, it is beyond dispute that "[b]ad facts make bad law," *B.L.*, 964 F.3d at 187, and it is easy in this case to criticize the school for disciplining B.L. over what many people likely perceive to be "just a cheerleading dispute." But if a male football player publicly criticizes his coach on Facebook for taking him out of a game, and the coach makes the player run laps at the next practice as punishment—something that probably happens at least once or twice each year on virtually every football team—would people be more likely to shrug and say, "Yeah, that seems okay"? If a theater student goes around town telling everyone, "This year's play is terrible, don't go see it," crushing the spirits of the rest of the cast, would there not be some justice in telling the student, "Fine, but you don't get to audition for the next play"? And if a student making a Student Council nomination speech gets up and gives a speech that is an "elaborate, graphic, and explicit sexual metaphor," causing some students to hoot and yell, some "by gestures [to] graphically simulate[] the sexual ac-

tivities pointedly alluded to in [the] speech," and others to be "bewildered and embarrassed," then would it not make sense to remove that student from the list of potential graduation speakers? *See Fraser*, 478 U.S. at 678.

Admittedly, that last example actually happened on school grounds, but the point remains the same: as NAPSA and PAPSA members can tell the Court, speech like that engaged in by B.L. can and will have a disruptive impact on that student's group, even if it is "just the cheerleading squad." Group cohesiveness and dynamics matter very much (especially when teammates must rely on one another for their own physical safety), and the old adage "sticks and stones can break my bones, but words will never hurt me" is just flat-out wrong, as any victim of cyberbullying can tell you. But NAPSA and PAPSA agree that such speech should at least have something to do with the group, before it becomes subject to discipline, which leads us to our last case: *Longoria ex rel. M.L. v. San Benito Independent Consolidated School District*, 942 F.3d 258, 267 (5th Cir. 2019), another case involving cheerleaders making negative comments on social media.

However, the facts in *Longoria* were a little different: M.L., who had just been selected to be head varsity cheerleader, was stripped of her position and dismissed from the squad after the cheerleading coaches discovered a series of tweets on M.L.'s personal Twitter account that contained profanity and sexual innuendo. Most of the posts were tweets from other persons that M.L. had "liked", causing them to be shared with her social media followers, including the following:

- "Imma show my mom all the snaps from girls partying for spring break so she can appreciate her lame ass daughter some more,"
- "i [sic] don't fuck with people who lowkey try to compete with/ out do me,"
- "I fucking love texas [sic] man….,
- a tweet from a Twitter account entitled "Horny Facts™," which states, "bitch don't touch my ..."

Id. at 262. Another tweet from M.L. responded "Yes" to someone else asking her, "Did pope split you in half?" *Id*.

While arguably inappropriate, none of these posts were about the cheerleading program, and none of them targeted a specific student, or were threatening or harassing in any way. So, like the Third Circuit in this case, the Fifth Circuit in *Longoria* was very concerned about the lack of clarity and guidance to school officials regarding when they could discipline students for off-campus speech. *See id.* at 269 ("We note that the lack of clarity in the case law has given rise to frequent calls from commentators asking courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation."). Unlike this case, however, *Longoria* was primarily a qualified immunity appeal, and given the "clearly established" element of the qualified immunity test, the Fifth Circuit felt compelled to uphold the school employees' immunity in light what it felt was not "clearly established" law. *Id*. at 265.

NAPSA and PAPSA bring this case to the Court's attention because even after the school administrators won, the Fifth Circuit went to extraordinary lengths to suggest some guidelines derived from Fifth Circuit cases (primarily *Bell*) for school administrators to follow in the future:

> First, nothing in our precedent allows a school to discipline non-threatening off-campus speech simply because an administrator considers it "offensive, harassing, or disruptive." Second, it is "indisputable" that non-threatening student expression is entitled to First Amendment protection, even though the extent of that protection may be "diminished" if the speech is "composed by a student on-campus, or purposefully brought onto a school campus." [Third], as a general rule, speech that the speaker does not intend to reach the school community remains outside the reach of school officials. [Fourth, b]ecause a school's authority to discipline student speech derives from the unique needs and goals of the school setting, a student must direct her speech towards the school community in order to trigger school-based discipline.

Id. at 269 (internal citations omitted). Given that the student tweets at issue in *Longoria* do not appear to satisfy any of these "limitations" proposed by the Fifth Circuit, one is left with the strong suspicion that the student might have won the case on the merits of her

First Amendment claim, had qualified immunity not been an issue.

In any event, *Longoria* does provide some guidance on when school administrators should not discipline students for off-campus, online speech: (1) when the speech is non-threatening, (2) when the speech is not directed at the school community or is not intended to reach the school community, and (3) when the speech is not purposefully brought onto a school campus. And, because M.L.'s posts were not about the cheerleading program, did not target a specific student, and were not threatening or harassing, *Longoria* should represent the tipping point at which school officials would no longer have jurisdiction over a student's off-campus, online speech.

But here, while B.L.'s Snapchat posts admittedly did not target a specific student, nor were they threatening or harassing, they were certainly about and did target the school community (at least the cheer program). It also strains credibility to argue that B.L. did not intend her posts to reach the school community; as the lower court's opinion notes, she knew that her posts would be seen by about 250 people, "many of whom were MAHS students and some of whom were cheerleaders." *B.L.*, 964 F.3d at 175. And those 250 persons would have known that the posts were attacking the cheerleading program itself, especially after reading the second post: "Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else?" *Id*.

Accordingly, NAPSA and PAPSA believe that Mahanoy High School officials properly followed

Tinker in determining that B.L.'s posts were reasonably likely to cause a disruption in the cheerleading program, and her discipline should not have been found to violate the First Amendment. At a minimum, NAPSA and PAPSA believe that the Third Circuit overreached in holding that *Tinker* categorically does not apply to off-campus speech, and that the sweeping nature of the Third Circuit's ruling can and will negatively impact student safety and well-being going forward.

IV.
CONCLUSION

For the foregoing reasons, the judgment of the court of appeals below should be reversed.

Respectfully submitted,

CHRISTOPHER B. GILBERT
Counsel of Record
STEPHANIE A. HAMM
THOMPSON & HORTON LLP
3200 Southwest Fwy., Suite 2000
Houston, Texas 77027
(713) 554-6744
cgilbert@thompsonhorton.com

Counsel for Amicus Curiae

DATED: March 1, 2021