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 *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, NATIONAL COALITION AGAINST CENSORSHIP, AND COMIC BOOK LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment permits public school officials to police and punish off-campus student expression.

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since its founding in 1999, FIRE has successfully defended the rights of tens of thousands of students at colleges and universities nationwide. FIRE believes that if our educational institutions are to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech protections for students and faculty.

FIRE defends student speech rights through public advocacy, targeted litigation, and participation as *amicus curiae* in cases that implicate student rights, like the matter now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020) (citing with approval FIRE's *amicus curiae* brief in holding that a student's online speech was protected by the First Amendment), *cert. granted*, 141 S. Ct. 976 (2021).

FIRE has a direct interest in this case because off-campus student expression, especially that which takes place online, is routinely censored by administrators at both the K-12 and collegiate level. Even protected on-campus student speech is punished when posted online. Every day, FIRE defends students facing life-altering discipline for protected but

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel for both parties have consented to the filing of this brief.

dissenting, unpopular, or merely offensive speech posted online. Because tomorrow's college students attend today's grade schools, and because courts often misapply K-12 precedent to uphold speech restrictions in matters involving college students,[2] the resolution of this case will resonate on campuses across the country for years to come.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of K-12 students and teachers, artists, authors, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of students in K-12 schools. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The Comic Book Legal Defense Fund (CBLDF) is a nonprofit organization dedicated to protecting the legal rights of the comic arts community. With a membership that includes creators, publishers, retailers, educators, librarians, and fans, the CBLDF has defended dozens of First Amendment cases in courts

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[2] *See*, *e.g.*, *Doe v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211–12 (11th Cir. 2016) (applying K-12 precedents to First Amendment claim involving college student speech); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (same); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (same).

across the United States and led important educational initiatives promoting comics literacy and free expression.

The comics community has decades of experience with attempts by school officials to control young people's interaction with new media. In the early years of the modern American comic book, children were compelled to bring their comics to school for burning due to sequential art's purported disruptive impact on learning and the social order. Today, the Sauron's eye of censorship has turned toward students' own expression through comics and related media, such as animation, cartoon memes, virtual worlds, and video games. Where school administrators once sought to constrain what students read, now students face discipline for what they create. This case gives the Court an opportunity to affirm that power has limits, even for schools.

Amici submit this brief because clarity is needed from this Court to properly educate a generation of students about the power of their First Amendment freedoms and the limits of governmental authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than fifty years after this Court's landmark ruling in *Tinker v. Des Moines Independent Community School District*, it is axiomatic that public school students do not shed their First Amendment rights at the schoolhouse gate.[3] Students in 1969 likely said much the same things to one another as their contemporary counterparts, discussing the challenges of coursework, problems with peers, or simply their feelings about the world as they found it. Both then and now, students speak in ways that an eavesdropping adult might find flippant, frustrating, or infuriating. But while students today communicate in virtual spaces that the *Tinker* Court could not have anticipated, they do not surrender their First Amendment rights when they log on to their personal social media accounts any more than they do at schoolhouse gates.

Public school students like Respondent are routinely investigated and punished for their off-campus expressive activity, especially when it takes place online. Even on-campus student expression that does not and is not likely to result in disruption or invade the rights of others is regularly punished simply because it occurs online. Public grade school administrators have disciplined students for voicing political and personal views from across the ideological spectrum, for exposing potentially unsafe school

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[3] 393 U.S. 503, 506 (1969). Indeed, the *Tinker* Court recognized that this principle was already well-established in 1969, proclaiming it "the unmistakable holding of this Court for almost 50 years." *Id.* (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Bartels v. Iowa*, 262 U.S. 404 (1923)).

conditions, for quoting popular movies, for joking with friends in private conversations, for expressing themselves artistically, and, as in this case, for simply venting their frustrations with old-fashioned profanity. College students fare no better, despite this Court's longstanding recognition that public college students' First Amendment rights are coextensive with those held by the public at large. *See Healy v. James*, 408 U.S. 169, 180 ("Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."). *Amicus* FIRE's case archives are replete with instances of students facing investigation and punishment for their protected off-campus or online expression—criticizing their university's campus fees, environmental policies, or fraught racial history, for example, or voicing their opinions on national political and social questions.

These are all classic examples of protected speech—especially when voiced off-campus, outside of school control. Transforming this everyday expressive activity into grounds for punishment at the K-12 level distorts *Tinker* beyond recognition, stretching its touchstone holding far beyond its intended function. "School officials do not possess absolute authority over their students," warned the *Tinker* Court. 393 U.S. at 511. But with the migration of student expression to social media, *Tinker*'s once bright line has blurred. From MySpace to Snapchat, courts have struggled for nearly two decades now to properly account for the First Amendment rights of students like Respondent when they express themselves on digital platforms.

This judicial confusion has carried a heavy consequence for student speech rights. Without the clear jurisdictional limit once demarcated by *Tinker*'s physical schoolhouse gate, grade school administrators nationwide routinely reach into students' private lives outside of school to police and punish a vast amount of off-campus student speech, simply because it occurs online. Petitioners' expansive conception of the proper jurisdiction of public school administrators would worsen the problem dramatically. Were this Court to endorse it, students would effectively grow up under the watchful eye of government employees at all hours, monitored whenever they spoke to their peers, even when off-campus altogether. This virtually limitless jurisdiction cannot be reconciled with *Tinker*. The First Amendment does not allow our public schools to become panopticons.

The United States Court of Appeals for the Third Circuit's ruling correctly restored *Tinker*'s jurisdictional boundary: When a student like B.L. speaks "away from campus, over the weekend, and without school resources, and . . . on a social media platform unaffiliated with the school," *Tinker* does not apply. *B.L.*, 964 F.3d at 180. Likewise, on-campus student expression that does not "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others" cannot be punished simply because it occurs online. *Tinker*, 393 U.S. at 513. While the Third Circuit appropriately reserved the question of "off-campus student speech that threatens violence or harasses others"—expression that may already be subject to civil or criminal liability—the clarity of its holding will benefit students and administrators from kindergarten to college. *B.L.*, 964 F.3d at 186.

This Court must reaffirm *Tinker*'s animating concern for student speech rights, not abandon it. Failure to do so will embolden campus censors. If public grade school administrators may surveil and punish off-campus student expression far beyond the schoolhouse gate, a generation of Americans will be taught a corrosive, illiberal lesson about the illusory value of their constitutional freedoms. Their experiences with our public schools will "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Ambach v. Norwick*, 441 U.S. 68, 79 (1979). Because "[t]his influence is crucial to the continued good health of a democracy," student experiences with our public schools must not include government censorship and surveillance. *Id.* To properly educate tomorrow's leaders about the power of their First Amendment rights and the limits of governmental authority, this Court should uphold the Third Circuit's decision.

ARGUMENT

I. STUDENTS ARE ROUTINELY PUNISHED FOR PROTECTED OFF-CAMPUS SPEECH AND PROTECTED ONLINE SPEECH.

Public grade school students nationwide regularly face investigation and punishment for a wide range of protected expression voiced off-campus. Students have faced discipline for expressing political views and exposing potentially dangerous or unhealthy school conditions, for example, as well as for more quotidian but equally protected speech, such as criticizing teachers, using profanity, telling jokes about zombie invasions, taking pictures of toy guns, and even quoting the 2004 film *Mean Girls*.

Students are also routinely punished for protected on-campus speech that does not meet *Tinker*'s test simply because it is posted online—an equally impermissible result under the First Amendment. On-campus student speech that would be beyond punishment had it been spoken aloud does not lose the First Amendment's protection by virtue of being posted to social media instead.

Like their high school counterparts, college students regularly face punishment for protected off-campus or online speech, as well. Because high school speech standards are often improperly imported into the college context, and because high school students who come to fear that their speech rights off-campus are illusory will bring that suspicion to colleges and universities upon matriculation, this Court must reaffirm the importance of First Amendment protection for student expression.

A. High School Students Are Routinely Punished for Off-Campus Speech.

"School officials do not possess absolute authority over their students," and the First Amendment does not allow public school administrators unlimited jurisdiction over students' expression after they exit through the schoolhouse gate and return home. *Tinker*, 393 U.S. at 511. Because students "out of school are 'persons' under our Constitution," when they are off-campus, students' expression is their own and punishable only under the First Amendment's narrow exceptions. *Id.* Nevertheless, high school students are routinely punished for their protected off-campus speech.

In New Jersey, for example, a student was investigated by administrators at her public high school for social media posts off-campus and during winter break that criticized Israel.[4] The student, who is herself Israeli and Jewish, was called into a meeting with administrators and reprimanded for "a tweet that contained a string of expletives directed at Israel and expressed happiness that a pro-Israel classmate had unfollowed her Twitter account."[5] Showing her printouts of her posts, an assistant principal issued the student a stark warning: "Do you realize that what you put out electronically can also get you in trouble in school, or put you in some kind of problem?"[6]

In Georgia, students at North Paulding High School were punished for off-campus posts containing images of school hallways crowded with unmasked students following the school's reopening last August during the COVID-19 pandemic.[7] One student reported receiving "a five-day, out-of-school suspension

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[4] Yanan Wang, *A N.J. teen who tweeted 'Israel is a terrorist force' was called to the principal's office for 'bullying'*, WASH. POST (Jan. 8, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/01/08/a-n-j-teen-who-tweeted-israel-is-a-terrorist-force-was-called-to-the-principals-office-for-bullying.

[5] Liam Stack, *Tweets About Israel Land New Jersey Student in Principal's Office*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/07/nyregion/anti-israel-tweets-land-new-jersey-student-in-principals-office.html.

[6] Wang, *supra* note 4.

[7] Lauren Strapagiel, *Two Students Say They Were Suspended From Their Georgia High School For Posting Photos Of Crowded Hallways*, BUZZFEED NEWS (Aug. 6, 2020), https://www.buzzfeednews.com/article/laurenstrapagiel/north-paulding-high-school-suspensions-for-hallway-photos.

for posting one photo and one video on Twitter," despite the fact that she done so after school hours.[8] Only after a national outcry was the student's suspension rescinded.[9]

Simple, off-campus criticism of a class or a teacher—a genre of student speech surely as old as the concept of education itself[10]—may subject a student to harsh discipline. A student at Oak Forest High School in Illinois was suspended for five days after creating a Facebook page titled "Anyone who has had a bad experience or plain dislikes [teacher's name]," despite the fact that the student posted his criticism "on his own time, on his own computer in his own home."[11] In Massachusetts, a student at Bartlett High School was suspended for "posting on his Facebook

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[8] Elliot Hannon, *Georgia High School Students Suspended for Social Media Posts Showing Packed Hallways*, SLATE (Aug. 7, 2020), https://slate.com/news-and-politics/2020/08/georgia-north-paulding-high-school-students-suspended-social-media-posts-packed-hallways.html.

[9] Madeline Holcombe, *Georgia student who posted photo of a crowded school hallway and called it 'good and necessary trouble' is no longer suspended, her mom says*, CNN (Aug. 7, 2020), https://www.cnn.com/2020/08/07/us/georgia-teen-photo-crowded-school-hallway-trnd/index.html.

[10] More than two millennia ago, for example, Aristotle could be "caustic" when criticizing his instructor, Plato. Christopher Shields, *Plato and Aristotle in the Academy*, *in* THE OXFORD HANDBOOK OF PLATO 504, 507 (Gail Fine ed., 1st ed. 2008) (noting Aristotle's characterization of Plato's Forms as "jibber-jabber" and "wholly irrelevant").

[11] Andrew Greiner, *Student Suspended for Facebook Teacher Slam*, NBC CHICAGO (Feb. 22, 2010), https://www.nbcchicago.com/news/local/student-suspended-for-facebook-fan-page/1867855.

page that racists should not be teaching Spanish," despite the fact that his post did not mention any teacher by name or even identify his school.[12] If this kind of quotidian student expression may lawfully be punished, absent more, student First Amendment rights are a dead letter.

Likewise, students risk unjust discipline for their off-campus conversations with friends, simply because they are online. For example, in Arizona, a female student at Ironwood Ridge High School was punished for tweeting a quote from the 2004 comedy *Mean Girls*.[13] After posting the quote one evening while watching the movie—"And on the third day, God created the Remington bolt-action rifle, so that Man could fight the dinosaurs… and the homosexuals. AMEN!"—the student was suspended for five days for "exhibit[ing] negative attitudes and actions toward others on campus."[14] A North Attleboro High School student in Massachusetts was punished for a single tweet he posted one evening that contained profanity in responding to the announcement of a snow day

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[12] Brian Lee, *Facebook posting leads to suspension*, TELEGRAM & GAZETTE (May 19, 2011), https://www.telegram.com/article/20110519/NEWS/105199396.

[13] Chris Flora, *Post on Twitter quoting 'Mean Girls' leads to five-day suspension*, EXPLORER (Nov. 20, 2013), https://www.tucsonlocalmedia.com/news/article_5b9403e4-51b0-11e3-8c70-0019bb2963f4.html.

[14] *Id.* As one parent wrote in a local newspaper, "If you want to suspend students for quoting 'Mean Girls', you are in trouble because given how often my teenager and her own friends quote it, the halls would be empty at every high school across the state." Thelma Grimes, *Amphi schools overreact*, EXPLORER (Nov. 26, 2013), https://www.tucsonlocalmedia.com/opinion/article_93479d4a-51b1-11e3-9664-0019bb2963f4.htm.

("Fuck off #seniors #nomakeup #chirpchirp").[15] Making clear that the discipline was motivated not by disruption, but by the school's desire to stifle criticism, administrators threatened to increase the student's punishment to a five-day suspension unless he deleted three other tweets that "did not contain profanity, but talked about the school's response to his original tweet."[16] Again, these posts were posted off-campus—and beyond the proper jurisdiction of school administrators.

In New Jersey, an Allentown High School student's Instagram post depicting herself and another student "drinking what appeared to be alcohol off-school grounds" resulted in a thirty-day suspension—not because of the apparent drinking, but because the other student in the picture was wearing an Allentown High School sweatshirt and she captioned the posts with the phrase "sophomore sensation."[17] The discipline was ultimately deemed "arbitrary, capricious and unreasonable" and overturned by the New Jersey Department of Education, which concluded

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[15] Amy DeMelia, *ACLU defends North Attleboro student in Twitter case*, SUN CHRON. (Feb. 12, 2014), https://www.thesunchronicle.com/news/local_news/aclu-defends-north-attleboro-student-in-twitter-case/article_5bfccd3a-61e3-52b1-afed-93291768b62f.html ("'I don't think a comment I made at 7 p.m. on my personal Twitter account — not on the school's Facebook page or Twitter account, but my own personal page — is the school's business,' said [the student], 18.").

[16] *Id.*

[17] David Foster, *Allentown star athlete's 30-day suspension for Instagram post overturned by state*, TRENTONIAN (Dec. 3, 2015), https://www.trentonian.com/news/allentown-star-athlete-s-30-day-suspension-for-instagram-post-overturned-by-state/article_70a67e7e-0106-59e0-b444-0e91928109bd.html.

that "there is no evidence indicating that the Instagram post caused any disruption to the school environment or impacted the orderly administration of the school."[18] While the student's expressive rights were eventually vindicated in this rare instance, common sense arrived too late: The student had already served her full suspension twenty months earlier.

Schools often punish students for off-campus posts containing images of lawfully obtained and permitted—or even toy—guns. In New Jersey, for example, public school administrators suspended two Lacey Township High School students for posting an image on Snapchat of "legally owned guns on a table with a caption that read, 'hot stuff' and 'If there's ever a zombie apocalypse, you know where to go.'"[19] In Colorado, a senior at Endeavor Academy, a public high school, was suspended for five days for posting a picture of herself and her older brother holding firearms with the caption: "Me and my legal guardian are going to the gun range to practice gun safety and responsible gun ownership while getting better so we can protect ourselves while also using the First Amendment to practice our Second Amendment."[20] Indeed, even images of toy guns can result in extended suspensions.

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[18] *Id.*

[19] Joe Strupp, *Should NJ schools punish students over social media posts?*, ASBURY PARK PRESS (June 21, 2019), https://www.app.com/story/news/2019/06/20/should-nj-schools-punish-students-over-social-media-posts/1476727001.

[20] Noah Shepardson, *Colorado School Suspends 17-Year-Old After She Posted a Non-Threatening Gun Photo With Her Older Brother*, REASON (Oct. 24, 2019), https://reason.com/2019/10/24/colorado-school-suspends-17-year-old-after-

(...continued)

An 11-year-old student at Florida's Horizon West Middle School was suspended—first for ten days, then for *an entire calendar year*—after posting a fleeting image of a toy gun with an orange cap on Snapchat.[21] None of these can reasonably be regarded as threatening in either the colloquial or legal sense. But because public school administrators now feel empowered to punish protected off-campus student speech, especially when it occurs online, each of these posts resulted in serious discipline.

B. High School Students Are Routinely Punished for Online Speech That Does Not Meet *Tinker*'s Test.

Public school administrators nationwide routinely investigate and punish students for a wide variety of expression properly protected by the First Amendment under *Tinker* simply because it is online.

For example, in an echo of the black armbands at issue in *Tinker*, a group of students at Texas' Tomball High School chose to wear black on a "dress 'American'" theme day to signify their support of the Black Lives Matter movement.[22] After some students

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she-posted-a-non-threatening-gun-photo-with-her-older-brother.

[21] Christopher Heath, *Who pays the real price when a student is suspended for making a post on social media?*, WFTV (Feb. 2, 2021), https://www.wftv.com/news/9investigates/its-no-win-situation-schools-who-pays-real-price-when-student-is-suspended-making-post-social-media/JOUVWWSB55B75OLD4R3T54CUAM.

[22] Shelby Webb, *Tomball High students clash over Black Lives Matter*, HOUSTON CHRON. (Nov. 4, 2016), https://www.chron.com/neighborhood/tomball/news/article/Tomball-High-students-clash-over-Black-Lives-10593249.php.

dressed in black posted a picture of themselves on Twitter, they were threatened with suspension by administrators "unless they deleted their tweets of the image."[23] Forced to choose between expressing their views on social media or being suspended, the students decided to self-censor and deleted the image.

Likewise, the student cheerleading team at North Carolina's North Stanly High School was placed on season-long probation after a photograph of team members posing in front of a "Make America Great Again" sign supporting President Donald Trump and Vice President Michael Pence's re-election campaign was posted on Facebook.[24] Both the Houston students and the North Carolina cheerleaders student engaged in plainly protected political expression; the fact that they expressed themselves online does not alone render their speech subject to the oversight and approval of public school administrators.[25] Again, the speech at

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[23] *Id.* A separate group of students wearing t-shirts that spelled out "T-R-U-M-P" was captured in the background of the photograph. The students wearing black reportedly "took the photo to show the ideological divide that exists at the school, not to criticize the Trump-supporting students or the candidate himself." *Id.*

[24] Lateshia Beachum, *How a MAGA sign and a high school cheer squad ignited a debate about free speech*, WASH. POST (Sept. 17, 2019), https://www.washingtonpost.com/education/2019/09/17/how-maga-sign-high-school-cheer-squad-ignited-debate-about-free-speech.

[25] The punishment of public grade school students for protected online expression mirrors the punishment of students for wearing clothing expressing viewpoints from across the ideological spectrum. Such punishment occurs regularly, despite the lack of material or substantial disruption or the reasonable forecast of (...continued)

issue did not cause, and was unlikely to cause, the type of material and substantial disruption or invasion of the rights of others subject to regulation per *Tinker*.

Students expressing their views on political issues are not the only ones targeted by public school administrators for investigation and punishment. Students who dare to expose, embarrass, or criticize school administrators often face the threat of discipline, as well. For example, a senior at John Glenn High School in Westland, Michigan, was suspended for posting a picture of dirty, yellow-tinged water running from a

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such. *See, e.g.,* Deanna Paul, *A teen was told her MAGA hat violates school code. She's fighting back.*, WASH. POST (Feb. 22, 2019), https://www.washingtonpost.com/education/2019/02/22/teen-was-told-her-maga-hat-violates-school-code-shes-fighting-back; William Cummings, *Oregon high school student punished for pro-Trump T-shirt settles lawsuit for $25,000*, USA TODAY (Jul. 26, 2018), https://www.usatoday.com/story/news/politics/onpolitics/2018/07/25/addison-barnes-oregon-high-school-student-trump-tshirt-settlement/838992002; Austin Prickett, *ACLU: Deer Creek High School student forced to take off 'Black Lives Matter' shirt*, FOX 25 (May 3, 2017), https://okcfox.com/news/local/aclu-deer-creek-high-school-student-forced-to-take-off-black-lives-matter-shirt; Tasneem Nashrulla, *Students Walk Out Of High School After A Girl Had To Remove Her Black Lives Matter T-Shirt*, BUZZFEED NEWS (Aug. 29, 2016), https://www.buzzfeednews.com/article/tasneemnashrulla/buckeye-high-school-black-lives-matter-protest; Melanie Potter, *High school student suspended for wearing 'Nobody Knows I'm a Lesbian' T-shirt*, YAHOO (Sept. 14, 2015), https://www.yahoo.com/entertainment/2015-09-14-high-school-student-suspended-for-wearing-this-t-shirt-21235467.html.

school bathroom sink on Facebook and Twitter.[26] The student was charged with "inappropriate use of electronics" and suspended for three days.[27] Despite the fact that the post had not caused any disruption nor invaded the rights of others, and that students routinely posted "selfies" taken in school to social media without punishment, the student's punishment was only rescinded after national media attention.[28]

Respondent B.L. is not alone. These examples demonstrate the extent to which protected off-campus student speech and protected online student speech are monitored, investigated, and punished nationwide without justification under *Tinker*. Indeed, these instances likely represent just a fraction of the actual administrative overreach occurring every year in violation of student First Amendment rights. Many students who face punishment for their protected off-campus or online speech do not have their stories in local or national news outlets; many likely accept the punishment. After all, defending one's First Amendment rights against government encroachment is challenging for adults, let alone grade school students with legal guardians, limited autonomy and resources, and an eye on graduation. Students in our

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[26] Rolando Zenteno, *Student suspended after she takes photo of school's dirty water*, CNN (Sept. 26, 2016), https://www.cnn.com/2016/09/26/health/school-dirty-water-post-teen-trnd.

[27] *Id.*

[28] Jessica Chasmar, *Michigan high school student suspended after posting photo of school's dirty water*, WASH. TIMES (Sept.26, 2016), https://www.washingtontimes.com/news/2016/sep/26/hazel-juco-michigan-high-school-student-suspended-.

schools should not be forced to choose between exercising their expressive rights or staying silent to avoid punishment.

Unfortunately, the censorship of protected off-campus or online speech is not limited to public grade schools.

C. College Students Are Routinely Punished for Protected Online Speech.

For more than a decade, *amicus* FIRE has warned that the unprecedented visibility of online student speech renders it an inviting target for censorship.[29] FIRE's prediction has proven prescient and bears out the concerns expressed by Justice Alito in *Morse v. Frederick* about the abuse of administrative discretion to stifle student speech. 551 U.S. 393, 425 (2007) (Alito, J., concurring) (arguing that the regulation of the *in-school* speech at issue stood "at the far reaches of what the First Amendment permits"). Because the

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[29] *See, e.g.,* Will Creeley & Greg Lukianoff, *Facing Off Over Facebook*, PHOENIX (Mar. 2, 2007), http://thephoenix.com/boston/news/34242-facing-off-over-facebook (FIRE attorneys observing that "America's institutions of higher education are increasingly monitoring students' activity online and scrutinizing profiles, not only for illegal behavior, but also for what they deem to be inappropriate speech.") [http://perma.cc/MT58-NPUU]; Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 CHARLESTON L. REV. 333, 336, 348 (2011) (observing that "the widespread adoption and integration of e-mail and social media into students' lives has resulted in a growing number of cases of students being punished for engaging in protected speech online," and arguing that in "monitoring student expression on blogs and social media sites, college administrators are spurred by a recognition that online expression may offend, embarrass, or insult in newly visible ways").

conversations once held in dorm rooms or on campus greens have moved to online arenas, students now find their everyday speech subjected to a pervasive form of administrative scrutiny. At colleges across the country, the student jokes, debates, criticisms, and frustrations that establish the daily rhythm of campus life are regularly cited as grounds for investigation and discipline, despite being fully protected by the First Amendment or institutional promises of free expression.

Amicus FIRE's case archives contain many examples of the threat to online student speech in the higher education context. Students have been suspended for emails that offended coaches[30] and expelled for social media posts that embarrassed university leadership.[31] They have been prevented from participating in graduation ceremonies for Facebook criticism of the administrative response to a natural

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[30] Will Creeley, *Journalism Student Suspended for Offending Hockey Coaches*, HUFFINGTON POST (Nov. 14, 2012), https://www.huffpost.com/entry/suny-oswego-journalism-alex-myer_b_2121906 (detailing suspension of State University of New York College at Oswego student for "disruptive behavior" after student sent email to hockey coach for journalism class assignment).

[31] Allie Grasgreen, *President Personally Liable for Student's Expulsion, Jury Says*, INSIDE HIGHER ED (Feb. 5, 2013), https://www.insidehighered.com/quicktakes/2013/02/05/president-personally-liable-students-expulsion-jury-says ("The jury found that Ronald M. Zaccari violated the student's due process rights and must cover the $50,000 due to Hayden Barnes, who was expelled after Zaccari claimed he had been indirectly threatened by a collage Barnes posted on Facebook to protest the construction of two parking garages."). *See also Barnes v. Zaccari*, 592 F. App'x 859 (11th Cir. 2015).

disaster,[32] investigated and punished for satirical,[33] political,[34] and social[35] Instagram posts, and suspended for copy-editing an ex-girlfriend's apology letter on Twitter.[36] More examples abound. These rights violations are depressingly common, but should

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[32] Marc Parry, *'Negative' Facebook Post Gets Student Barred From Commencement*, CHRON. OF HIGHER ED. (June 1, 2011), https://www.chronicle.com/blogs/wiredcampus/negative-facebook-post-gets-student-barred-from-commencement/31563 ("The apparent offending comment—a 'negative social-media exchange,' as the college put it—concerned Saint Augustine's handling of recovery from tornado damage.").

[33] Jenny Drabble, *Instagram post sparks outrage; Wake Forest investigating source of post*, WINSTON-SALEM J. (Mar. 23, 2019), https://www.journalnow.com/news/local/instagram-post-sparks-outrage-wake-forest-investigating-source-of-post/article_99482d36-0932-541c-a932-b59dc98b3499.html.

[34] Eugene Volokh, *Fordham University Disciplines Student (Austin Tong) for Political Instagram Posts*, REASON (July 24, 2020), https://reason.com/volokh/2020/07/24/fordham-university-disciplines-student-austin-tong-for-political-instagram-posts.

[35] Anemona Hartocollis, *Students Punished for 'Vulgar' Social Media Posts Are Fighting Back*, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html; Sarah McLaughlin, *Cooper Medical School of Rowan University revises social media policy after letter from FIRE*, FOUND. FOR INDIVIDUAL RIGHTS IN ED. (Oct. 6, 2017), https://www.thefire.org/cooper-medical-school-of-rowan-university-revises-social-media-policy-after-letter-from-fire.

[36] Cora Lewis, *The Suspension Of A College Student For A Viral Tweet Has Been Lifted*, BUZZFEED NEWS (July 19, 2017), https://www.buzzfeednews.com/article/coralewis/college-student-suspeneded-viral-tweet#.tjyzZD2z.

be unsurprising; universities now routinely monitor student social media.[37]

Subjecting student speech to suffocating administrative oversight teaches our future leaders the wrong lesson about the essential value of freedom of expression and pluralistic tolerance in our liberal democracy. The Third Circuit has astutely noted that the "concept of the 'schoolhouse gate,' and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse." *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) (internal citation omitted).

The Third Circuit made this observation in differentiating between speech regulations at public high schools and public universities, but its core point holds true in both contexts with regard to online student speech: Constant monitoring of protected student expression is misguided and impermissible. And because courts often import high school speech restrictions to the university context,[38] thus compounding their harm, this case presents a threat to

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[37] *See, e.g.,* Amy Rock, *Social Media Monitoring: Beneficial or Big Brother?*, CAMPUS SAFETY (Mar. 12, 2018), https://www.campussafetymagazine.com/university/social-media-monitoring.

[38] *See, e.g., Ward*, 667 F.3d at 733–34 (applying standard announced by this Court for high school speech restrictions in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), to graduate student and arguing that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one."); *see*

(...continued)

the rights of both K-12 and college students nationwide. *Amicus* FIRE's experience fighting censorship of online student speech in higher education demonstrates the danger of extending *Tinker*'s applicability and deputizing public school administrators to police student speech beyond the schoolhouse gate.

II. TO PROTECT THE FIRST AMENDMENT RIGHTS OF TODAY'S STUDENTS, THIS COURT SHOULD REAFFIRM THAT *TINKER* DOES NOT APPLY TO OFF-CAMPUS SPEECH.

For nearly twenty years, courts have struggled to fashion a coherent judicial response to the off-campus expression of public grade school students. Too often, courts have stretched *Tinker*'s test to allow public grade school administrators to punish student expression that originated beyond school grounds and the control of campus authorities. As a result, student speech that should properly be protected is at risk. The threat of punishment for protected expression off-campus betrays *Tinker*'s recognition of administrative authority to regulate speech within "the special characteristics of the school environment," where administrators act *in loco parentis* to facilitate learning. *Tinker*, 393 U.S. at 506. The Third Circuit's ruling strikes the proper balance between a student's life in school and the world beyond, properly educating students about the importance of their rights to the benefit of us all.

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also Doe, 838 F.3d at 1211–12 (applying K-12 precedents to First Amendment claim involving college student speech); *Hosty*, 412 F.3d at 735 (same).

A. The Confused Application of *Tinker* to Off-Campus Student Speech by Lower Courts Has Eroded Student First Amendment Rights.

When evaluating administrative punishment of off-campus student expression, lower courts have struggled. They have replaced *Tinker*'s bright-line jurisdiction with uncertain, imprecise approximations that leave both students and administrators guessing about the extent of First Amendment rights when students speak away from school or via social media. The confusion they have wrought effectively demonstrates why *Tinker* is not properly applied to off-campus student expression.

For example, in *Doninger v. Niehoff*, the Second Circuit considered a First Amendment claim brought by a public high school student challenging her punishment for off-campus, online expression. 527 F.3d 41 (2d Cir. 2008). The student, a member of the student council, had been prohibited from running for student council again because of a blog post she had written criticizing school officials for allegedly cancelling "Jamfest," an annual student concert. Despite the fact that the blog entry was written and published off-campus, the Second Circuit found that the student's punishment was properly analyzed under *Tinker* because it was "reasonably foreseeable that [the student's] posting would reach school property." *Id.* at 50. Characterizing the volume of calls and emails received by two school officials in response to the student's blog post as sufficient evidence of "a foreseeable risk of substantial disruption" to satisfy *Tinker*, the Second Circuit found that the student's punishment did not violate the First Amendment. *Id.* at 53.

In sum, the student was punished for effective advocacy.

The Second Circuit purported to recognize the need for judicial clarity, proclaiming itself to be "acutely attentive in this context to the need to draw a clear line between student activity that 'affects matter of legitimate concern to the school community,' and activity that does not." *Id.* at 48. (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in the result). It noted pointedly that it was "not called upon . . . to decide whether the school officials in this case exercised their discretion wisely," granting that "[e]ducators will inevitably make mistakes." *Id.* at 54. The court further understood the ubiquity of online communication, recognizing that students both on- and off-campus routinely engage in "expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication." *Id.* at 49.

Nevertheless, the rule affirmed by the Second Circuit in *Doninger* effectively provides would-be student speakers with no protection at all from the long arm of school authorities. Today, *all* off-campus student speech posted online might "foreseeably" be accessed by administrators in school; like more than 70% of all Americans, students and administrators use social media.[39] When speech that might "reach school property" is subject to *Tinker*, all online speech posted off-campus is subject to *Tinker*. *Id.* at 50. Under this

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[39] *See Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media (finding that "72% of the public uses some type of social media").

broad rule, speakers like the student council member in *Doninger* are taught an illiberal lesson about the risk of peacefully protesting decisions made by governmental authorities.

Other circuits have failed to improve on the Second Circuit's rule, offering no greater clarity to student speakers as to when their off-campus speech may lawfully be punished by public school administrators. For example, the Eighth Circuit has followed the lead of the Second Circuit. *See, e.g.*, *S. J. W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012) ("*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting."). The Fourth Circuit employs a close variant, analyzing off-campus speech under *Tinker* when the "nexus" of the student speech to the school's "pedagogical interests" is "sufficiently strong" to "justify the action taken" by school officials. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011). And the Ninth Circuit has declined to choose between the two, instead applying both the "nexus" and "reasonable foreseeability tests." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150 (9th Cir. 2016). Regardless of phrasing, the practical impact of each of these rules is the same: When students speak online or off-campus, they do so at their own risk.

Another circuit has epitomized the confusion by choosing not to adopt a cognizable rule at all. In *Bell v. Itawamba County School Board*, the Fifth Circuit found that a public high school's punishment of a student for a rap song he had recorded and posted on YouTube outside of school grounds did not violate the student's First Amendment rights. 799 F.3d 379 (5th

Cir. 2015) (en banc). The song criticized school gym instructors for allegedly sexually harassing female students. Because it found that the student had "intended his rap recording to reach the school community," the court determined that *Tinker* governed its consideration of the student's speech. *Id.* at 396.

In its analysis, the Fifth Circuit majority expressed concern about the "differing standards applied to off-campus speech across circuits," remarking that the confusion had "drawn into question the scope of school officials' authority." *Id.* at 392. But the court nevertheless expressly declined to adopt "a specific rule" about the limits of public grade school administrators' authority, finding instead only that "*Tinker* applies to off-campus speech in *certain situations*." *Id.* at 394 (emphasis added). Despite its stated concern about the unclear limits of schools' disciplinary authority, the Fifth Circuit effectively committed itself to *ad hoc* determinations about *Tinker*'s off-campus reach moving forward, proclaiming that "because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits." *Id.* at 396.

The Fifth Circuit's *ad hoc* approach is worse than no rule at all. As the dissent correctly recognized, it "fails to provide constitutionally adequate notice of when student speech crosses the line between permissible and punishable off-campus expression." *Id.* at 405 (Dennis, J., dissenting). Without a bright line, school authorities may pick and choose which off-campus student speech is subject to discipline—an unchecked power that "encourage[s] school officials to

silence student speakers, like [Respondent B.L.], solely because they disagree with the content and form of their speech, particularly when such off-campus speech criticizes school personnel." *Id.* at 405–06. In other words, "I know it when I see it" does not work in the school context, either.

The current judicial confusion regarding off-campus speech now stems beyond *Tinker*'s primary focus on speech that disrupts school operations. *Tinker* also permits school administrators to regulate speech that results in the "invasion of the rights of others." 393 U.S. at 513. This clause has been read so broadly as to permit school administrators to punish students for "minimally-disruptive, untargeted speech" shared amongst friends in a private Snapchat group that the allegedly harmed student did not know about and had not read. *Doe v. Hopkinton Pub. Schs.*, No. 19-11384-WGY, 2020 U.S. Dist. LEXIS 173127, at *28 (D. Mass. Sep. 22, 2020). Under the Third Circuit's rule, this speech would properly be beyond the reach of school administrators. But without clarity from this Court, it is easy to imagine it as an early harbinger of claims to come.

The dissenting Fifth Circuit judges in *Bell* were right to be concerned about the impact of granting broad authority over student speech to school administrators, and their warning has proved apt. As demonstrated by the examples in Section I, *supra*, judicial uncertainty about the limits of a public school's jurisdiction over off-campus speech has empowered school administrators to monitor and punish off-campus and online student speech nationwide. Permitting expansive government control of off-campus student speech removes *Tinker* from its moorings.

B. Limitless School Surveillance Betrays *Tinker* and Violates the First Amendment.

Public schools do not possess boundless jurisdiction over student speakers. A public school may regulate student speech under *Tinker* and its progeny only after a student crosses through *Tinker*'s "schoolhouse gate," at which point First Amendment rights are "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. On school premises, a public school may regulate certain student speech "even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist.*, 484 U.S. at 266.

School administrators are granted this leeway within their walls because of their "custodial and tutelary responsibility" for students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). When students are participating in school activities, school administrators are "acting *in loco parentis*, to protect children," *Fraser*, 478 U.S. at 684, and facilitating "a supervised learning experience." *Hazelwood Sch. Dist.*, 484 U.S. at 270. Given these responsibilities, *Tinker* permits school administrators a freer hand to regulate otherwise protected speech that causes or is reasonably likely to cause "disturbances or disorders *on the school premises*." *Tinker*, 393 U.S. at 514 (emphasis added).

But just as the school day ends, so too must a school's jurisdiction over student speech. When students are off-campus and on their own time—when there is no lesson being taught, nor supervisory control being exercised—public schools do not possess the

same justification for regulating student expression that they do when class is in session. The "special features of the school environment" are no longer present. *Morse*, 551 U.S. at 425 (Alito, J., concurring). Holding otherwise "obliterates the historically significant distinction between the household and the schoolyard by permitting a school policy to supplant parental authority over the propriety of a child's expressive activities on the Internet outside of school, expanding schools' censorial authority from the campus and the teacher's classroom to the home and the child's bedroom." *Bell*, 799 F.3d at 404 (Dennis, J., dissenting).

The Third Circuit's ruling astutely recognized this jurisdictional limitation in holding 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." *B.L.*, 964 F.3d at 189. To hold otherwise is to deny students the space needed to actually exercise their First Amendment rights. As one of the students punished for his off-campus "zombie apocalypse" joke stated, "When I was pulled into the principal's office for something I shared with my friends privately, outside of school, over a weekend, it felt like I had no place where I could truly speak freely."[40]

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[40] Amanda Oglesby & Hartriono B. Sastrowardoyo, *ACLU sues Lacey schools for students' gun rights*, ASBURY PARK PRESS (Apr. 11, 2019), https://www.app.com/story/news/education/2019/04/10/aclu-sues-lacey-schools-students-gun-rights/3427480002.

The clarity of the Third Circuit's decision distinguishes it from the confusion sown by other circuits and provides students and administrators a proper education in the First Amendment.

C. The Third Circuit's Ruling Restores *Tinker*'s Bright Line and Properly Educates Students and Administrators about the Power of Free Expression and the Limits of Government Authority.

The Third Circuit's holding restores *Tinker*'s bright line. It is a comprehensive and necessary response to the troubling willingness of other circuits to stretch *Tinker* past its breaking point and render off-campus student speech subject to punishment, simply because it occurs online. By demarcating the boundaries of school authority, the Third Circuit recognizes that "*Tinker*'s focus on disruption makes sense when a student stands in the school context"—but not when she stands off-campus, where her speech's "effect on the school environment will depend on others' choices and reactions." *B.L.*, 964 F.3d at 189. This clear delineation properly respects student rights and benefits students and administrators. "To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when not." *Id.*

When public grade school students express themselves off-campus and outside the *in loco parentis* control of school administrators—again, as in the case at hand—the "special characteristics of the school environment" are not implicated. *Tinker*, 393 U.S. at 506. Accordingly, *Tinker*'s test does not govern this speech. Again, because "[s]tudents in school *as well as*

out of school are 'persons' under our Constitution," off-campus student expression that does not fall into any recognized exception to the First Amendment is presumptively protected. *Id.* at 511 (emphasis added).

The Third Circuit's ruling does not require public school administrators to ignore student speech beyond its walls. Rather, it requires that student speech off-campus and online receive the same First Amendment protections afforded all citizens, and specifies that *Tinker*'s school-specific test for regulation does not apply. The Third Circuit properly reserved the question of "the First Amendment implications of off-campus student speech that threatens violence or harasses others." *B.L.*, 964 F.3d at 186. Speech that constitutes a true threat is not protected by the First Amendment either on- or off-campus. Likewise, discriminatory harassment, properly defined, is conduct that lies beyond the First Amendment's protection and may be subject to punishment.[41]

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[41] But caution and precision is needed here, too. In the context of peer-on-peer sexual harassment, for example, this Court has made clear that for liability to attach under the federal anti-discrimination statute Title IX, "the harassment must take place in a context subject to the school district's control." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999). Federal regulations governing Title IX also require institutions to respond to sexual harassment that occurs in programs or activities over which they have control. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106), https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal ("A (...continued)

A public school "is not permitted to punish a student merely because her speech causes argument on a controversial topic." *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 32 (1st Cir. 2020). But given the demonstrated willingness to censor political or dissenting student speech, this Court can safely conclude that authorities granted broad power to regulate off-campus speech will misuse it for ideological purposes. If this Court extends *Tinker* off-campus, administrators will construct claims of "foreseeable disruption" or the "invasion of the rights of others" to justify punishing merely unpopular or dissenting student expression. This danger is particularly acute in our polarized political moment, when partisan speakers on both sides of our country's ideological divide are willing to conflate speech they oppose with violence or threats to physical safety.[42] *Amicus* FIRE regularly sees such claims made about core political speech on college campuses.[43] As then-Circuit Judge Alito observed two decades ago: "The Supreme Court has held

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recipient with actual knowledge of sexual harassment *in an education program or activity of the recipient* against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.") (emphasis added).

[42] *See, e.g.,* Suzanne Nossel, *No, hateful speech is not the same thing as violence,* WASH. POST (June 22, 2017), https://www.washingtonpost.com/outlook/no-hateful-speech-is-not-the-same-thing-as-violence/2017/06/22/63c2c07a-5137-11e7-be25-3a519335381c_story.html (providing examples); Jonathan Zimmerman, *College Campuses Should Not Be Safe Spaces*, CHRON. OF HIGHER ED. (Jan. 17, 2019), https://www.chronicle.com/article/College-Campuses-Should-Not-Be/245505 (same).

[43] *See*, *e.g.*, Robby Soave, *Santa Clara University Student Government Won't Recognize YAF, Says Conservative Speakers Make*

(...continued)

time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001). It should do so again now, especially with respect to off-campus or online student speech.

Students who come of age with the ever-present threat of government discipline simply for expressing their thoughts on their own time will learn a debilitating lesson about their rights. With their every statement away from campus monitored and potentially subject to punishment, students will be denied an opportunity to explore, to make mistakes, to evolve, and to learn the full power of the First Amendment's protection against government overreach. Having grown up in a surveillance state, they may come to replicate and reinforce its methods, reporting other students to government authorities for unpopular, dissenting, or simply offensive speech, even speech uttered years ago.[44] This Court should reaffirm

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Campus 'Unsafe', REASON (June 10, 2019), https://reason.com/2019/06/10/santa-clara-university-yaf-students (student government member argues that visit by commentator Ben Shapiro would cause "emotional harm"). Attributing emotional harm to non-political speech is also common on campus. *See*, *e.g.*, Layla Peykamian, *Column: Is your favorite sitcom problematic?*, DAILY TARHEEL (Oct. 27, 2020), https://www.dailytarheel.com/article/2020/10/opinion-problematic-sitcoms-1028 (arguing that sitcoms like "The Office" contain jokes that cause "emotional harm to those they target").

[44] This is already happening. *See, e.g.,* Dan Levin, *A Racial Slur, a Viral Video, and a Reckoning*, N.Y. TIMES (Dec. 26, 2020), (...continued)

Tinker's crucial observation: "School officials do not possess absolute authority over their students. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." 393 U.S. at 511.

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https://www.nytimes.com/2020/12/26/us/mimi-groves-jimmy-galligan-racial-slurs.html (detailing one student's decision to release a video of another student using a racial slur in 2016 in order to discredit her 2020 support for the Black Lives Matter movement and resulting in severe consequences, including her withdrawal from the University of Tennessee).

CONCLUSION

For the above reasons, and those presented by Respondent, this Court should affirm the Third Circuit's ruling.

Respectfully submitted,

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