No. 20-255

IN THE

Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,

Petitioner,

—v.—

B. L., A MINOR, BY AND THROUGH HER FATHER, LAWRENCE LEVY, AND HER MOTHER, BETTY LOU LEVY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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INTRODUCTION

This case is about the free speech rights of young people *outside of school*—at church, during weekend protests, at home, or, as in this case, at a local convenience store with a friend on a Saturday afternoon. Outside of the school environment, young people have the right to find their voices without being unduly chilled, their parents have the right to manage their upbringing, and others have the right to hear what they have to say.

Petitioner seeks to change that. It would take *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), where this Court has never gone. In its view, *Tinker*'s rule, which permits schools to punish speech if listeners might react disruptively, would become not just something young people must endure at school, but a constant feature of their lives. It would subject young people to *Tinker*'s vague "disruption" standard 24 hours a day, 365 days a year, deterring them from saying anything that school authorities might deem controversial, critical, or politically incorrect, and therefore disruptive. Petitioner's only limitation, that the speech be "directed" to the school and reasonably likely to reach it, is defined so broadly that it would encompass all speech to another student, no matter its content, *and* all content that is school-related. For young people—whose contacts are primarily classmates and for whom school affairs are a frequent topic—that is no limit at all.

Petitioner's contention that its proposed rule would reach the speech at issue here illustrates the remarkable sweep of its approach. B.L. posted an expression of frustration after learning she did not

make her school's varsity cheerleading team. The post was neither threatening nor harassing. She created it while at a local convenience store on a Saturday afternoon and posted it to Snapchat, a platform from which posts irretrievably disappear after 24 hours. She shared it only with her Snapchat "friends," all of whom had agreed to receive her posts. The school admitted that her post did not disrupt any school activity, but it nonetheless asserts that punishing B.L. for her speech was constitutional.

Tinker and the "school speech" cases that followed constitute a carefully cabined exception to the First Amendment's limits on governmental authority to engage in content- and viewpoint-based censorship. They authorize the school to regulate students' speech within the "school environment"—on school grounds, traveling to and from school, at school-sponsored or -supervised activities—in ways that the government cannot otherwise regulate expression. In these contexts, schools are responsible for their students' care, and other students are often a captive audience. Within the school environment, therefore, schools can and do punish speech because others find the message offensive and disagreeable if it is likely that the hecklers will create "substantial disruption." But this restriction on speech is acceptable only because, outside that environment, young people are free from such censorship.

Petitioner and the United States erect a straw man by claiming that the decision below requires schools to "ignore" speech that occurs outside school and deprives schools of any "authority" over off-campus speech. Pet.Br. 3; U.S.Br. 7. That is doubly false. First, the court below expressly "reserv[ed] for another day . . . speech that threatens violence or

harasses others" outside of school, and held only that *Tinker* does not govern "off-campus speech *not* implicating that class of interests." Pet.App. 25a, 35a. And second, even as to nonharassing and nonviolent speech, the court did not "[f]orbid[] schools from addressing off-campus speech." Pet.Br. 12. It simply held that when regulating such speech, schools must satisfy traditional First Amendment standards. Pet.App. 34a–35a.

Those traditional First Amendment standards permit schools to regulate threats, harassment, bullying, cheating, and other prohibited conduct when they take place off-campus but have an effect on the school. Extending the blunt instrument of *Tinker* is thus unnecessary to address these problems. The fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

STATEMENT

A. Factual Background

On Saturday, May 27, 2017, Respondent B.L. went to a local convenience store with a friend. A 14-year-old freshman at Mahanoy Jr./Sr. High School, B.L. had recently learned that she had not made the school's varsity cheerleading team and would remain on the junior varsity team. She had also failed to get the position she wanted on her local softball team, and was anxious about her upcoming final exams. J.A. 24–25. Frustrated and upset, she typed the words at the

center of this dispute—"Fuck school fuck softball fuck cheer fuck everything"—on her personal cell phone. Pet.App. 5a; J.A. 20, 46 n.8. She then posted the words, with a photo of herself and her friend extending their middle fingers, to Snapchat, a social media platform from which such posts, colloquially known as "Snaps," disappear irretrievably after 24 hours. Pet.App. 5a & n.1, 51a.[1]

B.L. shared the Snap only with a select group of "friends" who voluntarily agreed to receive them. She used Snapchat for spontaneous communication with her friends, in the same way she would talk to them if they were together in person outside of school. J.A. 23. She knew the Snap would disappear from the platform on Sunday, long before school resumed. J.A. 27.

That should have been the end of the matter. But unbeknownst to B.L., another cheerleader, not among those who had signed up to receive B.L.'s Snaps, learned of the Snap and shared a screenshot of it with her mother, one of two cheerleading coaches at the school. J.A. 113.[2]

The cheerleading coaches suspended B.L. from the team for her entire sophomore year. Pet.App. 2a.

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[1] B.L. posted a second Snap shortly after the Snap at issue—"Love how me and [another student] get told we need a year of jv before we make varsity but that's [sic] doesn't matter to anyone else? 🙃"—but the school disclaimed any reliance on it for her punishment. Pet.App. 5a; J.A. 54–61, 87–88.

[2] Respondent's Brief in Opposition to the Petition for Certiorari mistakenly stated that the coach's daughter was one of B.L.'s Snapchat "friends." Br. Opp. at 2–3. In fact, the record demonstrates that she did not receive B.L.'s Snaps and learned of the Snap from another student.

The coaches claimed that B.L.'s use of profanity in the Snap in connection with the word "cheer" violated two "cheerleading rules." J.A. 35, 54–55. The first requires that students "have respect for your school, coaches, teachers, other cheerleaders and teams . . . when at games, fundraisers, and other events" and prohibits "unsportsmanlike conduct," including "foul language and inappropriate gestures." Pet.App. 51a; J.A. 17. The second states that "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." Pet.App. 51a; J.A. 18.

The School District asserted that B.L. also violated the school's "Personal Conduct Rule," which provides that "during the sports season," members of cheerleading and sports teams must "conduct[] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." J.A. 56.

The cheerleading coaches admitted that the Snap caused no disruption beyond brief questions by other students who were "upset" and wanted to know what would happen to B.L. J.A. 82–84, 90. The coaches also testified that "electronic squabbling amongst cheerleaders . . . 'is a fairly typical occurrence.'" Pet.App. 52a. Coach Nicole Luchetta-Rump testified that "she punished B.L. for profanely referencing cheerleading, not because of any possibility of disruption." Pet.App. 74a.

B.L.'s parents asked the principal and the school board to reconsider, but they both declined. Pet.App. 52a; J.A. 59–61.

B. Procedural History

B.L. and her parents filed suit against the Mahanoy Area School District ("School District" or "Petitioner") on September 25, 2017. The district court issued a temporary restraining order the next day restoring B.L. to the team.

After an evidentiary hearing, the district court granted a preliminary injunction. The School District "made no argument that the Snap . . . would substantially disrupt the operation of the school" and instead "solely relie[d] upon [B.L.'s] use of profanity," invoking *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). J.A. 45 n.7. The district court concluded that B.L. was likely to succeed on the merits because "*Fraser*'s profanity exception . . . does not apply to off-campus speech and Plaintiff B.L.'s speech cannot be considered on-campus speech." J.A. 50.

At the summary judgment stage, the School District again argued that B.L.'s punishment "is supported by the profanity exception to *Tinker* found in [*Fraser*]." Reply Br. Supp. Def.'s Mot. for Summ. J. at 1, ECF No. 55, 3:17-cv-1734 (M.D. Pa. Feb. 22, 2019). The district court granted B.L. summary judgment. Pet.App. 68a. It held that *Fraser* did not apply off-campus, and noted that the only evidence of "disruption" consisted of student concerns over B.L.'s Snaps and an admittedly brief disruption of Coach Luchetta-Rump's math class," and held that "[s]uch general rumblings do not amount to substantial disruption" under *Tinker*. Pet.App. 73a (internal quotations omitted). The court ordered the School District to expunge any record of its disciplinary action and awarded B.L. nominal damages.

The Third Circuit unanimously affirmed. As in the district court, the School District "principally defend[ed] its actions based on its power 'to enforce socially acceptable behavior' by banning 'vulgar'" words. Pet.App. 16a. The panel rejected that argument, agreeing with the district court that *Fraser* could not be extended to off-campus speech. Pet.App. 16a–21a.

It also rejected the School District's argument that B.L.'s suspension from the cheerleading team was justified under *Tinker*. The panel majority explained that *Tinker*'s disruption standard applies in "the school context," while B.L.'s speech occurred off-campus, outside school hours, not in a school-sponsored forum or at a school-sponsored event, and without any school imprimatur. Pet.App. 15a, 34a–35a.

The panel majority expressly "reserve[d] for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others." Pet.App. 25a, 34a–35a. It stressed that its "opinion takes no position on schools' bottom-line power to discipline speech in that category." *Id.* 35a. It held only that *Tinker* does not extend to "off-campus speech *not* implicating that class of interests." *Id.* To regulate such speech, the school "must answer to the same constitutional commands that bind all other institutions of government." Pet.App. 4a (internal quotations omitted).

Judge Ambro concurred in the judgment. He concluded that it was unnecessary to decide whether *Tinker* applied beyond the school because even assuming that it did, B.L.'s Snap "is not close to the

line of student speech that schools may regulate." Pet.App. 45a.

SUMMARY OF ARGUMENT

Outside of school, government may not penalize speech because listeners find it offensive or disagreeable. That principle, and the related prohibitions on content and viewpoint discrimination, apply equally where young people are involved. Inside school, however, under this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), authorities may punish any student speech that leads to, or might lead to, "substantial disruption"—even if the disruption is caused by others who find the idea expressed offensive or disagreeable. *Tinker* is thus a stark exception to the First Amendment's most fundamental rule, and one that the Court carefully confined to the "school environment"—in school, at school-sponsored or -supervised events, and when students are traveling between school and home. Petitioner here seeks to eliminate that limitation and to subject young people's speech *everywhere* to the reduced protection it receives within the school environment. The Court should not do so.

I. *Tinker*, like all of this Court's "school speech" cases, involves the regulation of speech "in school." It is justified by the "special characteristics of the school environment" and is limited to that setting. The cases that followed drew the same line. Thus, in school, authorities may regulate speech because it is lewd, expresses a pro-drug viewpoint, is deemed inappropriate for the school newspaper, or disruptive. But outside school, students may not be punished for lewd speech, speaking positively about drugs,

publishing an inappropriate article, or saying something that listeners object to in a "disruptive" manner.

The line the Court has drawn makes doctrinal sense. It is permissible to subject students to reduced protections in school because they have alternative channels to speak freely outside school. The *Tinker* standard is so open-ended that it would be unconstitutional if applied outside the school environment. Limiting its application to school also avoids interference with parents' authority over their children when they are not under school supervision. And it reflects the fact that students are a "captive audience" at school, but not elsewhere.

Unmooring *Tinker* would have far-reaching repercussions. *Tinker* has justified punishing students for wearing clothing at school that featured the Confederate flag, stated that "homosexuality is shameful," and claimed that the United States flag "flew over legalized slavery for 90 years." Schools have punished students for off-campus speech that includes posting pictures of themselves at a gun range and objecting to other students' use of racist language. *Tinker* permits censorship within the school if the school can show sufficient actual or potential disruption. But extending such censorial authority everywhere young people go would teach them exactly the wrong lesson.

Expanding *Tinker* is not necessary for schools to address off-campus threats, harassment, bullying, and other speech integral to proscribed conduct. Threats and speech integral to proscribed conduct are not protected. Moreover, these First Amendment categories may take account of the differences that age

or context make. That approach is both more narrowly tailored, and more faithful to precedent, than eviscerating the line that *Tinker* drew.

II. Petitioner's proposal to expand *Tinker* is not supported by any of the far-flung doctrines it invokes. Its proposed limitation to speech "directed" at and likely to reach the school is no limit at all, as it encompasses anything said to a classmate, regardless of topic, *and* anything said about the school, regardless of audience. Petitioner's assurance that its approach would not permit viewpoint discrimination is contrary to its own actions here, where it accuses B.L. of violating three expressly viewpoint-based rules. And as the many Confederate flag cases illustrate, *Tinker* itself permits speech to be suppressed because of its viewpoint if others might object to it in a disruptive way. Petitioner's suggestion that drawing a line between inside and outside school is unmanageable and arbitrary is belied by the fact that this Court drew precisely that line in each of its school-speech cases.

III. The United States agrees with B.L. that the vast majority of student speech outside school should not be subject to *Tinker* and properly rejects Petitioner's test as far too sweeping. Like B.L., it maintains that schools should have authority to regulate threats, harassment, and bullying. But the United States reaches that result in an ad hoc manner not grounded in existing speech doctrine, and proposes open-ended rules that would ultimately grant schools nearly as much unbounded censorial authority as the approach it rejects.

IV. If the Court decides to extend *Tinker*, it should limit its application to situations where students *intend* to cause substantial disruption.

V. Finally, as two judges below found, even if *Tinker* were applied full force to B.L.'s speech, she should prevail because her Snap caused nothing close to "substantial disruption."

I. APPLYING *TINKER* OUTSIDE OF SCHOOL WOULD SERIOUSLY UNDERMINE THE SPEECH RIGHTS OF YOUNG PEOPLE.

Petitioner does not dispute that, under traditional First Amendment principles, B.L. could not be punished for uttering a four-letter word. In Petitioner's view, however, that constitutional protection disappears if the utterance might be "disruptive" under *Tinker*. But *Tinker* is a narrow exception to bedrock First Amendment principles that applies only within the school environment—on school grounds, at school-sponsored or -supervised events, or on the way to and from school.

A. Outside the School Environment, Young People Have a First Amendment Right to Be Free from Content-Based Censorship.

At the heart of the First Amendment is the principle that content-based restrictions on speech are presumptively unconstitutional. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The First Amendment's "bedrock principle" provides that "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). For these reasons, the "heckler's

veto," which seeks to suppress speech because others react negatively to it, is anathema to our constitutional order. *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992).

These safeguards are "designed and intended to . . . put[ ] the decision as to what views shall be voiced largely into the hands of each of us," rather than the government. *Cohen v. California*, 403 U.S. 15, 24 (1971). In our system, redress for bad ideas comes through "discussion [of] the falsehood and fallacies" and "the processes of education"—"not enforced silence." *Johnson*, 491 U.S. at 419 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Government must therefore tolerate words and ideas that may be offensive to many—whether the speech offends because it criticizes public officials, espouses a dissenting view, or uses a four-letter word. "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures," *Cohen*, 403 U.S. at 26, including with words that are "spontaneous and emotional," *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982).

These principles apply to "content-based regulation[s] . . . [of] speech directed at children," "[e]ven where the protection of children is the object." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 804–05 (2011) (invalidating regulation of violent video games for minors); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975) (invalidating drive-in movies restriction designed to protect children); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997) (invalidating statute prohibiting indecent communications available to minors online).

The fact that a speaker is young "is reason for scrupulous protection of Constitutional freedoms of the individual." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). This is true whether the issue is the freedom to join a political march, to choose which religious services to attend, or to play violent video games. *Brown*, 564 U.S. at 795 n.3.

B. *Tinker* Is a Narrow Exception to the First Amendment's Prohibition on Content Discrimination and Is Limited to the School Environment.

Tinker established a narrow exception to the First Amendment's prohibitions on content discrimination and the bedrock principle that speech may not be punished because listeners are offended. *Tinker* allows schools to punish speech for its content when "the school authorities ha[ve] reason to anticipate that the [speech] would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 506, 509. But *Tinker* grants this authority only "in schools." 393 U.S. at 507.

Tinker's declaration that students do not "shed their constitutional rights to freedom of speech or expression *at the schoolhouse gate*" plainly distinguishes inside from outside school. *Id.* at 506 (emphasis added). And it presumes that young people generally have full First Amendment rights *outside* school. *Id.* at 506–07, 512–13. Recognizing the need of "school officials . . . to prescribe and control conduct *in schools*," *id.* at 507 (emphasis added), *Tinker* was expressly predicated on, and limited to, the "special characteristics of the school environment." *Id.* at 506.

A school's supervision of its students extends beyond "merely the classroom hours" to the whole "school environment," including "the cafeteria," "the playing field," and "campus during the authorized hours." *Id.* at 512–13. And the school environment includes "school-sanctioned and school-supervised event[s]," such as "class [field] trips," dances, or fairs; and in today's reality, remote learning. *See Morse v. Frederick*, 551 U.S. 393, 396, 400–01 (2007). But this list is notable for what it does *not* include: speech *outside* the school's supervision.[3]

Each of the Court's three post-*Tinker* school-speech cases reaffirms that their restrictions on speech are limited to the "special characteristics of the school environment." It is no accident that the Court calls these precedents the "*school* speech" cases; they turn on the speech taking place under school supervision. *Morse*, 551 U.S. at 401. They establish that "schools may regulate some speech in the school '*even though the government could not censor similar speech outside the school.*'" *Morse*, 551 U.S. at 401 (emphasis added).

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[3] Schools generally have supervisory responsibility and operate *in loco parentis* for students during school hours and when they are traveling to and from school. *See, e.g.*, 24 Pa. Stat. and Cons. Stat. Ann. § 5-510 (authorizing school boards to regulate students "during such times as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school"); La. Rev. Stat. § 17:416 (similar); Tenn. Code Ann. § 49-6-4102 (similar); Va. Code Ann. § 22.1-78 (similar). The principle is longstanding. *See, e.g.*, *Deskins v. Gose*, 85 Mo. 485, 487 (1885) (upholding school's discipline of students because the acts were done "while the pupils are returning to their homes, and before parental control is resumed").

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), for example, the Court upheld the *content-based* suspension of a student for delivering a lewd speech at a "required" student assembly because it was "part of a school-sponsored educational program." *Id.* at 677. The Court reasoned that schools may define "what manner of speech [is appropriate] *in the classroom or in school assembly*," "especially [when students are] in a captive [and unsuspecting] audience." *Id.* at 683, 684, 685 (emphasis added). "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405.

The same distinction was dispositive in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). There, the Court permitted the school to engage in *content-based* censorship of a school newspaper because it was a "regular classroom activity" and "supervised learning experience" "during regular class hours." *Id.* at 268, 270. But "'the government could not censor similar speech *outside the school.*'" *Morse*, 551 U.S. at 406 (quoting *Kuhlmeier*, 484 U.S. at 266). The *Kuhlmeier* Court expressly distinguished efforts to control young people's speech in "streets, parks, and other traditional public forums," *Kuhlmeier*, 484 U.S. at 267, as well as in independently produced underground newspapers, *id.* at 271 n.3 (distinguishing *Papish v. Univ. of Mo. Bd. of Curators*, 410 U.S. 667, 670–71 (1973)); *see also Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (holding that high school could not rely on *Tinker* to punish students for contents of an off-campus, underground paper).

In *Morse,* the Court drew the same line. It upheld the *viewpoint-based* discipline of a student for displaying a pro-drug message because the speech took place at "an approved social event or class trip" that "occurred during normal school hours" and at which teachers were "charged with supervising [students]." 551 U.S. at 400–01. Had Joseph Frederick displayed the same sign from his bedroom window or on his personal Facebook page, he could not have been punished. *Id.* at 409 (limiting holding to "student advocacy of illegal drug use *at school events*") (emphasis added).

As noted in *Morse*, *id.* at 406, Fourth Amendment doctrine draws a similar line. In "the school setting," authorities are permitted to search students' possessions on reasonable suspicion, without a warrant. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), But a school plainly could not conduct warrantless searches of young people's backpacks at home, at church, or elsewhere outside the school environment. "Fourth Amendment rights . . . are different *in public schools than elsewhere*" because of "the schools' custodial and tutelary responsibility for children." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (emphasis added).[4]

In short, the Court's "school speech" cases involve, as the name suggests, speech "in school," at "school events," and in "school-sanctioned and -

[4] Petitioner suggests that the Court's school drug-testing cases imply that reduced Fourth Amendment rights extend beyond the school environment because a drug test might conceivably be administered outside school. Pet.Br. 24. But in both cases, the urine samples were taken at school. *Vernonia Sch. Dist. 47J.* , 515 U.S. at 650; *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 832 (2002).

supervised forums." *Morse*, 551 U.S. at 396, 405. Where schools exercise supervisory responsibility, school authorities may engage in content- and even viewpoint-based discrimination. But outside the school environment, the state presumptively may not regulate speech on the basis of its content, even if it expresses a message the school disapproves of, uses profanity, or causes listeners to object in a disruptive way.

C. Limiting *Tinker* to the School Environment Makes Doctrinal Sense.

There are sound reasons for the Court's careful limitation of *Tinker* and its progeny to speech within the school environment. First, empowering schools to engage in content censorship within the school is tolerable only because young people *outside* that environment are not so limited. By confining the state's authority to engage in content discrimination to the school, the rule "'leave[s] open ample alternative channels'" for free speech. *McCullen v. Coakley*, 573 U.S. 46, 477 (2014) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791(1989)).

Second, the *Tinker* standard is inescapably vague, making it an unacceptable basis for regulating speech in the world at large. Neither of *Tinker*'s prongs—"substantial disruption" or "interference with the rights of others"—provide sufficient guidance for what speech is allowed outside school. Were a town to enact an ordinance prohibiting speech that "leads to substantial disruption or interferes with the rights of others," it would be unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (a prohibition that turns on a listener's reaction is

"vague . . . in the sense that no standard of conduct is specified at all"). The "substantial disruption" prong permits punishment of literally *anything* one says if it leads to "substantial disruption," or even the likelihood thereof.

Much like the "outrageousness" standard invalidated in *Snyder v. Phelps*, "substantial disruption" is a "highly malleable standard with an inherent subjectiveness about it which would allow [school officials] to impose liability on the basis of … [administrators'] dislike of a particular expression." 562 U.S. 443, 458 (2011) (internal quotations and citations omitted). The *Tinker* Court deemed such an open-ended standard, and its attendant risks, necessary *within the school*. But outside school, "[s]uch a risk is unacceptable; in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Snyder*, 562 U.S. at 458 (internal quotations and citation omitted).

Third, confining *Tinker* to the school environment avoids intrusion on parents' "authority in their own household to direct the rearing of their children." *Reno*, 521 U.S. at 864—65; *Meyer v. Nebraska*, 262 U.S. 390 (1923). "It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities." *Morse*, 551 U.S. at 424 (Alito, J., concurring). Attempts to "impose *governmental* authority" on "children's speech and religion" based on "what the State thinks parents *ought* to want" undercuts these rights. *Brown*, 564 U.S. at 795 n.3, 804. Thus, the Court has previously rejected laws that

could disturb the authority of a parent to "allow[ ] her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate." *Reno*, 521 U.S. at 878. While parents necessarily cede *in loco parentis* authority to schools when their children are at school, they regain those rights when their children return home.

Finally, confining *Tinker* to the school environment reflects the fact that schools have greater leeway to regulate speech in school in part because students are a "captive audience." *Fraser*, 478 U.S. at 683–84; *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209–10 (3d Cir. 2001) (Alito, J.) (speech may be more readily subject to restrictions when a school or workplace audience is "captive"). Petitioner objects that students are captive only in the classroom, Pet.Br. 21–22, but "children are just as much of a captive audience in the hallways, cafeteria, or locker rooms as they are in official school assemblies and classrooms." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 307 n.14 (3d Cir. 2013) (en banc).

D. Expanding *Tinker* Beyond the School Environment Would Radically Undermine Young People's Freedom of Speech.

A brief review of *Tinker* cases arising *within* the school environment illustrates the dangers of giving schools the same censorial authority outside of school. Under *Tinker*, courts have sustained discipline of students within school for:

- Wearing a shirt stating, "homosexuality is shameful. Romans 1:27;"[5]
- Quoting scripture and distributing small rubber dolls along with cards stating that they "represented the actual size and weight of a '12 week old baby;'"[6]
- Wearing shirts that read "We Are Not Criminals" to protest an immigration bill;[7]
- Wearing a shirt that displayed the American flag and stated "Old Glory Flew over legalized slavery for 90 years;"[8]
- Displaying a Confederate flag,[9] drawing a Confederate flag,[10] wearing clothing depicting the Confederate flag,[11] and wearing clothing that stated "Our School

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[5] *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171, 1179 (9th Cir. 2006), *cert. granted, judgment vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

[6] *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 30–31, 38 (10th Cir. 2013).

[7] *Madrid v. Anthony*, 510 F. Supp. 2d 425, 428, 435–36 (S.D. Tex. 2007).

[8] *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 440 (4th Cir. 2013).

[9] *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1247–49 (11th Cir. 2003).

[10] *West v. Derby Unified Sch. Dist.* No. 260, 206 F.3d 1358, 1361, 1366–67 (10th Cir. 2000).

[11] *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 329, 333–36 (6th Cir. 2010); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 217, 222 (5th Cir. 2009).

Supports Freedom of Speech for All (Except Southerners);"[12]

- Signing a petition stating that football players did not want to play for their coach after he was accused of abusing players;[13] and
- Wearing a University of San Diego sweatshirt and Los Angeles Lakers and Dodgers jerseys.[14]

It may sometimes be permissible to bar a student from wearing a shirt displaying the Confederate flag in school, but surely schools should not be able to penalize students for posting such an image on their Facebook pages. Under Petitioner's test, every one of these examples would be equally subject to punishment if communicated to a classmate outside school and students in school responded (or even were likely to respond) in a disruptive manner.

Most students and families do not have the means to litigate such disputes. In recent incidents that never reached litigation, or did not result in a reported decision, schools have disciplined students for the following:

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[12] *Hardwick*, 711 F.3d. at 431, 437–38 (4th Cir. 2013); *see also B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 737, 739–41 (8th Cir. 2009).

[13] *Lowery v. Euverard*, 497 F.3d 584, 585, 593 (6th Cir. 2007).

[14] *Jeglin ex rel. Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461, 1462 (C.D. Cal. 1993).

- Posting a photo and video to Twitter showing how crowded school hallways were in the middle of the COVID-19 pandemic;[15]
- Wearing a shirt that said "All the Cool Girls are Lesbians;"[16]
- Wearing shirts stating "abortion kills kids;"[17]
- Criticizing another student for sending racist messages;[18]
- Criticizing classmates for posting a video in which they pumped a shotgun and asked who is "ready to go [N-word] hunting?;"[19] and
- Posting photos on Snapchat depicting a weekend trip to a gun range, with guns that

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[15] 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.

[16] Catherine J. Ross, *Lessons in Censorship* 139 (2015).

[17] *Id.*; *Anti-abortion T-shirts at Center of School Argument*, Sioux City Journal (Apr. 30, 2005), https://siouxcityjournal.com/news/state-and-regional/anti-abortion-t-shirts-at-center-of-school-argument/article_b9d3cf1a-fa5c-5a63-927d-af749ca7bb99.html.

[18] *ACLU Urges Shaker Heights High School to Reverse Decision to Punish Students for Free Speech*, ACLU (Nov. 14, 2016), https://www.acluohio.org/archives/press-releases/aclu-urges-shaker-heights-high-school-to-reverse-decision-to-punish-students-for-free-speech?c=174534.

[19] Alissa Widman, *Racially Charged Video Leads to Discipline for 3 Pickerington Central Students*, The Columbus Dispatch (Apr. 13, 2016),https://www.dispatch.com/article/20160412/NEWS/304129851.

were legally purchased and properly licensed.[20]

Students understandably have to curtail what they say within the school environment. But they should not risk school discipline for what they say on a spring break mission trip with their church youth group, or in a friend's living room at a weekend gathering, merely because the school thinks it might be "disruptive."

The Internet does not justify *Tinker*'s expansion beyond the school environment. None of the tests proposed by Petitioner or its *amici* are limited to online communications, nor is there any principled basis for doing so. And even if the school's censorial authority were so limited, it would come at too great a cost. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno*, 521 U.S. at 868).

Restricting young people's speech would also inevitably infringe on the rights of those who want to hear what they have to say, including adults. "In order to deny minors access to potentially harmful speech, [Petitioner's rule would] effectively suppress [] a large amount of speech that adults have a constitutional right to receive." *Reno*, 521 U.S. at 874.

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[20] Robby Soave, *High School Suspends 2 Students for Posting Gun Range Photos on Snapchat, ACLU Files Suit*, Reason (Apr. 11, 2019), https://reason.com/2019/04/11/high-school-gun-snapchat-suspension-aclu/.

Expanding *Tinker* could also make school administration even more challenging by creating an expectation that principals will monitor and adjudicate controversial student speech 24 hours a day, 365 days a year. And it could prompt schools to conduct dragnet online surveillance of their students' off-campus and online communications, further deterring students from speaking freely outside of school.

Finally, and perhaps most importantly, Petitioner's rule would teach students the wrong lesson. As *Tinker* itself said, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)). But expanding *Tinker* to speech outside the school environment would teach young people to avoid saying anything that might be controversial, politically incorrect, or critical of the status quo, for fear of governmental retribution.

E. Limiting *Tinker* to the School Environment Would Not Prevent Schools from Addressing Off-Campus Harassment, Bullying, Threats of Violence, and Other Harmful Conduct.

Reaffirming that *Tinker* is limited to the "special characteristics of the school environment," 393 U.S. at 506, would not preclude schools from addressing off-campus threats of violence,

harassment, bullying, or a host of other speech integrally related to proscribed conduct.

Outside the school environment, the First Amendment permits regulation of comparable categories of speech, even as to adults. For example, "true threats" are not protected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003). Nor are several other "well-defined and narrowly limited classes of speech"—namely "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *see also United States v. Alvarez*, 567 U.S. 709, 719, *id. at* 734–36 (Breyer, J., concurring) (2012) (recognizing that false speech that causes harm can be prohibited under certain circumstances). In addition, First Amendment doctrines permit attention to "contextual factors," *Black,* 538 U.S. at 367 (plurality), and allow for "adjust[ing] the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children." *Brown*, 564 U.S. at 794; *see also Ginsberg v. New York*, 390 U.S. 629, 638–39 (1968). The way to do that, however, is not through a blunderbuss, one-size-fits-all expansion of *Tinker*, but via doctrines narrowly tailored to the specific concerns presented.

Schools can punish off-campus student speech that threatens the security of the school or its members by looking to the "true threats" doctrine. And that doctrine permits recognition that a statement that would not threaten an adult may nevertheless be threatening to a child.

Speech constituting harassment and bullying can also be regulated without expanding *Tinker*, as

speech integral to prohibited conduct. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). State and federal law have long prohibited discrimination and harassment, including through speech. *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (upholding against First Amendment challenge a conviction for violation of federal cyberstalking law). And Titles VI, VII and IX proscribe discriminatory harassment—including through speech that creates an objectively hostile work or school environment.

The First Amendment does not bar such regulation. *See R.A.V. v. City of Saint Paul*, 505 U.S. 377, 389 (1992) (recognizing that "words may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices" without violating the First Amendment). These standards, too, may take account of age and context. Whether conduct is sufficiently serious to constitute discrimination "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (internal quotations omitted). Those factors can include the victim's age. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999). Thus, schools can respond to a lower threshold of harassing behavior than an employer could, for example, for communications between adults. [21]

[21] There are, of course, both statutory and First Amendment limits on what can be proscribed in particular applications of such authority. But as this case does not involve harassment, bullying, or any illegal conduct, those questions are not presented here.

For the same reason, schools may also discipline students for aiding and abetting violations of school regulations of conduct. "That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality." *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (rejecting First Amendment challenge to injunction prohibiting aiding and abetting illegal blockades of abortion clinics); *United States v. Bell*, 414 F.3d 474, 483–84 (3d Cir. 2005) (upholding injunction against aiding and abetting tax fraud).[22]

Thus, because the First Amendment permits schools to regulate all of the above and may afford schools more leeway to do so than the state has with respect to adults, expanding *Tinker* is unnecessary to give schools the tools they need.[23] Here, as elsewhere when freedom of speech is at stake, the Court should be hesitant to expand the state's authority to engage in content-based discrimination. The nuanced,

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[22] Because this category permits regulation of speech integral to prohibited *conduct*, it does not permit regulations of pure speech, such as Petitioner's rule barring the posting of "negative information" on the Internet. But rules barring cheating, hacking, harassment, bullying, and the like regulate conduct, and in appropriate circumstances can encompass speech integral to that conduct.

[23] Petitioner and some *amici* argue that the Court should expand *Tinker* because otherwise school officials will be in the unfair position of being liable both if they fail to respond adequately to bullying or harassment, and if they violate the First Amendment in their response. Pet. Br. 36. But public schools and employers are already obligated to take action to avoid discrimination, for example, but also not to transgress the First Amendment (or any other constitutional limitation) in doing so. The doctrine of qualified immunity ensures that no official will be liable absent violation of a "clearly established" constitutional right. *Anderson v. Creighton*, 483 U.S. 635 (1987).

category-by-category approach that existing doctrine permits ensures that schools can address specific areas of concern, in a tailored way, without expanding the blunt instrument of *Tinker*.

II. PETITIONER'S PROPOSED EXPANSION OF *TINKER* IS NOT JUSTIFIED BY PRECEDENT, AND CONTAINS NO PRINCIPLED LIMIT.

Petitioner's proposed expansion of *Tinker* is not supported by any of the wide-ranging doctrines it cites and has no discernible limit. And Petitioner's objection that confining *Tinker* to the school environment is unworkable is belied by the fact that the other "school speech" cases require drawing the very same line.

A. The Purportedly "Closely Related Doctrines" Petitioner Invokes Do Not Support Its Proposed Standard.

Lacking any support for its position in the school-speech cases themselves, Petitioner turns instead to a host of what it calls "closely related doctrines." Pet.Br. 23–26, 13–16. But those doctrines are neither "closely related" nor supportive of Petitioner's theory. The very fact that Petitioner feels compelled to invoke so many doctrines *not* implicated here only underscores the absence of support for its position in the "school speech" cases that actually speak to the subject at hand.

Petitioner devotes many pages to a historical review of the scope of school authority to discipline students. Pet.Br. 13–16. But neither B.L. nor the court below question the school's authority *vel non* to regulate students' conduct outside the school, which is

ultimately a matter of state law. Rather, the question is what First Amendment standard applies when a school exercises that authority.[24]

For the same reason, the doctrines governing personal jurisdiction, and states' authority to regulate out-of-state activity, has no relevance. This case concerns not authority to regulate, but what First Amendment standard governs.[25]

Other cases Petitioner relies upon actually *contradict* its position. It cites *Grayned v. City of Rockford*, 408 U.S. 104 (1972), to suggest that schools can regulate speech beyond their four walls. Pet.Br. 18–19. But *Grayned* applied traditional First Amendment analysis, not *Tinker*. Grayned, an adult protester, was charged with violating two town ordinances: one that banned all picketing except labor picketing within 150 feet of a school, and a second ordinance that prohibited noise adjacent to a school that disturbed the school while it was in session.

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[24] Indeed, none of the pre-*Tinker* historical cases Petitioner cites even address a speech claim of any kind, and most were decided before the First Amendment applied to the states. In any event, Petitioner's sources do not uniformly support school authority to regulate off-campus activity as a general matter. *See, e.g.*, C.W. Bardeen, *The New York School Officers Handbook: A Manual of Common School Law* 162 (9th ed. 1910) (explaining that in New York the "authority of the teacher to punish his scholars extends to acts done in the school-room or playground *only*; and he has no legal right to punish for improper or disorderly conduct elsewhere.").

[25] To the extent that stray lines in the court of appeals' opinion taken out of context might be read to deny schools *any* regulatory authority over off-campus speech, the Court should simply clarify that the judgment is affirmed on the understanding that it holds only that *Tinker* does not govern school regulation of nonharassing and nonviolent off-campus speech.

Grayned did not say that schools could regulate off-campus speech based on content as long as it causes substantial disruption. To the contrary, it invalidated the anti-picketing ordinance because it was *content-based*. And it upheld the anti-noise ordinance as a *content-neutral* "time, place, and manner regulation[]" that "gives no license to punish anyone because of what he is saying." *Grayned*, 408 U.S. at 151, 121. The Court cited *Tinker* merely to acknowledge the state's interest in protecting the school from noise that interferes with teaching. There is nothing unique about that interest; the same analysis would have applied outside a hospital or in a residential area. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding content-neutral ban on picketing in front of residential home to preserve right to be let alone). In any event, *Grayned* involved regulation of speech activity adjacent to school grounds during school hours, not regulation of students'—or anyone's— speech anywhere anytime.

Nor do the public employee speech cases support Petitioner's proposed expansion of *Tinker*. Petitioner maintains that because teachers can be penalized for their speech off campus, it would be anomalous to treat students differently. Pet.Br. 23–24. But this Court has always treated the speech rights of public employees, including teachers, differently from those of others, including public-school students. "The government as employer indeed has far broader powers than does the government as sovereign." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citation omitted).

Under *Garcetti*, teachers can be disciplined for virtually anything they say in the classroom. *Id.* at 421 ("[W]hen public employees make statements

pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). Students, by contrast, have First Amendment rights in the classroom, even when they are speaking as students. *Tinker*, 393 U.S. at 513.

Students and teachers also have different speech rights outside the school. When public-school teachers speak as citizens, they are protected from employment consequences only if the speech is on matters of public concern, and even then, only when the employer's interest does not outweigh that of the speaker. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-73 (1968). Yet none of this Court's school-speech decisions have limited young people's protections to matters of public concern, either inside or outside the school environment.[26]

Petitioner's invocation of the military's authority to discipline enlisted personnel only reveals the weakness of its argument. As this Court has

[26] Nor should they. "*Most* of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation." *Stevens*, 559 U.S. at 479 (internal quotation marks omitted). It would be wholly unrealistic to expect children to draw fine distinctions as to whether they are speaking on a matter of public concern. And if such a standard were applied to students, matters relating to school, the most important public institution in their lives, in which they are required to spend most of their waking hours, would certainly be of public concern.

repeatedly explained, the military demands discipline unlike anything in civilian society.[27]

B. Petitioner's Proposed Rule Provides No Limit to *Tinker*'s Reach and Will Result in Both Content and Viewpoint Discrimination.

Petitioner maintains that its doctrine has two important limits: It applies only to speech "directed" at the school; and it will not permit viewpoint discrimination. Neither is any limit at all.

i. Petitioner's Proposed Limitation to Speech "Directed" at the School Is No Limit at All.

Petitioner contends that *Tinker* should extend "only" to off-campus speech that students "intentionally direct[] at the school environment" and that "foreseeably reach[es] that environment." Pet.Br. 27; *id.* 11 (same). According to Petitioner, "when students direct speech at the school community—for example, by referring to school affairs *or* sending speech directly to classmates—the fact that students pressed 'send' off-campus should not be dispositive." *Id.* 28 (emphasis added). Thus, Petitioner's test applies *Tinker* to *both* everything said to another student and everything said about school that might reach the school. This is no restriction at all.

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[27] *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 743 (1974) ("[T]he military is, by necessity, a specialized society separate from civilian society . . . . The differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise'" (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

The breadth of Petitioner's proposed standard for when *Tinker* applies is revealed by its application here. B.L. posted her message on the weekend on Snapchat, an intentionally ephemeral medium, to a select group of "friends" who opted to receive them. She did not send it to the school or to any school website or forum. The message reached the school only through the independent actions of a third party, *not* one of B.L.'s Snapchat "friends." Yet Petitioner contends that because some intended recipients were classmates, and because she said "cheer" and "school," the message was "directed" at the school. *Id.* 30–31.

If merely speaking to classmates or talking about something that happened at school is sufficient to constitute "directing" speech at the "school environment," the vast majority of young people's communications would be subject to *Tinker*—including many of the "ordinary conversations with family or neighbors" that Petitioner insists should *not* be included. *Id.* 28. Under Petitioner's test, the only off-campus speech clearly *not* subject to regulation is speech shared with no one. *Id.* at 29 (creating a "sexually explicit avatar" would not be reachable "if the student does not share them with anyone"). But the freedom of speech is not confined to what one writes in one's diary; the First Amendment protects the *exchange* of ideas.

Petitioner's theory would encompass virtually anything a young person says online, so long as it is accessible by another student. By 2018, nearly "95% of teens report[ed] they ha[d] a smartphone or access

to one" and "45% of teens . . . sa[id] they are online on a near-constant basis."[28]

Petitioner's additional requirement that it must be "reasonably foreseeable" that the speech will reach the school is also effectively meaningless, particularly in the Internet age. This Court has held that everyone assumes the risk that anything said to another person will be communicated by the recipient to others. *United States v. White*, 401 U.S. 745, 749, 751 (1971). And "[i]f one takes a broad enough view, *all* consequences of a negligent act, no matter how far removed in time or space, may be foreseen. Conditioning liability on foreseeability, therefore, is hardly a condition at all." *Consol. Rail Corp. v. Gottshal*, 512 U.S. 532, 553 (1994). Petitioner's argument that its "reasonably foreseeable" test would be satisfied here—where B.L.'s speech reached the school through the independent act of a third party, with whom she did not share her Snap and who acted without her consent—highlights the problem. Accordingly, this condition does not limit the scope of speech schools could punish for its content.

ii. Petitioner's Argument that its Approach Would Not Countenance Viewpoint Discrimination Cannot Be Squared with *Tinker* or Petitioner's Actions Here.

Petitioner's only other alleged restraint on school overreach is also illusory. Petitioner maintains that viewpoint discrimination is not permitted under

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

Tinker. Pet.Br. 29. But all three of the rules it cited to justify B.L's suspension from the team are explicitly viewpoint-based. One forbids the publication of "negative information" about cheerleading. J.A. 18. Another prohibits "tarnish[ing]" the school's image. *Id.* 56. A third demands that students express "respect for your school." *Id.* 17. Under these rules, speech that communicated *positive* information about cheerleading, that *burnished* the school's reputation, or that showed *respect* rather than *disrespect* for the school would not trigger punishment. That is classic viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) ("mandating positivity" is viewpoint discrimination).

Petitioner claims that under *Tinker*, "schools must target the disruption, not the viewpoint." Pet.Br. 29. But the "disruption" it now says justified B.L.'s expulsion—the fact that some other students were "visibly upset"—was plainly caused by the *views* she expressed. Had her Snap said "Cheer is fucking awesome," no "disruption" would have occurred. That, again, is viewpoint discrimination.

More generally, *Tinker*'s disruption standard allows schools to enforce a "heckler's veto," silencing speech precisely because the *viewpoint* expressed offends others sufficiently to cause "substantial disruption."

Thus, in Petitioner's view, *Tinker*, and its blessing of the heckler's veto, would apply to everything a young person says to a classmate, or about school. It would reduce young people's freedom of expression everywhere to the limited freedom they have in school.

C. The Line Drawn in *Tinker* Is the Same Line this Court and Lower Courts Have Routinely Drawn in "School Speech" Cases.

Petitioner claims that drawing a line between speech inside and outside the school environment is unmanageable and arbitrary. Pet.Br. 45–46. But that line has been essential to all of the Court's "school speech" cases, and schools, students, and courts are therefore already required to draw it.

Whether speech occurs within or outside the school environment already determines what standard applies. *Morse,* 551 U.S. at 396–97. Schools can punish vulgarity and pro-drug speech within the school environment, but not outside. *Id.* at 397. Indeed, Petitioner concedes as much. Pet. Reply in Supp. of Cert. 11 (citing *Fraser*, *Kuhlmeier*, and *Morse* and conceding "schools' inability to rely on other First Amendment doctrines to address disruptive off-campus speech"). Thus, the very inquiry Petitioner questions must already be undertaken.

The line is not difficult to draw in the vast majority of cases. The school environment includes all times when the school is responsible for the student, including on campus or its immediate environs during school hours, at a school-sponsored or -supervised event, on a school-sponsored website, while en route to or from school, or even from students' own homes if they are engaged in school-sponsored remote learning or using a school laptop issued for schoolwork. It does not include "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Pet.App. 31a.

Thus, a student on a school playground open to the public on the weekend but not supervised by the school would enjoy the same speech rights as anyone else on that playground. The same is true for students attending after-hours community events at the school.

By contrast, what students do and say while they are under school supervision is subject to *Tinker*, even if the school has an open campus and allows students to walk down the street for lunch at a park or restaurant. Similarly, a call from home to school personnel at school, an email from a personal server to a school server, activities taken for school credit, and the public sidewalk adjacent to the school during school hours and immediately before and after school are all subject to *Tinker*. On the other hand, unless students are on their way to school or on their way home, they do not lose their First Amendment rights just because they happen to be in a "school zone."

Petitioner asks why it should make a difference if a student sends a Snap from her phone at school or on the weekend, if it has the same effect. Pet.Br. 44. But the First Amendment is not determined by effect. A pro-drug message or a lewd speech to classmates outside of school at a private party might have the same effect as the speech in *Morse* and *Fraser*, yet the school could not regulate them as school speech. The reason is two-fold: The school needs the authority to respond immediately when speech occurs while students are under its supervision and care; and the extraordinary power of schools to regulate the content of students' speech on campus is acceptable precisely because young people outside that environment are free of such censorship. *See supra* Point I.B. The right answer in First Amendment cases is "not simply [whichever] route is easier. . . . the prime objective of

the First Amendment is not efficiency"—it is protection of the right to freedom of speech. *McCullen*, 573 U.S. at 495.

III. THE UNITED STATES CORRECTLY MAINTAINS THAT THE VAST ARRAY OF STUDENT SPEECH OUTSIDE THE SCHOOL ENVIRONMENT SHOULD NOT BE SUBJECTED TO *TINKER*, BUT ITS PROPOSED APPROACH IS INCONSISTENT WITH THAT PRINCIPLE.

The United States agrees with B.L. that "the vast array of day-to-day off-campus communication by students is beyond the legitimate reach of school discipline." U.S.Br. 20; *id.* 7. In particular, the United States rejects the notion that students can be punished for off-campus speech because it elicits a hostile reaction from listeners in the school: "[I]f a student delivers a fiery religious sermon or a controversial political speech over the weekend, it almost certainly would be protected under the First Amendment *no matter how disruptive its lingering effects might prove to be when the student returns to school*." *Id.* 20 (emphasis added). Thus, the United States correctly rejects Petitioner's approach.

Instead, the United States submits that there are "some narrow categories of student speech that occurs off campus [that] nevertheless are properly regarded as 'school speech' potentially subject to discipline by school officials." *Id.* It identifies three such categories: (1) threats to the school community; (2) speech that "intentionally targets specific individuals or groups in the school community;" and (3) speech that "intentionally targets specific school functions or programs regarding matters essential to

or inherent in the functions or programs themselves." *Id.* 7.

We agree that schools can regulate the first category of off-campus speech in appropriate circumstances. The same is true with respect to the second category *if it is properly limited to harassment and bullying*.[29] Our rationale for that conclusion is different, however: Ordinary First Amendment standards, adjusted for youth and context, already permit schools to regulate harassment and bullying, including when they are carried out by speech. *Supra* Point I.E. But the reason for treating these two categories distinctly matters less than our agreement on the bottom line that off-campus harassment, bullying, and threats of violence are regulable without extending *Tinker* to *all* off-campus speech. And because the speech at issue in this case is neither threatening nor harassing, the Court can reserve the question of which of the two explanations is preferable or how precisely the categories should be defined.[30]

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[29] The United States' second category is formulated very broadly, but the principal examples it gives are harassment and bullying. U.S. Br. 24–25. If so limited, the category would roughly match what we believe the First Amendment permits. But if the United States means that schools can regulate *any* speech that one student directs at another, its second category is far too sweeping and would seem almost as broad as Petitioner's test, which the United States rejects.

[30] The United States argues that speech in its three categories is subject to regulation to the same extent as any other "school speech." U.S.Br. 8, 29. On this view, such off-campus speech could be regulated if it were disruptive, *Tinker*, 393 U.S. at 513; lewd, *Fraser*, 478 U.S. at 685; advocated drug legalization, *Morse*, 551 U.S. at 401; or were merely deemed inappropriate from a curricular standpoint, *Kuhlmeier*, 484 U.S. at 271. That

But we part ways with the United States when it comes to the third category, which would encompass all student speech that "intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or programs themselves."[31] U.S. Br. 7, 24. That classification is boundless and entirely unmoored from any existing First Amendment category. It would give schools the very authority to suppress off campus student speech that the United States elsewhere rejects. A school that maintained, for example, that "cohesion" and "morale" were essential to a school program could prohibit all criticism of that program, even the reporting of a teacher, coach, or administrator for abuse, discrimination, harassment, or simply for being ineffectual. *See, e.g.*, *Lowery*, 497 F.3d at 585, 593. The chilling effect would be palpable. *See* Juliet Macur, *At Wisconsin High School, Accusations of Body Shaming at a Cheerleading Banquet*, N.Y. Times (Feb. 19, 2019) (student cheerleader who spoke to media about cheerleading coach distributing "Big Boobie award for the girl with the biggest breasts" and "Big Booty award" requested her name not be made public in the article "out of fear of retribution from the coaches"). *Any* criticism can be said to undermine "team cohesion or respect for the authority of the

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approach directly contradicts what the Court itself has said about the limits of its school-speech cases. *See supra* Point I.B.

[31] While we agree that one form of speech the United States puts in the third category—aiding and abetting violation of school rules—is subject to regulation, that is because aiding and abetting can be regulated under ordinary First Amendment standards, and those standards can be adjusted to reach students who aid and abet violations of school conduct rules—not because the speech somehow becomes "school speech" treated identically to speech uttered on campus. *Supra* Point I.E.

coach." Although such criticism may be proscribed on the playing field, it cannot be prohibited *everywhere*; school officials may not be insulated from all reproach by students in public debate.

The United States' third category essentially resurrects the argument the United States advanced in *Morse* that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Morse*, 551 U.S. at 423 (Alito, J., concurring). The Court did not endorse that broad argument for regulation of speech *in school* then and it certainly should not do so for speech *outside* school now, for the reason Justice Alito identified: It "can easily be manipulated in dangerous ways" by school officials. *Id.*

The United States argues that such censorship should be permissible in extracurricular activities because students choose to engage in them, and therefore schools can condition participation on avoiding speech that would undermine "team cohesion." But while some conditions may be imposed on students who participate in extracurriculars, the First Amendment prohibits conditions that would restrict participants' First Amendment rights *outside* the program. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013); *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (government may not impose a condition on a benefit that "prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program"). This principle applies whether the benefit is a government subsidy, *Open Society*, 570 U.S. 205, a towing contract, *Bd. of Comm'rs v. Umbehr*, 518 U.S. 688 (1996), registration of a federal trademark, *Matal*,

137 S. Ct. at 1763, or, as here, participation in an extracurricular activity. Thus, while schools may regulate what a team member can say as a representative of the school or team, they cannot impose a viewpoint-based restriction on what students can say in their private capacities wholly outside the program. *Kuhlmeier*, 484 U.S. at 271 (recognizing school's authority to regulate speech that "members of the public might reasonably perceive to bear the imprimatur of the school").

IV. IF THE COURT EXPANDS *TINKER* TO SPEECH OUTSIDE THE SCHOOL ENVIRONMENT, IT SHOULD LIMIT ITS APPLICATION IN THAT CONTEXT.

If the Court chooses to expand *Tinker* beyond the school environment, it should require a showing not only that the speech caused "substantial disruption" or "interfered with the rights of others," but that the student *intended* that result. The Court has often used intent requirements to protect First Amendment rights. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curium) (limiting "incitement" to speech directed to causing imminent lawless action); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964) (requiring "actual malice" to limit libel of public figures); *Scales v. United States*, 367 U.S. 203, 221 (1961) (adopting "specific intent" standard to protect right of association). While it would not solve all of the problems identified above, an intent requirement would at least narrow the standard's otherwise boundless application and guard against the risk that "disruption" caused by other

students' disagreement with the message of the speech at issue will justify its censorship.[32]

Lower courts have largely held that *Tinker*'s application does not turn on a student's intent. *See, e.g.*, *Cuff ex rel. B.C. v. Valley Cent. Sch. Dist.*, 677 F.3d 109, 113 (2d Cir. 2012) (explaining that *Tinker* "test is an objective one, focusing on the reasonableness of the school administration's response, not on the intent of the student"). That may be appropriate inside the school environment, where schools must often take prompt or immediate measures. But if *Tinker* is expanded without an intent limitation, young people will face the risk of punishment anytime they say anything anywhere that another student might find upsetting.

Adding an intent requirement to *Tinker* would allow schools to respond to the speech that poses the greatest problems while guarding against the danger that schools will punish young people for off-campus speech made with no intent to cause disruption or interfere with the rights of others. It would reduce the likelihood that young people will be deterred from describing a teacher's sexual harassment or racist comments, or criticizing their school's "political correctness," for fear that raising these issues will cause disruption and result in their punishment. It will also provide some protection for immature and impulsive speech, a fixture of adolescence, requiring schools to counsel students (and parents) about

[32] If the Court deems an intent test too demanding, it should at a minimum require that the school demonstrate that it reasonably understood the student to have specifically intended "substantial disruption" or "interference with the rights of others" and not merely that those effects were reasonably foreseeable.

misguided speech lacking indicia of intent, but allowing them to sanction persistent violations.

An intent test would also limit the possibility that young people's off-campus speech will be punished because of disruptions caused by classmates expressing disagreement or offense—the heckler's veto. If young people speak not to cause disruption, but to express their political or religious views, they should not be punished even if others react in a disruptive manner. The heckler's veto is so fundamentally at odds with the First Amendment's bedrock principle that it should not be countenanced beyond the school environment, even if *Tinker* is in other respects extended.

V. EVEN IF *TINKER* APPLIES WITHOUT MODIFICATION TO OFF-CAMPUS SPEECH, THE SCHOOL DISTRICT VIOLATED B.L.'S FIRST AMENDMENT RIGHTS.

Even if the Court adopts Petitioner's position that *Tinker* applies here, it should affirm the judgment below. As both the district court and Judge Ambro, concurring on the court of appeals, concluded, the undisputed facts establish that B.L.'s Snap caused no actual or potential substantial disruption. Before this Court, Petitioner barely defends its action against B.L. and instead urges the Court to remand for a determination of whether the *Tinker* standard was satisfied on these facts. Pet.Br. 11, 46–47. But no remand is necessary because, as Judge Ambro noted, this is not even a close case. Pet.App. 45a.[33]

[33] The Court in *Tinker* itself followed that course. 393 U.S. at 509.

Petitioner's principal argument below was that B.L. could be punished under *Fraser* for swearing—an argument that it has only now abandoned. At the single evidentiary hearing in this case, the School District "admitted that B.L was only punished because of the profanity contained within her Snap, *not because they had a reasonable fear of disruption*." J.A. 45 n.9 (emphasis added). Petitioner continued to press *Fraser* and profanity as its justification at summary judgment and in the court of appeals, where it "principally defend[ed] its actions based on its power 'to enforce socially acceptable behavior' by banning 'vulgar, lewd, obscene, or plainly offensive' speech by students." Pet.App. 16a.

In the court of appeals, Petitioner alternatively argued that B.L. could be punished under *Tinker* because her Snap "undercut the 'team morale' and 'chemistry' on which the cheerleading program depends and because, in the unique context of extracurricular activities, this is enough to satisfy *Tinker*." Pet.App. 23a n.10. But even if undermining team morale and chemistry were sufficiently disruptive to satisfy *Tinker*, there is simply no evidence in the record to show that B.L.'s speech caused, or could be reasonably expected to cause, that effect.[34]

[34] The court of appeals' assertion, repeated by Petitioner, Pet.Br. 8, that "B.L. does not dispute that her speech would undermine team morale and chemistry," Pet.App. 23a n.10, is not supported by the record. Its source is Defendant's Statement of Undisputed Facts, which states that "the coaches felt the need to enforce the Rules against B.L. 'to avoid chaos and maintain a team-like environment.'" ¶¶ 55–56, ECF No. 40. B.L. did not dispute "that Ms. Luchetta-Rump testified that she personally believes that issues concerning negative information communicated electronically must be addressed for the cheerleading coaches to

The only facts Petitioner cites as evidence of disruption are that: students approached the coaches to express their concerns about the Snap; students were "visibly upset;" and other students asked Coach Luchetta-Rump during her algebra class how she was going to respond. Pet.Br. 6–7. As the district court found, such "general rumblings" are a far cry from the kind of disruption the *Tinker* Court contemplated. Pet.App. 73a.

Petitioner's assertion that B.L.'s Snap violated the cheerleading rules does not alter this result. Pet.Br. 7; J.A. 15–18. First, as the court of appeals found, B.L.'s speech did not violate any of the rules. Pet.App. 38a–41a. The "Respect Rule" applies only "*at games, fundraisers, and other events*" and therefore did not apply to B.L.'s Snap. Pet.App. 39a–40a (emphasis added). She did not post any "negative information regarding cheerleading . . . on the internet," because her Snap contained no "information" at all and was merely an expression of emotion. Pet.App. 40a. And the rule prohibiting conduct tarnishing the school's image applied only during the season, and B.L. sent her Snap after the spring season had concluded and before the fall season began.[35]

'avoid chaos' and maintain a 'team-like' environment," Pl.'s Resp. to Def.'s Stmt. of Undisputed Facts ¶ 55, ECF No. 50, but she did not concede that the belief was well-founded. On the contrary, B.L. maintained that her punishment was *not* based on any actual negative impact on students and that the School District had no reason to believe that B.L.'s Snap would disrupt any school activities. Pl.'s Stmt. of Undisputed Facts in Support of B.L.'s Mot. for Summ. J., ¶¶ 59–61, ECF No. 39.

[35] Moreover, given the rules' vagueness, no waiver of constitutional rights can be found here. This Court's established

Second, even if she violated any of these viewpoint-based rules, the school could punish her under *Tinker* only if the Snap caused an actual or potential substantial disruption. It did not. And the coach's testimony that B.L. would have equally violated the rules had she written "Cheer is fucking awesome," J.A. 35, demonstrates that B.L. was punished for her choice of words, not for any effect they had on the cheerleading team.

Thus, even if some off-campus speech can be punished under *Tinker*, B.L.'s Snap cannot.

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rule is that a waiver of First Amendment rights cannot be presumed in the absence of clear and affirmative consent. *Janus v. Am. Fed. of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully Submitted,

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Date: March 24, 2021