20–1950

United States Court of Appeals
For the First Circuit

JOHN DOE, by his Mother and Next Friend, JANE DOE; B.B., by his Mother and Next Friend, JANE BLOGGS,

v.

HOPKINTON PUBLIC SCHOOLS,

Defendant – Appellee

CAROL CAVANAUGH, in her individual capacity and official capacity as Superintendent of the Hopkinton Public Schools; EVAN BISHOP, in his individual capacity and official capacity as Principal of Hopkinton High School

Defendants

On Appeal from the United States District Court
For the District of Massachuset, New Hampshire, and Rhode Island

Committees In Support of Defendant -Appellee and Affirmance

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INTEREST OF *AMICI CURIAE*

Amicus curiae the National School Boards Association ("NSBA") was founded in 1940 and is a non-profit organization representing state associations of local school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members governing nearly 14,000 local school districts serving approximately 51 million public school students. NSBA regularly represents its members' interests before Congress, federal courts, and state courts, and has participated as *amicus curiae* in numerous cases involving issues under the First Amendment's Free Speech Clause.

The Massachusetts Association of School Committees, Inc., ("MASC") is a Massachusetts c

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ence by online and social media activities
resented has substantial implications for

MASC's members who are charged with providing a full, effective public education and a safe learning environment to their residents.

The New Hampshire School Boards Association ("NHSBA") is a voluntary, non-profit association whose membership is comprised of approximately 160 of the 176 locally elected New Hampshire school boards. NHSBA represents the interests of local school boards by providing a variety of services designed to help school boards effectively perform their duties and obligations. As elected bodies entrusted by their respective towns and cities to direct and oversee the public schools, the school boards of New Hampshire are uniquely positioned to explain to the Court the importance of this case. NHSBA's interest is to ensure that the Court is aware of the significant impact its ruling will have on New Hampshire's 176 local school boards and the numerous decisions those local school boards are obligated to make.

The Rhode Island Association of School Committees ("RIASC") is a non-profit organization dedicated to developing the effectiveness of Rhode Island School Committee members in meeting their role and responsibilities in promoting student achievement in safe and challenging learning environments, while playing a leading role in shaping and advocating public education policy at the local, state, and national levels. RIASC, on behalf of its school committee members, is uniquely positioned to explain to this Court how its decision will affect public education in Rhode Island.

The Maine School Boards Association ("MSBA") is recognized as a non-profit educational advisory organization under Me. Rev. St. tit. 30-A § 5724(9). The members of MSBA are 221 of the 229, or 97%, of local district school boards representing the municipal and regional school administrative units in the State of Maine. The mission of MSBA is to enhance the education of all students in Maine's public schools by identifying the needs of local school boards through board development, information and support services, and by advocating for all Maine public schools at the state and national levels. MSBA offers its insights to the court to ensure it understands the impact its decision will have on school board policy in Maine.

FRAP 29(a)(2) STATEMENT

All parties have consented to the filing of this *amicus* brief.

FRAP 29 (a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents a question that is of vital importance to NSBA and to its member state school board associations: whether public school officials acting to teach the art of civil discourse and to prevent the dire impacts of cyberbullying on students can protect the opportunity for an education and a safe learning environment promised to residents by their local school boards.

Amici urge this court to ensure – as the District Court has done – that school officials are able to intervene when a student is targeted for harassment so that they may protect not only that student's safety and emotional well-being but also the school's learning environment. No longer is there any reasonable doubt that online bullying via social media that personally targets individual students, and that goes unchecked, has pervasive and often life-changing consequences for its victims as well as for the others involved, and even for those who merely witness it. These impacts include academic failure in, and withdrawal from, school; emotional and physical harm, frequently severe; substance abuse; and suicide ideation that on occasion leads to actual suicide.[1] In fact, it was a bullied student's suicide in 2010

[1] Researchers including the Centers for Disease Control and Prevention have linked bullying and suicide in school-age children. CDC National Center for Injury Prevention and Control, Division of Violence Prevention, The Relationship Between Bullying and Suicide: What We Know and What It Means for Schools, https://tinyurl.com/26r88up6; StopBullying.gov,

The student conduct at issue in this case clearly invoked the Massachusetts law and led to unacceptable consequences for the victim. A group cyberbullying effort targeting one student can be, and indeed was, terribly harmful to that student. It is just the sort of power imbalance anti-bullying statutes are intended to prevent. *Tinker's* "second prong," recognizing the damage words can do when used as weapons, rejects any notion that the First Amendment is a vehicle for converting school into the equivalent of a survivalist boot camp. Here, the defendant school district's response was in full compliance with *Tinker*'s "second prong" standard (*i.e.* protecting student "physical and psychological" wellbeing)[2], with this court's recent decision limning that standard, *Norris v. Cape Elizabeth School District*, 969 F.3d 12 (1st Cir. 2020), and with its responsibilities under the state anti-bullying law. In addition to these legal standards, the school district here fully complied with its educational duty to teach and uphold standards of civil discourse and to maintain a safe and supportive learning environment. Public school officials performing these essential tasks, in a fraught legal land p2.9 (g)3.2 i-4.5 (e)40.001 Tc 09 -2.30c(it)-4.3 (h)-1.1 (

Amici therefore urge this court to affirm the District Court's judgment and to hold that, in fealty to *Tinker*, school officials have authority to discipline students for cyberbullying when it affects the rights of a student or school operations.

ARGUMENT

I. PUBLIC SCHOOL OFFICIALS MAY ADDRESS CYBERBULLYING UNDER *TINKER*'S "RIGHTS OF OTHERS" PRONG AND DEFENDANTS PROPERLY DID SO HERE.

Plaintiff-appellants John Doe ("Doe") and Ben Bloggs ("Bloggs") (collectively "plaintiffs") have appealed the District Court's judgment holding that they were lawfully disciplined under the Massachusetts Anti-Bullying Law, Mass. Gen. Laws ch. 71, § 370 (2021), when they participated with their fellow high school students in demeaning a peer, Robert Roe ("Roe"), on Snapchat, a social media platform. While the activities of Doe and Bloggs were limited to derogatory posts, other members of their group engaged in additional bullying conduct during school activities. Plaintiffs claim that the discipline violated their First Amendment speech rurB gad[-1.3 (e)-1.4 (c)Tc 0 -2.e vsMdd

More than half a century on, the familiar tenets of the 1969 ruling in *Tinker* are entrenched: students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District.* 393 U.S. 503, 506 (1969) *and* student speech therefore is insulated from restriction absent material and substantial disruption of the school. *Id*. at 511. *Tinker* involved classic viewpoint speech regarding the ongoing national debate about the war in Vietnam, in the form of a silent, armband-wearing protest by students. This was, as the Court saw things, "'[t]he classroom [as] peculiarly the 'marketplace of ideas.'" *Id*. at 512 [citation omitted]. The *Tinker* Court was prescient, however.

While deciding the case before it, in which the student speech was silent and victimless, the Court anticipated that there would be others in which student speech might be a harder fit with traditional First Amendment values and might inflict harm on individual students without significantly "disrupting" the school's operations. *Tinker* therefore made repeated reference to two independent standards for triggering permissible discipline of student speech – speech that would "materially and substantially disrupt the work and discipline of the school" (the "first prong"), *id.* at 513, and speech that "impinge[s] upon the rights of other students" (the "second prong"), *id*. at 509. That these are separate grounds for regulating student speech is compelled by the clear language in *Tinker*.

No fewer than six times did the Court's opinion expressly identify these two results as independent triggers for lawful discipline under the First Amendment. *See Tinker, supra*, 393 US at 508, separating "interference … with the schools' work" from "collision with the rights of others," and differentiating speech which intrudes on "the work of the schools" from that which intrudes on "the rights of other students;" at 509, distinguishing interference with "the work of the schools" from "impinge[ment] upon the rights of other students;

When *Tinker* was decided, cell phones, the internet, social media, and even the concept of bullying as a recognized problem for schools all lay decades in the future. But the consequences when others use modern technologies to target and harm individual students are especially well-suited to *Tinker*'s second prong. The professional literature shows why.

Numerous studies have established that cyberbullying victims are "more likely to lose trust in others, experience increased social anxiety, and decreased

time and space, preserves words and images in a more permanent state, and lacks supervision." Nixon, *supra*, at 143. And cyberbullying has become more common. A 2019 study found that one in three students experiences cyberbullying in middle or high school, almost double the rate found in 2007. Justin W. Patchin, *Summary of Our Cyberbullying Research* (2007-2019), Cyberbullying Research Center, https://tinyurl.com/4z9fbmcf, (last visited May 12, 2021).

When the cyberbullying is perpetrated by a group against an individual, common sense tells us that these grievous impacts are only exacerbated. Common sense also tells us that these impacts invariably and necessarily "impinge on the rights" of the victimized student, well within the meaning of *Tinker*'s second prong.[7]

at school."[3] *See Tinker, supra*, 393 US at 509, 513 (allowing schools to regulate speech that "impinge[s] upon the rights of other students" and that constitutes an

In fact, e

B. This Court Has Held That *Tinker*'s "Rights of Others" Prong Applies to Speech That Constitutes Bullying.

There is no doubt that *Tinker*'s second prong covers bullying (and therefore "cyberbullying") in this circuit. In *Norris v. Cape Elizabeth School District*, 969 F.3d 12, 29 (1st Cir. 2020), this court squarely held that "bullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*."[4] The *Norris* court therefore concluded that "schools may restrict such speech *even if it does not necessarily cause substantial disruption to the school community more broadly*." *Id.* [emphasis added]. Nothing about the compelling reasoning in *Norris* conflicts with *Tinker*. The ineluctable conclusion is that the Massachusetts Anti-Bullying Law passes constitutional muster under *Tinker*. The only remaining question is whether the District Court's ruling here – that this case involves speech that is outside *Tinker*'s protection – satisfies *Tinker*'s second prong and *Norris*. The answer clearly must be "yes."

While the court found the facts in *Norris* to be insufficient to find that the plaintiff student had engaged in bullying unprotected by *Tinker*, the facts here lie at the opposite pole and present circumstances that occur all too frequently in the digital

[4] In support, *Norris* cited *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 572 (4th Cir. 2011) and *C.R. v. Eugene School District* 4J, 835 F.3d 1142, 1152-53 (9th Cir. 2016).

age. The *Norris* plaintiff, acting alone, had anonymously posted a sticky note in the female bathroom stating "[t]here's a rapist in our school and you know who it is." The note stayed there for mere minutes and was seen by only two other students. It did not name the alleged target and was ambiguous in several other respects. The plaintiff was a sexual assault advocate and confidant of assault victims, and school officials conceded that the note at least partly targeted them for alleged mishandling of past assault claims. Previously, a video accusing the alleged target had circula9 (ge)3.tgepudfo

were widely suspected of past assaults. *Id.* at 14-15, 31-33. For all these reasons, the

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These are exactly the sorts of harms that school officials must minimize or prevent daily as part of their mission to maintain safe learning environments in compliance with their state's law. The school officials in this case acted well within their lawful "discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment." *Norris*, *supra*, 969 F.3d at 29 n.18. There can be no question that the school's "decision regarding [plaintiffs'] speech" must be given deference, because its "judgment [was] reasonable." *Id*. at 30. Under *Norris*, nothing more is needed to affirm.

C. The Massachusetts Student Speech Statute Incorporates *Tinker*'s Second Prong. The Discipline Imposed for Plaintiffs' Cyberbullying Therefore Was Equally Proper Under State Law.

Tinker's second prong also disposes of the claim by Doe and Bloggs that their discipline violated the Massachusetts student speech statute, Mass. Gen. Laws. ch. 71, § 82 (2021). The District Court ruled that because § 82 simply "codified the *Tinker* standard," the "invasion of [Roe's] rights clears the threshold required under Massachusetts law." *Doe v. Hopkinton Public Schools*, 490 F.Supp.3d 448, 470 (D. Mass. 2020). The court got it right.

In *Pyle v. School Committee of South Hadley*, 423 Mass. 283, 667 N.E.2d 869 (1996), the Supreme Judicial Court ("SJC") answered a question certified to it by this court (*see Pyle v. South Hadley School Committee*, 55 F.3d 20 (1st Cir. 1995)). That question asked whether § 82 protects speech by high school students that "may

reasonably be considered vulgar, but causes no disruption or disorder?" *Id*. at 22. The SJC answered the question "yes." *Pyle*, *supra*, 423 Mass. at 287, 667 N.E.2d 869. It rejected an argument that § 82 incorporated the decision in *Bethel School*

Bloggs took part in the activities of the Snapchat group which denigrated Roe and his family. They did not merely "belong" to the group or even simply post "like" emojis. The relative degree of their contributions does not insulate their speech from discipline. That, instead, is a fit subject for school officials to consider in exercising their considerable discretion regarding the penalties that should be imposed. Doe and Bloggs were disciplined for thei(b)-1.1 (M)1 (i)1.1 (ne)4 (d1.8001 Twe)-(o)4.2 c02 t3.9 (rt

Amici urge this Court to rule that *Norris*'s deference to school officials has meaning and cannot be circumvented by some contrived formula that purports to calibrate a participant's level of involvement.

CONCLUSION

It is vital that the local boards represented by *amici*, acting through their school administrators, are able to furnish a safe, effective education to their residents without unnecessary and destructive impediments. Bullying conduct directly interferes with that fundamental objective because it harms the victim, the perpetrators, and even those who do no more than witness it. *See* Salmivalli, *supra* at 113 – "peers merely witnessing the attacks can be negatively influenced." It is essential that these boards have the tools to vital5-0.002 Tc 0. (in)-1.1 (g)-1ir(eer)-3 (o)3.2 (ls

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT

CERTIFICATE OF SERVICE FORM
FOR ELECTRONIC FILINGS

I hereby certify that on May 27, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the document will be sent electronically to all registered participants identified in the Notice of Electronic Filing.

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