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 SCHOOL BOARDS ASSOCIATION, AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, THE NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that represent the front lines of public school administration:

The National School Boards Association (NSBA) is a non-profit organization founded in 1940 that represents state associations of school boards and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in public education through school board leadership. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA strives to promote public education, ensure equal educational access for all children, and further its members' interests in effective school board governance.

The School Superintendents Association (AASA) represents more than 13,000 school system leaders across the country. AASA advocates for the highest quality public education for all students. Our Nation's superintendents believe that school officials must continue to have authority to address student behavior that disrupts the learning environment.

The National Association of Elementary School Principals (NAESP) is a leading advocate for elementary and middle-level principals in the United States. NAESP believes that it is critical for

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

school leaders to be able to appropriately respond to student actions that interfere with learning and school operations.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the Nation's public schools have followed this Court's seminal opinion in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in determining when they may address student expression that seriously disrupts core school functions. *Tinker* recognizes that students retain important free speech rights when they enter the "schoolhouse gate," but permits school administrators to respond when that speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513. In the decades since, every circuit and state high court to decide the question has rejected the argument that the *Tinker* standard is strictly limited to on-campus speech. This shared recognition not only underlies school board policies across the nation, but also has provided the foundation for numerous state education laws, including against bullying.

The Third Circuit erred in upsetting this stable consensus in favor of its "own path," rendering *Tinker* categorically inapplicable to student expression that originates "off-campus." Pet. App. 31a. The Third Circuit's inflexible new rule is doctrinally unsound and guaranteed to imperil critical aspects of school administration. In the social media age, the geographic location where speech originates is increasingly meaningless. An Instagram post aimed at another student, teacher, or administrator will have the same disruptive impact on the school environment regardless of where it is sent. What matters is the content of the post (and whether it bears on school activities), its audience, and its impact

on the school—not whether the post was made while the student was physically on school grounds or off. The moment a student clicks "share" on her iPhone, the impact is the same.

Nor is this illogical rule necessary to prevent against overreach, as the Third Circuit reasoned. *Tinker* prevents schools from prophylactically regulating speech simply on the basis of its controversial content. *Tinker* also instructs that its "substantial disruption" standard will be especially difficult to meet when the student's speech concerns subjects that have no direct connection to the school, such as political speech. Accordingly, courts have long found the *Tinker* standard perfectly workable in the off-campus context. There will always be close calls. But the way to address overreach is to faithfully apply *Tinker*'s existing standard—not to adopt an arbitrary categorical limit on *Tinker*'s scope.

The Third Circuit's categorical rule would be disastrous for both schools and students. School administrators must be able to discipline off-campus speech that threatens harm to the school environment—including speech that bullies or harasses students or staff or concerns potential on-campus violence. Taking action in these areas is a core part of schools' most essential obligation: to provide a safe environment for students conducive to learning and development. In fact, the majority of States have statutory mandates *requiring* schools to address off-campus bullying. The Third Circuit's decision eliminates schools' ability to rely on the *Tinker* standard in addressing these grave threats—leaving dangerous uncertainty in its wake. It is critical for the Court to make clear that schools retain this authority under *Tinker*. And the best way to do

so is to adhere to the time-honored *Tinker* standard. That approach is far more desirable than creating a set of ad hoc exceptions that depend on the *type* of speech at issue (bullying or otherwise), rather than whether that speech is materially disruptive.

While the circumstances are less dire, there is also no basis for preventing schools from addressing off-campus speech that materially disrupts core school programs. This includes not just academics in the classroom but also extracurricular activities. Sports, student clubs, and other extracurriculars are just as integral to education as classroom lessons. Schools need the authority to address student speech—whether it originates on campus or not—that substantially disrupts these activities. Comments that used to remain in the locker room now can be blasted to students across an entire school.

Tinker's balancing act has stood the test of time. Its "substantial disruption" lodestar is a principled and administrable test that preserves extensive First Amendment freedoms for students, on campus or off. This Court should reject the Third Circuit's categorical, on-campus/off-campus rule.

ARGUMENT

I. *TINKER* GRANTS SCHOOLS NEEDED LEEWAY TO ADDRESS DISRUPTIVE STUDENT CONDUCT

America's public schools have a "difficult" but "vitally important" job. *Morse v. Frederick*, 551 U.S. 393, 409 (2007). Teachers, staff, and administrators are entrusted with the momentous task of educating our youth so that they may earn a living, contribute to their communities, and otherwise be prepared to face the challenges of adult life. Of course, that

mandate encompasses instruction beyond algebra and Shakespeare. Education is the "very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

To achieve these critical objectives, schools must create an environment that not only enables academic success, but also fosters collaboration and social development. *See Board of Education of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring) (observing that the "public expects its schools not simply to teach," but also to maintain "a school environment that is safe and encourages learning"). And school officials must preserve that environment not only within the classroom's four walls, but also in the hallways, cafeteria, rehearsal hall, and playing fields. Experiences gained competing on a soccer field, at a robotics competition, or singing in the school choir can be just as formative to a student's educational growth and preparation to enter society.

Second, the analysis in *Tinker* set important guideposts for what kind of speech is appropriately considered "disruptive to the school environment" and what is not. The Court made it clear that the school could not punish the Tinker children's political statement just because it was provocative—even though the armbands "caused discussion outside of the classroom" and the school reasonably feared a "disturbance." *Id*. at 508, 514. When it came to such core political speech, the Court instructed, "undifferentiated fear or apprehension of disturbance is not enough," because "[a]ny variation from the majority's opinion may insp

including policies governing off-campus speech.[2] As discussed below, the *Tinker* standard is also baked into state anti-bullying laws. *See infra* at 24-25.

This standard enables schools to take action necessary to protect the core pedagogical function. They can address student insubordination. They can safeguard other students from harassment and bullying. And they can instill important values of teamwork, sportsmanship, and mutual respect in extracurricular activities, by retaining the ability to reinforce those lessons with context-appropriate discipline. Indeed, for some, the lessons learned on a gridiron, in a soup kitchen while meeting a school community service requirement, or in any other extracurricular setting are as important—and lasting—as the lessons learned in a classroom.

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II. THE THIRD CIRCUIT'S CATEGORICAL LIMITATION IS MISGUIDED

The Third Circuit erred in subjecting *Tinker*'s carefully balanced standard to a rigid on/off switch, categorically preventing schools from addressing under *Tinker* student speech that originates off campus—no matter how disruptive or damaging to the school environment. But the Third Circuit's myopic focus on where the speech takes place conflicts with the logic of *Tinker* itself, which made clear that student speech can be disruptive for reasons other than its "time" or "place." 393 U.S. at 513.

A. *Tinker* Has Never Been Strictly Confined To On-Campus Conduct

The Third Circuit declared that "[p]ublic school students' free speech rights have long depended on a vital distinction": speech that takes place within "'the schoolhouse gate,'" and speech outside it. Pet. App. 4a (citation omitted). But that is incorrect. From the 1970s up until the decision below, lower courts have understood *Tinker* to apply to at least some forms of student speech originating outside school grounds—and no court of appeals or state high court had rejected that proposition as a categorical matter.

For instance, in the decade following *Tinker*, the Second Circuit considered whether a school could discipline students for a satirical newspaper published off school grounds. *Thomas v. Board of Educ.*, 607 F.2d 1043, 1045-46 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980). The court did not end its First Amendment analysis with the fact that the newspaper was written off campus; rather, the court could "envision a case in which a group of students incites substantial disruption within the school *from*

some remote locale" and indicated that a case involving such a "threat or forecast of material and substantial disruption within the school" would have come out differently. *Id.* at 1052 n.17 (emphasis added). Instead, the court held that the school acted unconstitutionally in reacting to nothing more than "undifferentiated fear or apprehension of [a] disturbance"—which *Tinker* itself deemed insufficient to warrant censorship. *Id.* (quoting *Tinker*, 393 U.S. at 508). In other words, the court simply enforced *Tinker*'s rule, rather than imposing an artificial limit on its application.

During this period, other lower courts likewise declined to adopt a categorical rule based on whether student speech takes place on—or off—school grounds. *See e.g.*, *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1072, 1074-75 (5th Cir.) (assuming *Tinker* applied in another case where a student newspaper was distributed "near" the campus), *cert. denied*, 414 U.S. 1032 (1973); *Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517, 519, 521-28 (C.D. Cal. 1969) (applying *Tinker* to uphold discipline of students who produced their newspaper off campus but distributed it "just outside the main gate," when 25 to 30 teachers reported their classes were interrupted by the paper's profane content).

activities, or members of the school community—such that the speech poses a reasonable risk of substantial disruption to the school—schools are not prohibited from addressing it.[3] These decisions also recognize that a strict on-campus/off-campus line would prevent schools from addressing speech that severely disrupts school operations and learning, with profound consequences for student safety and development.[4]

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[3] *See Wisniewski v. Board of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007) (schools may discipline off-campus speech when "it was reasonably foreseeable" that it "would come to the attention of school authorities"), *cert. denied*, 552 U.S. 1296 (2008); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573, 577 (4th Cir. 2011) (schools may discipline off-campus speech with a "sufficient nexus with the school" or its "pedagogical interests," such as online speech directed at the school environment); *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 392-93 (5th Cir. 2015) (en banc) (*Tinker* allows schools to discipline threatening, intimidating, or harassing off-campus speech "intentionally directed at the school community"), *cert. denied*, 136 S. Ct. 1166 (2016); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (schools may discipline off-campus speech that is "targeted at" the school); *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019) (per curiam) ("[A] school district may constitutionally regulate off-campus speech" when "the speech bears a sufficient nexus to the school."); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (Schools may discipline off-campus speech where "there is a sufficient nexus between the [speech] and the school.").

[4] *See, e.g.*, *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069-70 (9th Cir. 2013) (schools must be "allow[ed] to protect their students" from off-campus threats of violence, and students should be encouraged to report such speech to school authorities); *Kowalski*, 652 F.3d at 572, 574 (reasoning that "[j]ust as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from

Nor have this Court's subsequent school-speech decisions called *Tinker*'s application to off-campus speech into doubt. In *Morse*, the Court concluded that the student's display of a "BONG HiTS 4 JESUS" banner during an off-campus "school-sanctioned activity" qualified as "school speech." 551 U.S. at 397, 400-01 (citation omitted). In so holding, the Court eschewed a strict campus-boundary approach in favor of a flexible analysis focused on the speech's audience and concepts of fair notice. *See id*.

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results or intractable uncertainty in the circuits that adhere to it. It is the Third Circuit's "own path," Pet. App. 31a, that is unwise and unwarranted.

B. A Categorical Rule Is Particularly Ill-Suited For The Social Media Age

The Third Circuit's categorical rule is especially ill-suited for today's social media age. Students can disrupt the school community from *anywhere* simply by hitting send, and the same tweet, Instagram post, or you name it will have the same impact no matter where it was sent. And like their parents, virtually all teenagers are equipped with what decades ago would have been unthinkable: a mobile communications platform—or iPhone—which fits in a pocket and allows them to blast messages to any number of other people or groups whenever they wish.

As of 2018, 97% of kids age 13 to 17 use at least one social media platform.[5] Ninety-five percent of that cohort have access to a smartphone, with 45% of them reporting being online "almost constantly."[6] In 2014, that last figure was 24%—a startling upward trajectory (no doubt to the chagrin of some parents).[7]

Social media and other online platforms can be beneficial to students. For example, such platforms can help students stay more connected to family and friends, provide outlets for their creativity, and enable them to meet and interact with others who

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[5] Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center: Internet & Technology (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/.

[6] *Id.*

[7] *Id.*

share their interests.[8] But it hardly can be denied that social media has fundamentally changed the way that students interact with their peers—both on and off campus. Online platforms give every student a virtual megaphone with which she can instantly reach hundreds, even thousands, of other people. Even if a student initially tries to limit her audience, a message can immediately be shared or forwarded to others. A single post can spread through a class, team, or even the whole school in minutes. *See, e.g.*, *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 208 (3d Cir. 2011) (en banc) (recounting how a student's fake MySpace profile for his high school principal "spread like wildfire" once the student added his classmates as the principal's "friends," and the vulgar profile soon reached "most, if not all" of the school), *cert. denied*, 565 U.S. 1156 (2012).

The viral nature of these platforms, designed around replication and reaction, can and often does enhance the visibility of the cruelest and most disruptive posts. This is unquestionably impacting our youth. Indeed, nearly a quarter of teens believe that social media has a "mostly negative" impact on their lives, with the number one reason being "bullying/rumor spreading."[9] Medical experts agree that social media can have serious detrimental effects, ranging from distraction and heightened peer

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[8] Johns Hopkins Medicine, *Teaching Kids to Be Smart About Social Media*, https://www.hopkinsallchildrens.org/Patients-Families/Health-Library/HealthDocNew/Teaching-Kids-to-Be-Smart-About-Social-Media (last visited Feb. 26, 2021).

[9] Anderson & Jiang, *supra*.

pressure to depression and anxiety.[10] They also warn that social media can have "negative health effects" on "attention[] and learning," specifically.[11]

For this reason, it makes little sense to say that a school can address student speech targeting the school, teachers, or other members of the school community if that student happens to speak on campus during school hours, but not address the same exact message if the speaker originally posts it on social media off campus. Messages that might have been physically posted on a school bulletin board decades ago are now virtually posted online. But the audience—and impact—of the messages is the same. Indeed, to take a real and gut-wrenching example that has actually repeated itself, it is equally, if not more, disruptive for a student to share a photoshopped image depicting his African-American classmates running away fromly, iceJ-12.74 -1.2 TD2.74 lux4 l TDo7ct

that horrifying image and physically handed it to a friend during school hours or taped it to a locker.[12]

Social media is also distinctive in that the same post can have the same impact at a school regardless of where it was initially sent or, for that matter, where a student receives it. *See Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011) (treating the question of "where" a student's online speech occurred as merely "metaphysical," given the student's knowledge that her speech targeting a classmate would impact the school). A tweet about a class, teacher, or other student made during lunchtime in the cafeteria would have the same impact if it were sent from the local Starbucks after school. Likewise, a Snapchat revealing the questions on an English test that is being taken by different classes over successive days is just as disruptive whether a student sends it from her kitchen table that night or as she is leaving the classroom.

The Third Circuit's rigid rule, if adopted, would create a dangerous loophole. A student could engage in malicious speech directly targeting the school, a

See Layshock, 650 F.3d at 221 (Jordan, J., concurring) (recognizing that a student could "engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators . . . would be left powerless"). And the arbitrary nature of such a regime will not be lost on the students themselves—including bullying victims, teammates, and other students who are disciplined for similar on-campus speech. Forcing school officials to enforce such an unfair regime will undermine the effectiveness of the officials' authority generally.

The Third Circuit did not deny that "social media has continued its expansion into every corner of modern life," nor that "[t]echnology has brought unprecedented interconnectivity." Pet. App. 24a, 28a. The court also acknowledged that "when a student speaks in the 'modern public square' of the internet, it is highly possible that her speech will be viewed by fellow students and accessible from school"; in some instances, the court conceded, that possibility is a "virtual certainty." *Id.* at 29a (citation omitted). The Third Circuit nevertheless dismissed those concerns on the ground that applying the First Amendment in cognizance of the fact that "the internet and social media have expanded *Tinker*'s schoolhouse gate" would "contradict[]" this Court's "instruction . . . to apply legal precedent faithfully even when confronted with new technologies." *Id.* (citing *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017); *Reno v. ACLU*, 521 U.S. 844 (1997)). That is incorrect.

To begin with, nothing in *Tinker* or subsequent cases supports a categorical limit on school authority based on *where* speech originates. *Amici* are not

asking this Court to "discard" its precedents in this area. Pet. App. 13a-14a. Far from it. The digital age may have dramatically increased the likelihood that off-campus speech will have on-campus effects. But the balance *Tinker* struck in the analog age still makes sense: Schools can regulate student expressive activity that poses a reasonable threat of materially disrupting the school environment.

More fundamentally, neither *Reno* nor *Packingham* "instruct" courts to turn a blind eye to the realities of new technologies in developing and applying constitutional rules. In fact, they do the opposite. *See Reno*, 521 U.S. at 868-69 (recognizing that "[e]ach medium of expression . . . may present its own problems," which may sometimes require different regimes (alterations in original) (citation omitted)); *Packingham*, 137 S. Ct. at 1737 (rejecting position that states can prohibit registered sex offenders from accessing any social networking website, but suggesting it would be constitutional to prohibit offenders from accessing a particular website based on its dangers); *id.* at 1743-44 (Alito, J., concurring in the judgment) (emphasizing that "there are important differences between cyberspace and the physical world" that could bear on the First Amendment analysis).

Likewise, members of this Court have urged the rejection of broad, inflexible constitutional rules precisely because of the need to adapt to new technologies. *See Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) ("[T]he Court must tread

concurring in the judgment) (because cyberspace presents unique First Amendment issues, "we should proceed circumspectly, taking one step at a time"); *cf.*

417 (Thomas, J., concurring) ("[U]nless a student's speech would disrupt the educational process, students ha[ve] a fundamental right to speak their minds (or wear their armbands).").

This is a high standard. Administrators know that they may not discipline speech because it touches on a "controversial" subject, *Tinker*

Fostering student expression—including on divisive topics—is a vital and integral part of students' academic growth, civic education, and social development. *See Tinker*, 393 U.S. at 512 ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (quoting *Keyishian v. Board of Regents of the State of N.Y.*, 385 U.S. 589, 603 (1967))). It is only when student speech materially disrupts core school operations and learning that *Tinker* permits a school to discipline student expression. But as discussed below, preserving that limited authority is absolutely crucial to schools—and students as well.

III. THE THIRD CIRCUIT'S CATEGORICAL RULE WOULD HAVE DISASTROUS CONSEQUENCES

Any "effort to trace First Amendment boundaries along the physical boundaries of the school campus" is "a recipe for serious problems in our public schools," *Doe v. Valencia College*, 903 F.3d 1220, 1231 (11th Cir. 2018) (citation omitted)—if not worse.

This Court has long recognized that the challenges of school management "are vast and complex." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Those challenges also often require "immediate, effective action," *id.*, as well as "a certain degree of flexibility in school disciplinary procedures," *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985); *cf. Morse*, 551 U.S. at 409-10. The Third Circuit's categorical rule would deny that critical flexibility and prevent school administrators from addressing blatantly harmful expression that threatens students—with terrible consequences for students and their families.

Off-campus bullying is one clear threat. As discussed, a bully no longer needs physical proximity to harm his victim; that pain can be caused anytime, anywhere, and in full view of the student body, thanks to the Internet. Giving a cyberbully carte blanche to bully as long as speech originates off-campus would give her free reign to destroy lives in schools as well. And as social media use has become more widespread, cyberbullying has dramatically increased. A 2019 study found that one in three students experiences cyberbullying in middle or high school, almost double the rate found in 2007.[13]

Governments at every level have recognized that effectively addressing student-on-student bullying is a core part of a school's role. *See Kowalski*, 652 F.3d at 572 (noting that "schools have a duty to protect their students from harassment and bullying in the school environment"). Federal law requires schools to undertake this obligation; the Department of Education has long instructed that student bullying

laws do not exempt off-campus conduct from their scope. Indeed, the Department has cautioned schools that "[h]arassing conduct" may "include use of cell phones or the Internet."[15] The Department also has made clear that schools' responsibilities apply off campus while students across the country engage in distance learning during the COVID-19 pandemic.[16]

In addition, every state legislature in the country has codified schools' duty to prevent bullying. These state anti-bullying statutes generally require school districts to report, investigate, and punish bullying, and to formulate policies to that end.[17] And crucially, those state laws recognize that schools must be able to address off-campus bullying under appropriate circumstances—and they incorporate *Tinker*'s standard to elucidate what those circumstances are.

bullying that substantially disrupts or interferes with the school environment.[18] The remaining States either expressly or implicitly authorize schools to adopt policies regulating off-campus bullying.[19]

The fact that the majority of state legislatures have not just authorized schools to regulate off-campus bullying, but *obligated* them to do so, underscores that a school's ability to discipline materially disruptive speech cannot depend solely on where the speech originates. *Cf. Morse*, 551 U.S. at 408 (emphasizing that "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use"). Adopting the Third Circuit's rule would prevent schools from fulfilling this obligation—and invalidate these state laws in one fell swoop.

And countless instances of severe bullying would go unaddressed. For example, the Eugene School

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[18] *See, e.g.*, Ala. Code § 16-28B-3(1) (defining "bullying" to include "cyberbullying or written [and] electronic . . . acts" that "take[] place on or off of school property" and "[h]ave 5.3((at)]TJ o)4.2(f)-1.1(b-.08(thaof)4)]TJ o

District would have been powerless to help the two disabled middle school children who were repeatedly harassed by older boys—using sexualized taunts—as they walked home from school. *See C.R. v. Eugene*

the year, requiring the school to replace her with three different substitutes. *Id.* at 852.[20]

The Third Circuit did not deny these very real concerns. And its attempts to address them were entirely unsatisfying. The court first suggested that school actions to address speech "harassing particular students or teachers" might withstand First Amendment review under the strict-scrutiny standard applicable to content-based regulations of speech. Pet. App. 34a-35a. But even assuming that might be true in some instances, educators should not have to run the risk that their actions will later be found wanting by a court applying that exceedingly stringent standard. Such an approach would also place schools on a knife's edge: address bullying and run the very real risk of a First Amendment violation, or stand back and potentially incur liability under federal or state law should a court later determine that this was one of those limited instances in which the First Amendment would have permitted action.

The Third Circuit also suggested that this Court might see fit to create a special "exception" to student-speech rights for this category. Pet. App. 35a. But that would be denying the problem, not solving it. Off-campus bullying merely illustrates how social media posts can harm students even when sent away

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[20] As with anti-bullying statutes, many States have enacted laws that incorporate the *Tinker deterion*,

from campus; while disciplining such speech should be allowed under *Tinker*, so should disciplining other speech that likewise materially disrupts schools. And creating sui generis exceptions—to be later developed on an ad hoc basis—is far less desirable than continued adherence to *Tinker*'s existing "substantial disruption" standard across the board.

The Third Circuit's rule also would tie schools' hands in the face of threats to student and teacher safety—the situation "every school dreads." *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1070 (9th Cir. 2013). It is a tragic reality that since the Columbine massacre in 1999, school shootings have become more prevalent.[21] When presented with evidence of student expression indicating possible violence, schools must react immediately—they cannot wait for more danger signs to emerge. *See id.* (court stating that "'[w]e can only imagine what would have happened if the school officials, after learning of [a student's online speech describing violence], did nothing about it' and [he] did in fact come to school with a gun" (first alteration in original) (citation omitted)). And even in situations where the speaker may not truly intend harm, the school must take action. *See Morse*, 551 U.S. at 425 (Alito, J., concurring) (explaining that "due to the special features of the school environment, school officials

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[21] Center for Homeland Def. & Sec., *Shooting Incidents at K-12 Schools 1970-Present*, https://www.chds.us/ssdb/charts-graphs/ (last visited Feb. 26, 2021) (providing statistics); Luis Melgar, *Are School Shootings Becoming More Frequent? We Ran The Numbers* (May 17, 2019), https://www.kunc.org/2019-05-17/are-school-shootings-becoming-more-frequent-we-ran-the-numbers (the average length of time between shootings has decreased over recent years).

must have greater authority to intervene before speech leads to violence," as *Tinker* allows).

Sadly, these scenarios are not hypothetical. The Third Circuit's rule would have prevented Sherwood High School, for instance, from disciplining a student who created a "hit list" containing 22 Sherwood students as targets who "*Must* Die," simply because the student made the list off campus. *See McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 704 (9th Cir. 2019) (per curiam). Likewise, it would have prevented Weedsport Middle School from suspending a student who sent instant messages to classmates using an avatar of a person being shot in the head accompanied by text saying "Kill Mr. VanderMolen," the student's English teacher. *See Wisniewski v. Board of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007). These cannot be ignored.

And once again, the Third Circuit's proposed solutions offer no reassurance. The court suggested that the "true threat" doctrine might carve out such behavior from First Amendment protection. Pet. App. 35a; *see Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). But that doctrine—designed to mark the line between protected speech and criminal activity—imposes a high standard that will not be satisfied in many student cases. *See, e.g.*, *McNeil*, 918 F.3d at 709 (student's hit list could not be a "true threat" because it was discovered by a parent). Nor should schools have to count on passing strict scrutiny on a case-by-case basis (as the Third Circuit also suggested). *See* Pet. App. 35a. Schools cannot afford to wait and build a record that might better set up their decisions for later review, nor can they be expected to show that their actions in times of extreme uncertainty were always the least restrictive

available. And forcing schools into such as-applied litigation would give administrators and staff good reason to hesitate in moments when hesitation can be deadly.[22]

continued vigorous application of *Tinker*'s protections—not arbitrary rules that engender