

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 THE NATIONAL EDUCATION
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted, with consent of the parties, on behalf of the National Education Association (“NEA”).¹ NEA is the nation’s largest professional association representing over three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. NEA has a deep and longstanding commitment to ensuring that every child has access to a high-quality public education. Such an education requires that students be allowed to freely inquire, research, and speak on topics of public importance. See NEA Resolutions C-42 (“Student Rights and Responsibilities”), I-20 (“Freedom of Creative Expression”). It also requires a learning environment where students and educators are physically safe and free from threats and harassment. See NEA Resolutions B-14 (“Racism, Sexism, Sexual Orientation, and Gender Identity Discrimination”), C-13 (“Safe Schools and Communities”), F-12 (“Protection of Education Employees”) I-30 (“Bullying”). The interests at stake here—students’ abilities to learn and thrive—are core to NEA’s mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Quality public education is the bedrock of our society and democracy. Our nation’s public schools are entrusted with preparing each new generation to be-

¹ This brief is filed with the written consent of both parties. *Amicus* states that no party’s counsel authored the brief in whole or in part; no party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amicus*—contributed money that was intended to fund preparing or submitting the brief.

come productive members of the workforce, of our communities, and of the polity. Ensuring a quality public education requires, among other things, protecting the rights of students and educators alike to freely inquire, research, learn, and speak on a rich array of topics. It also requires the maintenance of an education environment that is safe and conducive to learning.

This Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), guides how schools and educators reconcile these sometimes-competing demands. *Tinker* ensures that students are not required to relinquish their constitutional rights at the schoolhouse gate, but still enables schools and educators to step in where there is a threat of substantial disruption.

Since *Tinker* was decided more than 50 years ago, both the outlets for students to speak and the potential sources of disruption to schools have become more diffuse and more powerful. While students are able to harness the power of the internet to speak and explore ideas, schools must contend with cyberbullying, online radicalization, and threats of gun violence at school.

In the decision below, the Third Circuit categorically rejected the *Tinker* standard for off-campus student speech, including for speech that occurs online and may be targeted directly at the school environment. This decision is dangerously unworkable and should be repudiated.

Off-campus speech can create disruptions to the school environment that are just as substantial—and sometimes more substantial—than speech occurring on school grounds. This is particularly true of speech occurring online, where students may be communi-

cating the warning signs of school violence or engaging in cyberbullying and harassment of other students or educators.

The Third Circuit’s rigid, location-based standard misreads *Tinker* and this Court’s other student-speech cases. The unifying principle of all of these cases is the need to protect the proper functioning of the school environment, regardless of the source and nature of potential disruptions.

This Court should disavow the Third Circuit’s flawed standard and affirm that *Tinker* is not limited to strictly on-campus speech. In so doing, this Court should elaborate on how *Tinker* applies to off-campus speech, including speech that occurs online. First, this Court should make clear that schools cannot restrict off-campus speech unless it has a sufficiently close nexus to the school environment. Second, this Court should emphasize that, in deciding whether a school may restrict online speech, a court may uphold restrictions only where the nature of the speech threatens disruptions that are truly “substantial.” Finally, this Court should emphasize that *Tinker* does not permit viewpoint discrimination or restrictions of off-campus speech that addresses matters of genuine political, social, artistic, and religious importance.

Having rejected the Third Circuit’s unworkable standard and clarified the application of *Tinker* to off-campus speech, this Court could remand the case to the Third Circuit for further proceedings, or it could decide to conduct the *Tinker* analysis on its own and affirm the judgment below.

ARGUMENT

This case implicates a delicate balance that schools and educators face every day: how to maintain a safe and productive learning environment while, at the same time, ensuring that students are able to exercise their rights to speak on controversial or divisive topics. For more than 50 years, this Court's decision in *Tinker* has provided steady guidance on where and how to strike that balance by providing, on the one hand, that schools are able to prevent substantial disruptions to the school environment while, on the other hand, students are not required to relinquish their constitutional rights at the schoolhouse gate.

Much has changed since *Tinker* was first decided. The internet has, for both better and worse, enabled forms of communication that were previously unimaginable. The online world is constantly generating new and innovative ways to speak, listen, advocate, and protest—as well as new ways to commit abuse and harm. And firearms of increasing sophistication and deadliness are more plentiful and easier to obtain. These developments have made it more challenging than ever for schools to ensure a safe learning environment for students and educators alike.

The Third Circuit's decision below categorically rejects the *Tinker* standard for off-campus student speech, including for speech that occurs online and may be targeted directly at the school environment. Amicus NEA submits that the Third Circuit's decision is dangerously unworkable and should be repudiated in favor of an application of *Tinker* that protects the legitimate needs and interests of schools, students, and educators.

A. Schools must be able to respond effectively to off-campus speech—particularly threats of violence and harassment—that can cause substantial disruptions to the school environment.

“[E]ducation is perhaps the most important function of state and local governments.” *Ambach v. Norwick*, 441 U.S. 68, 75–76 (1979). Our nation’s schools play a crucial role in preparing young people to responsibly exercise their rights as citizens by instilling in them the “fundamental values necessary to the maintenance of a democratic political system.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); see also *Ambach*, 441 U.S. at 76, (1979) (noting the role of public schools in instilling in all students “the values on which our society rests”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation . . . is the very foundation of good citizenship.”). Indeed, it is no exaggeration to say that the system of public education operates as the “cradle of our democracy.” *James v. Bd. of Educ.*, 461 F.2d 566, 568 (2d Cir. 1972).

Our public schools must also provide students with the training, skills, and knowledge necessary to realize their full potential. See *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972). To “better prepare students for an increasingly diverse workforce and society,” schools and educators must “break down . . . stereotypes” and teach students in an environment that promotes understanding across lines of race, gender, religion, disability, and sexual identity. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); see also *Ambach*, 441 U.S. at 77 (describing public schools as a place where “diverse and conflicting elements in our society are brought together on a broad but common ground”).

On top of which, public schools have a fundamental obligation to protect the students entrusted to their care. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007). They have broad duties to ensure that the learning environment is free of invidious discrimination. See Pet. Br. at 35–36. And they often act as the primary social safety net for many vulnerable young people—from providing free school lunches for students who are food-insecure to serving as mandatory reporters of childhood abuse and neglect. See *Ohio v. Clark*, 576 U.S. 237, 246–47 (2015).

Suffice it to say, having to carry out all of these obligations simultaneously means that educators and school administrators “have a difficult job, and a vitally important one.” *Morse*, 551 U.S. at 409. In recognition of that, this Court has consistently held that the constitutional constraints on schools in their dealings with students must be tailored to the “special characteristics of the school environment.” *Tinker*, 393 U.S. at 506; see also *Morse*, 551 U.S. at 396–97 (“[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”) (citation and quotation marks omitted). Thus, while the First Amendment broadly protects the rights of students to express their views—and those protections “do not embrace merely the classroom hours”—schools are still permitted to regulate “conduct by the student, *in class or out of it*, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” *Tinker*, 393 U.S. at 512–13 (emphasis added).

The advent of what this Court calls “the Cyber Age,” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017), has been both a boon and a challenge for public schools in their efforts to manage the some-

times-competing demands of respecting students' free expression and maintaining a school environment that is conducive to learning. With the vast wealth of information available on the internet, educators are increasingly integrating online resources and social media into their instruction.² And more than any other generation, today's school-aged children and teens live their lives online—a trend that has only accelerated during the current COVID-19 pandemic, as many children not only receive remote school instruction online but also forgo many of their normal activities outside the home.³

The ubiquity of the internet and mobile communication has wrought “far-reaching systemic and structural changes” in our society. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). And some of these changes present special challenges for how educators and school administrators evaluate and deal with significant threats to the school environment and the safety of students.

² See, e.g., Courtney Blackwell, *Teacher Practices with Mobile Technology Integrating Tablet Computers into the Early Childhood Classroom*, 7 J. EDUC. RES. 1, 3 (2015); Paige Abe & Nickolas A. Jordan, *Integrating Social Media Into the Classroom Curriculum*, 18 ABOUT CAMPUS 16, 16 (2013).

³ See Common Sense Media, *Media Use by Kids Age Zero to Eight* 3 (2020) (finding that, on average, children from five to eight years old spend more than three hours per day on screen media); Common Sense Media, *Media Use by Teens and Tweens* 3 (2019) (finding that, for eight- to twelve-year-olds, the amount of time spent on screen media is just under five hours per day and, for teenagers, the average time is just under seven and a half hours). See also Matt Richtel, *Children's Screen Time Has Soared in the Pandemic, Alarming Parents and Researchers*, N.Y. Times (Jan. 16, 2021).

1. Threats of school violence. “[W]e live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis.” *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001). The effects of gun violence on school-aged children are significant.⁴ They not only have potentially ruinous consequences for children’s physical and mental well-being, but they greatly affect their ability to reap the crucial and lasting benefits of their education. See David J. Harding, *Collateral Consequences of Violence in Disadvantaged Neighborhoods*, 88 SOC. FORCES 757, 760 (2009) (finding that exposure to gun violence is “linked to post traumatic stress disorder (“PTSD”), anxiety, depression and aggressive behavior, and is thought to disrupt the developmental trajectories of children” and that children exposed to gun violence often exhibit “slowed cognitive development, poor academic achievement or trouble forming relationships with peers and others, all risk factors for school dropout.”).

Educators can also be the victims of students’ threats of violence. See, e.g., *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (upholding the expulsion of a student who created a

⁴ The burden of gun violence has a particularly outsized impact on Black students. Among 253 shooting incidents at K-12 schools where the racial demographic information of the student body was known, 64% of them occurred in schools with a majority minority student population. See Everytown for Gun Safety, National Education Association, and American Federation of Teachers, *Keeping Our Schools Safe: A Plan to Stop Mass Shootings and End Gun Violence in American Schools* 13 (Feb. 11, 2019). Moreover, while Black students represent just 15% of the total K-12 student population in the United States, they constitute 24% of the victims of K-12 student victims in the instances where the race of the victim was known. See *id.*

website at home with “written words, pictures, animation, and sound clips” violently threatening his Algebra teacher, which caused the teacher severe anxiety); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) (upholding a student’s suspension after he drew a gun shooting his English teacher). Indeed, one in ten public-school teachers reported that a student from their school threatened the teacher with injury during the 2015–16 school year. See Anlan Zhang et al., Nat’l Ctr. for Educ. Statistics, *Indicators of School Crime and Safety* 46 (Apr. 2019).

The steady drumbeat of school gun violence since the mass shooting at Columbine High School in 1999 has “put our nation on edge” and “focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies.” *LaVine*, 257 F.3d at 987; see also Meghan Keneally, *The 11 Mass Deadly School Shootings that Happened since Columbine*, ABC News (Apr. 19, 2019). After each of these incidents, “questions [are] asked about how teachers or administrators could have missed telltale ‘warning signs,’ why something was not done earlier and what should be done to prevent such tragedies from happening again.” *Lavine*, 257 F.3d at 987.

Warning signs of the next school shooting can appear in off-campus student speech. A report by the U.S. Secret Service analyzing 41 incidents of school violence at K-12 schools found that all attackers exhibited concerning behaviors, and most communicated some intent to attack. See U.S. Dep’t of Homeland Security, *Protecting America’s Schools: A U.S. Secret Service Analysis of Targeted School Violence* (2019). “In many cases, someone observed a threatening communication or behavior *but did not act*, either out

of fear, not believing the attacker, misjudging the immediacy or location, or believing they had dissuaded the attacker.” *Id.* (emphasis in original). Another analysis of mass school shootings found that 78% of mass school shooters revealed their plans ahead of time, often on social media. See Jillian Peterson & James Densley, *School Shooters Usually Show These Signs of Distress Long Before They Open Fire, Our Database Shows*, The Conversation (Feb. 8, 2019).

Sometimes these warning signs will come in the form of overt threats of imminent violence. But often the signs are less direct. For example, after the deadliest school shooting on record, the attack that took 32 lives at Virginia Tech, a report to Virginia’s governor identified the following warning signs for schools to watch out for: violent, fantastical writings and drawings; a fascination with and possession of firearms; suicidal ideation; expressions of contempt for others and comments indicating violent aggression; imitation of other violent shooters; an interest in previous mass shootings; violence towards animals; actions and words causing others around them to become fearful and suspicious; and more. See *Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel Presented to Governor Kaine* M-2 (Aug. 2007).

If school officials cannot respond to signs that portend a threat to safety, the learning environment at school will suffer. Parents may be afraid for their children to attend classes. See Jeffrey M. Jones, *More Parents, Children Fearful for Safety at School*, Gallup (Aug. 24, 2018). And the students themselves may be distracted or may act out in response to the fear, stress, and uncertainty of a potential threat. If school violence does occur, not only will the direct victims suffer, but the survivors are likely to struggle to re-

turn to and succeed in school. See Jared Keller, *The Psychological Aftermath of Surviving School Shootings*, Pacific Standard (Mar. 25, 2019).

Like threats made against students, threats directed at educators can also be highly disruptive. As the Fifth Circuit described:

[T]hreatening, harassing, and intimidating a teacher . . . impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place . . . it encourages and incites other students to engage in similar disruptive conduct . . . [and] it can even cause a teacher to leave that profession. In sum, it disrupts, if not destroys, the very mission for which schools exist—to educate.

Bell v. Itawamba County Sch. Bd., 799 F.3d 379, 399–400 (5th Cir. 2015).

2. *Bullying and harassment.* Bullying and harassment are a perennial problem in school environments. For example, the most recent data from the United States Department of Education indicates that over 20 percent of students ages 12 to 18—more than 1 out of every 5—report being bullied at school during the school year. See Zhang, *supra*, at 66–72.

Vulnerable student populations tend to be bullied at higher rates. Female students are bullied at higher rates than male students; students of color at predominately white schools are bullied at higher rates than white students; and Asian students are physically injured by bullying at three times the rate of white students. *Id.* “[S]tudents with disabilities are disproportionately affected by bullying.” U.S. Dep’t of Educ., *Dear Colleague Letter on Bullying of Students with Disabilities* at 2 (Aug. 20, 2013) (citing Susan M.

Swearer et al., *Understanding the Bullying Dynamic Among Students in Special and General Education*, 50 J. SCH. PSYCHOL. 503 (2012)). And “students with learning disabilities, attention deficit or hyperactivity disorder, and autism are more likely to be bullied than their peers.” *Id.* (citing Kimberly A. Twyman et al., *Bullying and Ostracism Experiences in Children with Special Health Care Needs*, 31 J. DEVELOPMENTAL BEHAV. PEDIATRICS 1 (2010)).

The Cyber Age has now enabled new forms of bullying and harassment that present additional risks to students and challenges for schools. Cyberharassment or cyberbullying generally involves repeated online expression that intentionally targets a particular person and causes the target substantial emotional distress and/or the fear of bodily harm. See Danielle Keats Citron, HATES CRIMES IN CYBERSPACE 13 (2014); see also Sameer Hinduja & Justin W. Patchin, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 4–6 (2d ed. 2015). Perpetrators of cyberharassment and cyberbullying often engage in their conduct online precisely *because* it can produce harms in another setting, such as the target’s school or workplace. See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657 (2012).

Online bullying and harassment “may not only produce all of the effects that ‘real-life’ harassment does, but also has the potential to be even more pernicious and long-lasting than ‘real-life’ harassment.” *Id.* at 682. In particular, the internet gives harassers the capacity to quickly find a wide audience for their harassment, including users who will join in the harassment. *Id.* Also, the internet’s permanence and easy searchability mean that online attacks—which often include personal information about their tar-

gets—can be very difficult to erase. *Id.* at 682–83; see also Daniel J. Solove, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 94 (2007) (noting that internet-based shaming often creates a “digital scarlet letter”).

The victims of cyberbullying and cyberharassment are often from marginalized groups, and its effects on them can be devastating. See Ari Ezra Waldman, *Triggering Tinker: Student Speech in the Age of Cyberharassment*, 71 U. MIAMI L. REV. 428, 455 (2017) (noting that “victims experience mood swings, anxiety, depression, panic attacks, fear of social interactions, post-traumatic stress disorder, and a panoply of other injuries,” and that they “also report increases in alcohol and substance abuse”). Student victims of cyberbullying may “withdraw from school activities and both face-to-face and online social interaction,” experience “lower educational achievement and diminished professional success,” and suffer from anxiety that “contributes to poor socialization, long term depression, and marginalization.” *Id.* at 455–56. When adolescent victims of cyberharassment are members of a traditionally marginalized group, these effects may be even worse. *Id.* at 456.

Similar to victims of traditional bullying, student victims of cyberbullying may also engage in disruptive behaviors at school. See Hinduja & Patchin, *supra*, at 91. “For example, if a victim feels scared about going to school because of cyberbullying, he may be tempted to bring a weapon to school for protection.” *Id.* Victims of cyberbullying may also sometimes turn into the attackers. See U.S. Dep’t of Homeland Security, *Protecting America’s Schools*, *supra*, at 33–36 (concluding, in an analysis of school violence, that 80% of attackers were previously bullied by their classmates).

It is no surprise that cases involving the online bullying and harassment of students are already beginning to fill the federal reports. *See, e.g., Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) (student was targeted by fellow students on Myspace and accused of having herpes); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773 (8th Cir. 2012) (two students created a blog where they wrote “a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name”). Educators, too, can often be the targets of online bullying and harassment. *See* Sara Morrison, *America's Students are Cyberbullying their Teachers*, *The Week* (June 8, 2017); *Teacher Forced to Move After Receiving Threats for Being Gay*, *N.Y. Post* (Apr. 19, 2018). As more and more communication moves online, the need for schools to meaningfully address these kinds of abuses will be ever-growing.

* * *

Threats of school violence and harassment are just two of the issues that schools and educators must face and that have become increasingly challenging as technology advances. How these challenges evolve over time—and what new challenges could arise—will remain uncertain. As this Court has recognized, we “cannot appreciate yet [the internet’s] full dimensions and vast potential to alter” how we live and learn. *Packingham*, 137 S. Ct. at 1736. The technology still remains “so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.” *Id.* For the case now before it, this Court must be careful to articulate a First Amendment standard that ensures, not only that schools can deal meaningfully with the currently

known potential for online speech to disrupt the school environment, but that schools will have the ability to address new forms of harm and disruption as they arise.

B. This Court’s *Tinker* standard is not limited to on-campus speech, and the Third Circuit’s rejection of *Tinker* for off-campus speech is unworkable.

The Third Circuit below held that *Tinker*’s “substantial disruption” standard is categorically inapplicable to off-campus speech, including speech that occurs online. See *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 189–91 (3d Cir. 2020), *cert. granted*, No. 20-255, 2021 WL 77251 (U.S. Jan. 8, 2021). And, although the court below noted that its standard did not necessarily disable schools from addressing online threats of violence and harassment, its reasoning casts significant doubt on a school’s ability to address these problems in all but the most egregious cases. See *id.* at 190–91 (suggesting that off-campus student speech related to violence can only be restricted if it qualifies as a “true threat” and that off-campus harassment can only be addressed by restrictions that satisfy the standards of “strict scrutiny”).

The Third Circuit’s standard is wrong as a matter of doctrine, and this Court should repudiate it. Most importantly, in misreading *Tinker* and this Court’s other student-speech cases, the Third Circuit’s standard fails to provide either reliable guidance or adequate flexibility to schools faced with the serious and even life-threatening disruptions that can be caused by off-campus speech in the Cyber Age.

The Third Circuit’s primary error was to read *Tinker* as prioritizing *where* student speech takes place over *the effect* the speech has on the functioning

of the school. *Tinker* makes clear that students' protections under the First Amendment "do not embrace merely the classroom hours," yet this Court was careful to note that schools are still permitted to regulate "conduct by the student, *in class or out of it*, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 512–13 (emphasis added). The *Tinker* Court's focus on the in-school effect of the speech, rather than on some rigid analysis of the speech's location, is consistent with the core concern connecting all of this Court's student-speech cases: schools must be able to carry out their pedagogical function. See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683–84 (1986) (acknowledging a school's interest in "teaching students the boundaries of socially appropriate behavior" as sufficient to justify discipline of a student who used vulgar language during a school assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (recognizing that schools can "exercis[e] editorial control over . . . school-sponsored expressive activities" based on schools' pedagogical interests in controlling the curriculum); *Morse*, 551 U.S. at 397 (upholding discipline for "[s]tudent speech celebrating illegal drug use at a school event" based on schools' special need "to safeguard those entrusted to their care").

The Third Circuit's rejection of *Tinker* in favor of a rigid, location-based standard will make it exceedingly difficult for schools to respond to threats of violence, bullying and harassment, and other student conduct that can substantially disrupt the educational environment. By failing to address the circumstances under which a school may restrict off-campus threats and harassment, the Third Circuit's standard will sow confusion in local school districts across the

country about if and how they may deal with disruptions. That confusion will only grow over time, not only as local school districts struggle with questions about how to correctly identify the precise on- or off-campus location where online speech occurs, but also as new platforms and technologies enable new forms of communication.⁵

Accepting the Third Circuit’s standard would also upend state legislation and school district policies across the country that are designed to protect students, educators, and school administrators from threats and harassment. See Pet. Br. at 40–42. These laws and policies are often the product of extensive deliberation and input from key stakeholders that reflects pedagogical needs of students and those who teach them. This Court should be reluctant to cast their legitimacy into doubt, particularly because these policies are best seen, not as a means of restricting speech, but as a means of facilitating and encouraging it. After all, threats and harassment have the (often intentional) effect of silencing their targets. So, preventing those kinds of abuses—and thereby allowing those who might be bullied into silence to instead contribute to the marketplace of ideas—would “advance the reasons why we protect speech in the first place.” Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 98 (2009).

⁵ Indeed, as the Petitioner explains in its brief, if the Third Circuit’s standard is followed to its logical conclusion, it could call into question the constitutionality of basic expectations that educators have for students, such as completing research assignments for homework or refraining from cheating by giving another student answers to a test. See Pet. Br. at 19–20, 39.

C. Proper application of the *Tinker* standard allows schools to prevent disruption without unduly burdening the free speech of students.

In rejecting the Third Circuit’s rigid, location-based standard, this Court should elaborate on how *Tinker* applies to off-campus speech, including speech that occurs online. On that score, three points bear particular emphasis to ensure both that students are able to exercise their First Amendment rights and that schools can protect the school environment.

First, in agreement with the vast majority of circuit courts, this Court should make clear that schools cannot restrict off-campus speech unless it has a sufficiently close nexus to the school environment. Such a requirement is necessary to ensure that students are not disciplined for speech having little or nothing to do with the school’s legitimate educational needs. As Petitioner concedes in its brief, it should generally be outside the school’s purview to restrict speech unless it was “not only directed . . . at school, but has sought a foreseeable, disruptive effect on campus.” Pet. Br. at 29.

Second, this Court should emphasize that any predicted disruption that might justify restriction of off-campus speech must indeed be “substantial.” Moreover, when making this determination, the nature of the speech—particularly when it is online—must be taken into account. In some instances, the amplification and permanence of online speech will mean that it creates a more substantial disruption than it would have if posted on a school bulletin board. See Franks, *supra*, 682–83. But in other instances, the inconspicuous or fleeting nature of speech on certain online platforms will diminish its

potential to create substantial disruption. See Mike Isaac, *Disappearing Tweets? Twitter Now Has a Feature for That*, N.Y. Times (Nov. 17, 2020) (identifying various social media platforms that allow “users to post ephemeral photos or text that will automatically disappear”).

Third, this Court should emphasize that *Tinker* does not permit viewpoint discrimination or restrictions of off-campus speech that addresses matters of genuine political, social, artistic, and religious importance. *Tinker* itself makes clear that public schools “may not be enclaves of totalitarianism,” and “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate” or “confined to the expression of those sentiments that are officially approved.” 393 U.S. at 511. These admonitions hold even truer for student speech that occurs online and away from school grounds. And courts must be vigilant about protecting the right of students to participate in public debates and activism on the most important issues of the day. See Mihir Zaveri, *‘I Need People to Hear My Voice’: Teens Protest Racism*, N.Y. Times (June 23, 2020); see also *Morse*, 551 U.S. at 423 (Alito, J., concurring) (explaining that schools cannot, consistent with the First Amendment, “suppress speech on political and social issues based on disagreement with the viewpoint expressed”).

D. This Court may affirm the decision below on alternate grounds or remand to the Third Circuit for a proper application of the *Tinker* standard.

To ensure that schools and educators are able to maintain a safe educational environment, it is imperative that this Court repudiate the Third Circuit’s rigid, location-based standard. Beyond that, however,

this Court has some discretion as to the ultimate disposition of the case.

The question presented by Petitioner asks only *whether*—and not *how*—*Tinker* applies to the speech at issue in this case. This Court could therefore determine that the latter issue is beyond the question presented and remand the case to the Third Circuit for further proceedings consistent with this Court’s opinion. See *West v. Gibson*, 527 U.S. 212, 223 (1999).

Alternatively, this Court generally has the authority to affirm a judgment based on any ground adequately preserved below. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989). Before the Third Circuit, Respondent’s *primary* argument was that her suspension was not justified by any legitimate need on Petitioner’s part to prevent a substantial disruption. See Brief of Appellee, *B.L. v. Mahonoy Area Sch. Dist.*, No. 19-1842, at 22–25 (3d. Cir. Aug. 21, 2019). That argument appears to have considerable force, considering both the fleeting nature of the speech and the lack of any demonstrated disruption. Accordingly, this Court may decide to conduct the *Tinker* analysis on its own and affirm the judgment below.

Amicus takes no position on which approach this Court should take, apart from clearly repudiating the Third Circuit’s dangerous and unworkable standard.

CONCLUSION

Accordingly, the judgment below should either be reversed and remanded for further proceedings, or it should be affirmed on alternate grounds.

Respectfully submitted,

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