No. 20-255

IN THE

Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
Petitioner,
v.
B.L., A MINOR, BY AND THROUGH HER FATHER, LAWRENCE LEVY, AND HER MOTHER, BETTY LOU LEVY,
Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") and The Rutherford Institute respectfully submit this *amici curiae* brief in support of Respondents.[1]

INTEREST OF *AMICI CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression guaranteed by the First Amendment for all Americans, including students. Campuses are not just a place where free expression should be protected; it is vital to their mission. And they are uniquely positioned to instill in the next generation an appreciation for free speech. This is why *"[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted and emphasis added).

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States.

SUMMARY OF ARGUMENT

This case is nominally about the jurisdiction of schools over non-school speech, focusing on the purported effect on the school's ability to maintain discipline and order. But that framing minimizes the impact of this case. In the time of social media and on-line schooling, precedent based on in-person activity that occurred either on school grounds or at a school sanctioned event, does not capture the severity of schools coopting the digital leviathan to reach into private life to judge and penalize—possibly at the behest of a complainant who invokes the authority of the school to further a private agenda.

With the advent of social media, fundamental rights are imperiled when schools seek to regulate private behavior. While this case turns on the use of Snapchat, expanding school authority over off-campus speech naturally implicates other technologies, allowing schools to observe students' homelife, including spaces in which parents or other family members have a right to privacy and autonomy. It is

not enough to argue that schools have only good intentions; pervasive surveillance imperils lawful behavior by students and the individual rights of conscientious parents who would self-censor to avoid rebuke for their children. And, as recent experience with remote schooling shows, allowing schools to see into children's homes can result in penalizing children before the facts have been established or the parents notified—good intentions notwithstanding.

It is equally important to be clear on what this case is not: it is not about threats or bullying directed at an individual or identifiable group through social media, which, if it intrudes onto campus causing "substantial disruption" would be within school authority under *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969), or within government's ambit to address threats under *Watts v. United States*, 394 U.S. 705 (1969). Indeed, the Third Circuit's ruling that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur," Pet. App. 31a, sits comfortably alongside *Tinker*'s recognition that even *within* the school environment "our Constitution does not permit officials of the State to deny their form of expression" except for "interrupted school activities," intrusion "in the school affairs or the lives of others" or "interference with work." *Tinker*, 393 U.S. at 514. The Third Circuit's disciplined approach accurately reflects the limits of state power over private speech.

ARGUMENT

I. FREE SPEECH IS JUST THE BEGINNING—STATE SURVEILLANCE IMPLICATES PRICELESS FREEDOMS.

This case stands at the intersection of rights that previously were only tangentially related to public schooling, including the right of students to speak, the right of parents to educate and raise their children, the right of students and their family members to privacy, and due process rights, which are at risk when government agents can monitor and judge private activity. *Tinker* created a carve-out to speech rights for students in recognition of "special characteristics of the school environment." 393 U.S. at 506. This limitation on student speech rights was an anomaly against the backdrop of general broad protection of speech under the First Amendment and thus should be strictly cabined. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Any limitation on student speech rights must be squared with this general principle.

In *Tinker*, while acknowledging that "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools" the Court also affirmed that students maintain First Amendment protection in school. Thus the "problem lies in the area where students in the exercise of First Amendment rights collide with the

rules of the school authorities." 393 U.S. at 507. The Court resolved that collision by recognizing that "forbidding discussion . . . anywhere on school property except as part of a prescribed classroom exercise . . . would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id*. at 513.

Accordingly, in *Tinker*, the Court referred to "classroom hours," "the cafeteria," "on the playing field," or "on the campus during the authorized hours," as time and space parameters where the student's speech was protected by the First Amendment but also subject to school authority in the limited instance of "substantial disruption of or material interference with school activities." 393 U.S. at 512–14. There was no inkling that students' private or off-campus speech were within those parameters. Within school, the First Amendment protected students' non-disruptive speech, and outside school no school authority to monitor speech was recognized at all.

In *Morse v. Frederick* the Court recognized an extension of school authority to a "school event" that took place off-campus, during school hours, and with teacher supervision, to hold that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." 551 U.S. 393, 397 (2007). This carve-out from *Tinker* inspired a majority of the Court to write separately. Seven justices described the holding in *Morse*, as "adding to the patchwork of exceptions to the *Tinker* standard" *Id.* at

4222 (Thomas, J. concurring); "standing at the far reaches of what the First Amendment permits", *Id*. at 425 (Alito, J. concurring); "rais[ing] a host of serious concerns," *Id*. at 426 (Breyer, J. dissenting); and "inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs." *Id*. at 446 (Stephens, J. dissenting). Notwithstanding the controversial holding, *Morse* did preserve the boundary on school jurisdiction to situations in which students had been "entrusted to [the school's] care." In both cases, the student was peripherally subject to the school's supervision and in the presence of the observer; thus, any potential overreach was limited to the physical event the school agent could see.

The Court's limitation of *Morse* applies with equal force today. Technology does not change that.

A. The Rights of Parents to Educate Their Children Are Imperiled When Schools Seek to Extend Their Authority Beyond Campus.

Here, the school district seeks to monitor and discipline children outside the boundaries of the school. This attempted overreach sets up a conflict between the limited authority of the school and the near-plenary rights of parents.

Concurring in *Morse v. Frederick*, Justices Thomas and Alito presented competing models of school authority: the *in loco parentis* model, and the state-agent model. Each model is limited in scope, providing an outside boundary to school authority. Coupled with longstanding recognition of parents' rights over rearing and educating their children, both caution against expansive interpretation of school authority to

monitor and censor student speech except in the narrow circumstances set forth in *Tinker*. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 534–35 (1925) (recognizing the right of parents to raise and educate their children).

Under the *in loco parentis* model, authority of schools over students derives from the concept that while children are in the school's care, the school acts "in place of the parent." This legal doctrine, which originally governed the legal rights and obligations of tutors and private schools, has been applied to public schools. *Morse*, 551 U.S. at 413 (Thomas, J. concurring) (citing 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) ("[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed")). Under this model, the authority of a school to act *in loco parentis* is coterminous with the authority delegated by the parent.

The state-agent model, conversely, advises tighter boundaries arising from the threat posed by state power. As Justice Alito cautioned: "It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as

agents of the State." *Morse*, 551 U.S. at 413 (Alito, J. concurring). This is so, in part, because "[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school." *Id*.[2]

Under either model, school authority does not extend into the child's private life to displace the authority of the parent well outside the schoolhouse gate.

This interpretation is consistent with the Court's longstanding recognition that the Fourteenth Amendment protects "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," which include the rearing and education of children. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Thus, while recognizing state power to compel school attendance and to make reasonable regulations for schools, the Court has acknowledged "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer*, 262 U.S. at 402–03. And interfering with "the power of parents to control the education of their own" children violates the Fourteenth Amendment. *Id*. at 399–401.

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[2] *See also State Compulsory Education Laws*, FindLaw, June 20, 2016 ("All states have compulsory education laws and allow exemptions for private schools and homeschooling, although the regulation of non-public schooling varies from state to state. . . . Parents who fail to comply with state compulsory education laws may be charged with a misdemeanor, punishable upon conviction by a fine or—for particularly serious violations—up to 30 days in jail." http://bit.ly/3cc0y2b.

The Court has rarely found a state interest to transcend the interest of the parent in the child's upbringing. *Prince v. Massachusetts*, 321 U.S. 158, 161 (1944) (upholding child labor law that prohibited girls under age eighteen from selling magazines in a street or public place.). But in *Prince*, the Court was careful to annunciate the cardinal rule that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" and to affirm that the ruling should not extend beyond its facts. *Id*. at 166, 171.

Accordingly, even where a school may have a valid interest in protecting its ability to deliver education, the Court has consistently found school interests must yield to parental rights in all but the most compelling circumstances. Here, no such compelling circumstance has been identified much less proven.

B. Electronic Monitoring by the State Implicates Other Priceless Freedoms.

Freedom of speech is not a standalone issue. Because speech is intimately connected to other rights, when speech is chilled, other constitutional rights are implicated. When a school punishes off-campus student speech, due process rights are also affected—particularly when school involvement does not arise out of a spontaneous need to keep order but springs from some other motivation, such as dislike of a student's viewpoint or request from a third party that the school use its authority to silence the student.

For example, when a Kansas high school student tweeted disparaging remarks about the state governor, she was reprimanded at school and ordered

to apologize.[3] In another instance a New Jersey teen was called into the assistant principal's office regarding statements that she had made on Twitter.[4] And an Ohio student was suspended from the school soccer team for retweeting a post during summer vacation from his home computer.[5] All were instances that at least arguably involved political speech, which would ordinarily carry the most stringent First Amendment protection. In each case, the school's involvement was prompted by a complainant who invoked the power of the school against the student, and not by the school's own impetus to keep order.

Students accused of speech "violations" have been subject to: a demand to write out a statement without a lawyer present;[6] being pulled out of class by a police officer, search of the student's phone, multi-day suspension from school, and in-school isolation;[7]

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[3] Erik Kain, *Kansas Teen Emma Sullivan Shouldn't Apologize to Governor Brownback*, Forbes, Nov. 27, 2011, http://bit.ly/3lKSQPu.

[4] Yanan Wang, *A N.J. teen who tweeted 'Israel is a terrorist force' was called to the principal's office for 'bullying'*, The Washington Post, Jan. 8, 2016, http://wapo.st/3tOLYnb.

[5] Linda Martz, *Senior athlete suspended for weed-related retweet sues district*, Mansfield News Journal, Apr. 10, 2014, http://bit.ly/3tLNOoS.

[6] Yanan Wang, *A N.J. teen who tweeted 'Israel is a terrorist force' was called to the principal's office for 'bullying'*, The Washington Post, Jan. 8, 2016, http://wapo.st/3tOLYnb.

[7] Dan Griffin, *Monroe student suspended after social media post; father says school went too far*, wlwt.com, Jan. 4, 2017, http://bit.ly/3lHzOK5.

suspension from the school soccer team;[8] suspension and demand that a twelve-year-old student provide her email and Facebook log-in information;[9] and an offer to provide a meeting with the school board on the *last day* of the suspension, when the issue of punishment was essentially moot.[10]

Recent experience with remote schooling, which allows schools unprecedented access into students' homes, demonstrates the ease with which schools may tread upon enumerated rights. As nature abhors a vacuum, so too will any aperture into students' private lives be breached unless the limits of school authority are robustly defended. The numerous examples of school personnel calling law enforcement or punishing students for lawful activity based on a teacher's view into the child's home during video class demonstrate the ease with which such access can translate into trampling due process—with severe repercussions for a child who broke no law.[11]

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[8] Linda Martz, *Senior athlete suspended for weed-related retweet sues district*, Mansfield News Journal, Apr. 10, 2014, http://bit.ly/3tLNOoS.

[9] Lydia Coutre, *Minnesota school that demanded student's Facebook password settles First Amendment lawsuit*, Student Press Law Center, Mar. 28, 2014, http://bit.ly/2NJ4U7q.

[10] Linda Martz, *Senior athlete suspended for weed-related retweet sues district*, Mansfield News Journal, Apr. 10, 2014, http://bit.ly/3tLNOoS.

[11] Kristie Cattafi, *Edgewater police called after student had Nerf gun during Zoom class*, northjersey.com, Sep. 11, 2020, http://njersy.co/3rhpE3X; Robby Soave, *Louisiana School Threatens 9-Year-Old Boy with Expulsion for Having BB Gun During Virtual Class*, Reason.com, Sep. 25, 2020,

For example, a teacher's view of one 12-year-old's home-based Nerf Zombie Hunter subjected him to a five-day suspension plus a visit from the sheriff, without notice to his parents, in which he was told that his behavior could have led to criminal charges, terrifying the child and his parents.[12] Without limits on school authority over off-campus activity, good intentions can easily translate into targeting previously private behavior without any meaningful chance to protect fundamental rights before punishment is imposed. In cases where there may be a difference in opinion regarding acceptable behavior outside of school hours or in the home, the power of the state to impose punishment without due process can overwhelm the power of parents to protect their children from the school's judgment. Even for parents who prevail, if suspension or expulsion has been imposed, the damage to the child is done before any process is had.

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http://bit.ly/31bVDIo; Robby Soave, *School Board Won't Reverse Fourth-Grader's Suspension for BB Gun Incident During Virtual School*, Reason.com, Dec. 7, 2020, http://bit.ly/3cXwKpb; Robby Soave, *School Calls Cops on 12-Year-Old Boy Who Held Toy Gun During Zoom Class*, Reason.com, Sep. 7, 2020, http://bit.ly/3sjVA9k; Chris Papst, *"I Felt Violated"|Police Search Baltimore County House Over BB Gun in Virtual Class*, foxbaltimore.com, Jun. 10, 2020, https://bit.ly/3tT42N7.

[12] Rob Low, *Nerf Gun Suspension: 12-year-old suspended over toy gun seen in virtual class*, kdvr.com, Sep. 3, 2020, http://bit.ly/2NNyZ5W.

C. Family Members' Rights Are Chilled When the Child Is Subject to Surveillance.

The implications of schools scrutinizing students in their homes or private lives is broader than even the stories above would indicate. It is not, after all, the *child's* house that is visible on a video call. It is the parent's house. And if school personnel take issue with material in the background of the call, whether books on the shelves, religious artifacts on the wall, conversations overheard, political literature, or the identities of people gathered in the kitchen, it is the adults who are inspected by an agent of the state, and it is the fundamental freedoms of any adult whose protected choices are exposed that are in peril. To the extent that a parent may support a particular political candidate, believe (or not believe) in Marxism, plan to open a new *Chick-fil-a* location, or practice a disfavored religion, the evidence of those activities should not risk triggering official opprobrium against the child. Conscientious parents who appreciate the risk could not help but be chilled in their practice—even in their homes—against imperiling their child.

There is a fine line between an unlawful search and acquiescence to surveillance when education is compulsory and electronic devices can be moved from room to room without parent participation. The only way for parents to preclude unwanted scrutiny would be to withdraw children from public school and place them in an alternative form of education. For many parents that alternative is not feasible, leaving them with a Hobson's choice, either sacrifice their own constitutional protections or violate compulsory education laws.

The *ability* of schools to surveil children does not create the constitutional authority for them to do so. The authority to act as policeman-at-large over students in the entirety of their lives has simply not been granted to schools even if technology allows schools to replicate in-school observation to reach off-campus activity. As here, the First Amendment is particularly vulnerable to infringement by zealous school authorities and thus commands that school authority be clearly limited.

II. *TINKER* IS BROAD ENOUGH TO ADDRESS ONGOING, NON-SPECULATIVE SCHOOL DISRUPTION.

Tinker rightfully focused on demonstrated disruption and eschewed limitations on speech arising from fear or speculation. As such, it is broad enough to encompass speech that manifests in disruption at school. Coupled with the government's existing authority to respond to threats, there are already tools in the legal toolbox to respond to threats or harassment that reach the school's shores without unleashing new authority to punish speech based on apprehension of what might happen.

A. *Tinker* Addresses Real, not Speculative, Disruption.

When it comes to the First Amendment, tense matters. Speech that is causing or has caused injury is subject to greater scrutiny than future speech for which any harm is speculative. For example, "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and *present danger* of action of a kind the State is empowered to prevent and punish." *W. Virginia State Bd. of Educ. v. Barnette*,

319 U.S. 624, 633 (1943) (emphasis added). On the other hand, "[a]ny system of *prior restraints* of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (emphasis added). *Tinker* is consistent with this approach, focusing on present-tense harm, and protecting student speech rights unless the "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially *disrupts* classwork or *involves* substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added).

This is not a conditional standard and does not depend on speculation. Indeed, in *Tinker*, the Court cautioned against regulating based on "apprehension of disturbance," instead, limiting the school's authority over student speech to known disruption of school operations. *Id*. at 508. *Burnside v. Byars*, on which *Tinker* relied, likewise is stated in the present tense. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (school officials "cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and school rooms *do not* materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.") (emphasis added).

Here, the Third Circuit correctly adopted this approach and refused to engage speculative risks, relying on the district court's "finding that B.L.'s snap *had not caused* any actual or foreseeable substantial disruption of the school environment," and thus "her

snap was also not subject to discipline under *Tinker*". Pet. App. 7a (emphasis added). No actual disruption of school operations was identified in this case. *Id*.

The difference between "happened," "would have happened," and "would happen" is a critical distinction. The conflation of conditional tenses with the present or past tense, develops in part from the natural imprecision of speech and the attempt to generalize precedent to current cases. So too regarding the *Tinker* Court's use of the word "would." Where *Tinker* used "would" relative to interference with school operations, it was to show what *was not proven*: "Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Tinker*, 393 U.S. at 509.[13] There is nothing in the holding of *Tinker* that allows speculation as to whether speech would cause [future conditional] disruption to justify school entanglement. And thus, Petitioner's assertion that *Tinker* would be satisfied where "school officials reasonably conclude [speech] would 'materially and substantially disrupt the work and discipline of the school,'" Pet. Brief at 17, is a

[13] *Accord Tinker*, 393 U.S. at 513 (demonstrating how a hypothetical regulation would fail: "If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.").

misreading of *Tinker's* emphasis on existing disruption and its rejection of regulation based on "apprehension of disturbance." 393 U.S. at 508.

Amici in support of Petitioner similarly conflate disruption that either already happened or currently is happening, with conjecture regarding disruption that might happen—arguing that cited examples showing past or present disruption of schoolwork or invasion of the rights of other students are indistinguishable from speculative harm that might possibly arise from statements made outside of school but for which no such harm has been established.[14] *Amici* similarly conflate school authority to respond to existing disturbance or invasion of rights with their desired authority to prospectively regulate student speech regardless of time, place, or effect. While it is understandable that conscientious school officials would prefer to avoid trouble before it begins, when it comes to the First Amendment, the difference between actual harm and prognostication matters.

Caselaw applying this terminology is not wholly consistent and examples of expansive use of conditional phrasing become more common the greater the degrees of separation from *Tinker*, but the consistent theme is to cabin authority to immediate circumstances—not to expand authority to some indeterminate future potentially involving intervening activity by others.

This reading is consistent with the Third Circuit's understanding that "*Tinker's* focus on disruption

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[14] Thus the "might reasonably lead school authorities to forecast" and "reasonably foreseeable that the speech will reach the school community" models should be rejected as requiring speculation.

makes sense when a student stands in the school context, amid the 'captive audience' of his peers. . . . But it makes little sense where the student stands outside that context, given that any effect on the school environment will depend on others' choices and reactions." Pet. App. 32a (citation omitted). Thus, *Tinker* and the Third Circuit identified a second critical point: any limitation on student speech applies only to students who cause the disruption in school by their own speech—not to students who speak off-campus whose words may be carried onto campus by another student who then acts out. Pet. App. 34a. ("Tinker applies, as it always has, to any student who, on campus, shares or reacts to controversial off-campus speech in a disruptive manner.").

Accordingly, the Third Circuit correctly held that:

> The answer is straightforward: The school can punish any disruptive speech or expressive conduct within the school context that meets *Tinker's* standards—no matter how that disruption was "provoke[d]."

Id.

This focus on past or present disruption taking place on-campus, where the provocateur acts within the ambit of school authority, is consistent with *Tinker*, the First Amendment, and common sense.

B. School Authority to Address Harassment and Threats Exists Without Removing the Limiting Principle from *Tinker*.

Because *Tinker* recognizes students' First Amendment rights in school and only narrow circumstances in which the school may limit those

rights, the question then becomes whether those narrow circumstances are broad enough to encompass threats and harassment that disrupt school. The answer is yes—if the disruption is manifest and not mere apprehension of what might occur.

First, as shown above, *Tinker* precludes school intervention where "[t]here is . . . no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Tinker* 393 U.S at 508. Accordingly, where evidence of "actual or nascent" interference with the school's work or "collision with the rights other students to be secure and to be let alone" has already begun to manifest in the school, then *Tinker* does not preclude school action.

Moreover, whether in the school context or outside of it, government may address "true threats." *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) ("[a] state may punish words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"). The Third Circuit recognized as much: "After all, student speech falling into one of the well-recognized exceptions to the First Amendment is not protected," Pet. App. 35a (citing *Doe v. Pulaski Cty. Special Sch. Dist.*, 306 F.3d 616, 619, 621–27 (8th Cir. 2002) (*en banc*) (upholding a school's punishment of a student who wrote a threatening letter under the "true threat" doctrine of *Watts*, 394 U.S. at 708)).

Because this case did not present off-campus speech threatening violence or harassing students or teachers, the Third Circuit properly held "that off-campus speech not implicating that class of interests

lies beyond the school's regulatory authority." Pet. App. 35a. Accordingly, this case would not present a proper vehicle for sacrificing First Amendment freedoms to cure apprehensions of wrongdoing. There are tools in the legal toolbox to address threats to students or teachers as well as non-speculative disruption to school operations or other students in-school without expanding *Tinker* to accommodate a school-based surveillance state.

III. PUBLIC SCHOOLS SHOULD UPHOLD FREE SPEECH, NOT CHILL IT.

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

—*Judge Learned Hand*[15]

This Court has consistently recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Regarding boards of education, the Court has said that they have "important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Tinker*, 393 U.S. at 507 (citing *Barnette,* 319 U.S. at 637). These stouthearted statements

[15] Judge Learned Hand, *The Spirit of Liberty*, 1944, available at Digital History, http://bit.ly/3raLZQN.

depart from school efforts, whether in the name of safety or other well-intentioned goals, to teach children that constitutional freedoms may be edited when technology changes.

School surveillance, inconsistent with the First Amendment, educates students in misunderstanding of the American system that is anathema to the rights secured by the Constitution; and permitting schools to scrutinize private out-of-school communication educates the next generation that this is the kind of relationship citizens should expect with their government.[16] Because electronic communication allows broader observation and the ability to capture ephemeral communications for later use, it is particularly important that schools bear in mind their duty to educate children in the protection of constitutional rights—wherever they are exercised. Consistent with *Barnette*, schools should teach students to carry with them the understanding that government must respect constitutional freedoms regardless of expanded power to circumvent them.

A consistent theme among the incidents described above, § I. B. *supra*, is that intervention by school authorities did not arise spontaneously in response to disruption of school, but rather was invoked by other people who called upon the schools to enforce their perspectives. So too here. Pet. App. 52a. This raises two troubling possibilities. First, that this case may present the risk of inadvertently departing from

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[16] The inclination toward a converse-Lotus principle, where everything that is not allowed is forbidden, is contrary to the American and English traditions and should be avoided. *See generally Everything which is not forbidden is allowed*, Wikipedia, http://bit.ly/2TgF5vB (last visited Mar. 23, 2021).

Tinker by transferring the focus of school scrutiny away from the student who introduced conflict into the school, and onto a student whose speech was wholly outside school; and second by fostering a system where the well-connected can wield levers of influence. *Tinker* did not address either of those scenarios, but was limited to an in-school speaker, focusing on whether any disruption was caused by that individual. 393 U.S. at 513. The Court should resist any extension of school authority that could flip the focus of *Tinker* away from the in-school speaker and place the spotlight instead on off-campus speech.

CONCLUSION

The Court should affirm the Third Circuit.

Respectfully submitted,

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