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 HISD STUDENT CONGRESS, KENTUCKY STUDENT VOICE TEAM, MARCH FOR OUR LIVES ACTION FUND, STUDENTS FOR A SENSIBLE DRUG POLICY, AND STUDENT VOICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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March 31, 2021

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are student activist organizations dedicated to the pursuit of social justice:

The **Houston Independent School District Student Congress** (HISD StuCon), an unincorporated association, represents more than 215,000 students in the largest school district in Texas. Founded in 2014, HISD StuCon is an independent student-run, student-led organization that pushes stakeholders across Houston and the State of Texas to take students seriously and facilitate their agency. Over the years, HISD StuCon's high school students have filed an *amicus* brief in the Texas Supreme Court, have testified in the Texas Legislature, and have regularly spoken at HISD school board meetings on issues that directly impact their lives--such as school inequity, student mental health, coronavirus reopening plans, and student free speech.

The **Kentucky Student Voice Team** supports students as research, policy, and advocacy partners working to ensure that Kentucky's education system is as equitable, just, and excellent as it can be. Consisting of approximately 100 self-selected youth from across the state, it was formed in 2012, was incubated until 2020 by The Prichard Committee for Academic Excellence, and was incorporated as a youth-led independent organization in 2021. The

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[1] Pursuant to Sup. Ct. R. 37, counsel *pro bono publico* for *amici curiae* state that no party's counsel authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than counsel for *amici curie* made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of the brief.

organization has filed for 501(c)(3) status, and the Bluegrass Community Foundation serves as its fiscal sponsor. Its website is located at https://www.kystudentvoiceteam.org/home.

March For Our Lives Action Fund is a 501(c)(4) social welfare organization incorporated in Delaware. Since February 2018, students from across the United States have called for common-sense gun legislation reforms that will save the lives of more than 3,000 young people each year, including implementing universal, comprehensive background checks; creating a searchable database for gun owners; investing in violence intervention programs, specifically in disenfranchised communities; funding the Centers for Disease Control to research gun violence so that reform policies are backed up by data; and banning high-capacity magazines and semi-automatic assault rifles. The organization's informational website can be found at www.marchforourlives.com.

Students for Sensible Drug Policy (SSDP) is the largest global youth-led network dedicated to ending the War on Drugs. At its heart, SSDP is a grassroots organization, led by a Board of Directors primarily elected by and from our student and youth members. It brings young people of all political and ideological orientations together to have honest conversations about drugs and drug policy. SSDP creates change by providing a platform where members collaborate, communicate, share resources with, and coach each other to generate policy change, deliver honest drug education, and promote harm reduction. Founded in 1998, SSDP is comprised of thousands of members in hundreds of communities around the globe. The organization's website is located at https://ssdp.org/about/.

Student Voice is a by-students, for-students 501(c)(3) nonprofit organization incorporated in Delaware that works in all 50 states to equip students as storytellers, organizers, and institutional partners who advocate for student-driven solutions to educational inequity. Through direct civic action, Student Voice helps students hold their schools and surrounding communities accountable to the Student Bill of Rights and prepares them to become lifelong agents of social and political change. The organization's website is StuVoice.org, and it can be followed on social media at @Stu_Voice and #StuVoice.

Amici are unified in their commitment to progressive reform initiatives in the areas in which their respective missions are focused, and their use of social media in communicating their messages to fellow students and the general public is instrumental to the achievement of their policy objectives. With memberships composed of public high school students, *amici* depend on the First Amendment principle established in *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020), for protection of their often critical, provocative, and resistant out-of-school speech from school punishment. Without the "clarity and predictability" (*id*. at 188) afforded by the ruling in *Levy*, *amici*'s constitutional rights will inevitably be compromised as they refrain from speaking out on controversial matters pertaining to the operation of public school systems, to the detriment of an informed community. The First Amendment may not give a public high school student the right to wear Cohen's jacket in the classroom setting, but it unquestionably protects a student's right to wear the same jacket outside of school or to post the same profane anti-government message on social media — even with the knowledge that the

message will likely come to the attention of school officials. *Cohen v. California*, 403 U.S. 15 (1971) (overturning breach of peace conviction of Vietnam War protestor for wearing inside a courthouse a jacket bearing the slogan "Fuck the Draft").

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Mahanoy Area School District's ("School District") brief begins with the claim that this Court's landmark decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), does not prohibit the nation's public schools from regulating their students' speech outside of school whenever it results in disruption inside the school. Pet. Br. 13-22. Tethered to a string of ancient *state* Supreme Court cases decided decades before *Tinker*, this argument transmogrifies *Tinker* from a location-based to a harm-based precedent. *Id*. at 15, 17-18. Its novelty has caught the *amici*, who rely on *Tinker*'s restricted application to the school environment to safeguard their First Amendment rights, by surprise. Presumably it will also come as a surprise to this Court, which has steadfastly limited public schools' ability to punish student speech that is "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d at 189 (Krause, J.).

According to Petitioner, because social media has made the determination of the doctrinal "schoolhouse gate" boundary more difficult in some cases — a concern which is overstated — *Tinker*'s restrictions on public school authority over student speech should be abandoned depending on the "severity of the on-

campus harm" (Pet. Br. 18) attributed to the speech. Even assuming that student expression in the "modern public square" (*Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)) of social media has, as asserted by the United States, to some degree rendered *Tinker*'s schoolhouse gate concept "metaphorical" (SG Br. 13), that does not justify such a radical departure from this Court's public student speech jurisprudence. *Manhattan Community Access Corp. v. Halleck*, 587 U.S. ___, 139 S. Ct. 1921, 1937 n.2 (2019) (Sotomayor, J., dissenting) ("Regardless of whether something 'is a forum more in a metaphysical than in a spatial or geographic sense, . . . the same [First Amendment] principles are applicable.'") (quoting *Rosenberg v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)). The dramatic expansion of school authority called for by Petitioner would "erase the dividing line between speech 'in the school context' and beyond it, a line which is vital to young people's free speech rights.'" *Levy*, 964 F.3d at 188 (citation omitted).

The preservation of that dividing line is vitally important to the exercise of the *amici*'s First Amendment rights. *Levy* made explicit what was implicit in *Tinker*: when students express themselves outside of school and beyond school supervision, they are entitled to full constitutional protection of their free speech rights the same as any other citizen — no matter how "inappropriate, uncouth, or provocative" their expression. *Id*. at 189. Otherwise, as underscored in *Levy*, students confronted with the potential application of *Tinker*'s "material and substantial disruption" test will censor their off-campus speech to avoid on-campus punishment. *Id*. ("Holding *Tinker* inapplicable to off-campus speech also offers the distinct advantage of offering up-front clarity to students and school officials.").

This Court has acknowledged that the exchange of information on social media is "integral to the fabric of our modern society and culture." *Packingham*, 137 S. Ct. at 1730. Nevertheless, the School District would have the Court "swipe left" by ignoring the established limitations its decisions have imposed on public schools' authority over their students off-campus speech. As discussed more fully below, *Tinker*'s application, while appropriate in accounting for the special characteristics of the educational environment, provides inadequate protection to students' First Amendment rights outside of school. Further, if applied to minimize constitutional scrutiny over student speech tied to participation in extracurricular activities, it will grant public school districts excessive authority to punish student expression based on school officials' retaliatory disapproval of its message — a path to censorship repudiated by Justice Alito's concurrence in *Morse v. Frederick*, 551 U.S. 393, 423 (2007).

Amici agree that "B.L.'s Snap is not close to the line of student speech that schools may regulate." *Levy*, 964 F.3d at 195 (Ambro, J., concurring in the judgment). Yet, they fear that *Tinker*'s incautious expansion in the manner urged by Petitioner and the United States will erode that line and subject their similarly protected social advocacy to potential punishment by their schools — especially when their speech criticizes the effectiveness or fairness of school policies or the conduct of school personnel. That would displace the "up-front clarity" of *Levy*'s constitutional rule with uncertainty and confusion, stifling the *amici*'s right to speak out on controversial issues. *Id*. at 189. The First Amendment, as applied in this Court's public student speech jurisprudence, prohibits such a result.

ARGUMENT

I. STUDENTS HAVE HISTORICALLY USED THEIR VOICES IN THE VANGUARD OF POLITICAL AND SOCIAL MOVEMENTS

A. Social Media Empowers Student Activism and Civic Engagement.

Students in our nation's public schools play a critical — albeit often overlooked and undervalued — role in our democracy. Their civic engagement should not be stifled simply because it challenges school authority. Throughout history, student organizations such as the *amici* have played instrumental roles in momentous political and social movements. For decades, youth across the country have used their voices to express their views, impact policies, and effect change. During the Civil Rights movement, for example, student organizations staged sit-ins and marched in protest of segregation laws, challenged racism during Freedom Rides, and advocated for voter rights legislation. Student organizations have consistently embraced what former student activist and later Congressman John Lewis called "good trouble" — fearless agitation designed to provoke, challenge, and move the nation forward. Students' reliance on social media is not only a critical component of social activism and civic engagement, but important to their cultural development and identity formation. *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) ("The importance of these new technologies to the development of not only their social and cultural connections but also their identities should not be underestimated.").

Student involvement in social movements has endured over time. In each era, student organizations

have adapted to and embraced technology to promote their initiatives and expand their reach. In today's digital age, the Internet provides "a global experience that transcends language, culture, and philosophy, permitting the transfer of information across borders and time zones instantaneously." Carolyn Elefant & Nicole Black, *Social Media For Lawyers: The Next Frontier Xv* (2010). Social media provides a platform for users to express opinions and exchange points of view on any number of issues — from the melancholy, isolation, and frustrations of pandemic-induced quarantine life, to the social, political, and ethical perspectives implicated by government policy proposals, presidential debates, and other matters of public concern. Popular social media platforms such as Instagram, Twitter, and Facebook have become participatory vehicles indispensable to the support of social and political causes.

Social media has empowered American teens not only to tell their stories and share their opinions, but to generate support for their perspectives and mobilize collective action on a national and even global scale. While social movements of the 1950s used pamphlets, telephone calls, and mass meetings to convey information and coordinate support from the public at large, today's activism thrives from online engagement and the use of social media to instantaneously disseminate messages to what may be a global audience.

For example, in 2016 the Houston Independent School District Student Congress (HISD Student Congress) organized a meme campaign on Facebook that raised awareness about chronic underfunding in their school district. In the caption under the posts, the organization provided information regarding the

school district's budget cuts and also provided a link to its education summit, which addressed the budget cuts and other issues impacting students in the district. HISD Student Congress's Instagram and Twitter pages also post virtual whiteboards with sticky notes — written by students — about issues, common themes, and possible solutions on topics such as mental health, school safety, and online learning.

Similarly, Student Voice developed a *Roadmap to Authentically Engage Youth Voice in the U.S. Department of Education*, and used social media to reach thousands of students from all 50 states through a digital survey focused on a vision for the next Department of Education. On Twitter, Student Voice used the hashtag #StartWithStudents to raise awareness around its proposed recommendations to the Department, which included incorporating students on Department committees and roundtables and hiring a staff member for youth engagement. Student Voice also used Facebook to broadcast a live online press conference, where eight high school students from Maryland, New York, Missouri, Kentucky, Georgia, Montana, and California spoke about issues in their schools that the Department could address by meeting the organization's recommendations.

According to a 2020 Pew Research Center study, social media users under the age of 30 are more likely than those above that age to use a hashtag related to a political or social issue to encourage others to take action on issues they see as important. Brooke Auxier, *Activism On Social Media Varies By Race And Ethnicity, Age, Political Party*, The Pew Research Center (July 13, 2020). https://pewrsr.ch/304HThw. The study also found Black and Hispanic social media users, as compared to Caucasian users, to be nearly

twice as likely to find social media very or somewhat important for finding other people who share their views about personally salient issues. *Id*. There are similar racial gaps when users are asked about the importance of these sites as a means for getting involved with issues they care about or as providing a venue for the expression of their political opinions. *Id*. Curtailing students' First Amendment rights on social media outside of school would therefore likely disproportionately impact students from historically underrepresented groups.

B. Students Are Best Positioned To Communicate Information About Public Schools.

The right to speak out on matters of public concern is deeply engrained in First Amendment law and allows Americans to participate in self-governance. The ability to communicate on social media has immediate relevance for high school students, who are not yet of voting age but have a constitutional right to participate in public discourse, including on matters directly impacting their demographic cohort.

High school students are best positioned to convey information based on their day-to-day experience regarding public school systems and their operation. For example, in 2015, after lobbying for a Texas school funding bill that was unsuccessful, then high school students Zaakir Tameez and Amy Fan authored an Amicus Brief on behalf of the HISD Student Congress to the Texas Supreme Court addressing the lack of adequate public school funding in their district. In their brief, the students shed light on several issues within the classroom, such as the lack of funding for high school music programs, large class sizes, outdated textbooks, and ineffective teaching at

various HISD schools. The organization also took to social media to explain its position and was granted a radio interview on the school district's educational deficiencies.

Similarly, the Kentucky Student Voice Team, as part of a student advocacy campaign, used the handle "#SaveOurSeats" on social media to spread awareness on Kentucky House Bill 178, which would remove the student and teacher representatives from the district's board of education. The organization's Instagram page included the telephone number for state lawmakers and provided supporters with a script to follow when calling in support of preserving the non-voting student and teacher board seats. Protection of these seats directly impacts students' representation and participation in the Kentucky political process.

Finally, since 2018, Student Voice has trained more than 50 student storytellers across the United States through its Journalism Fellowship and Press Corps in first-person opinion editorial writing and news coverage about their experiences in schools. Student Voice's storytelling initiatives address their view that public narratives around schools often rely on data, research, and the dynamics of major policy actors, without placing this information in the context of students' lived experiences. Student Voice Journalism Fellows flip the script of national conversations about education, putting the experiences and needs of students at the forefront through first-person storytelling in major outlets such as The Washington Post, NBC News, and CNN.

Throughout history, American students have used their speech in the vanguard of political and social movements. Employment of their First Amendment rights should not be impaired merely because they are

exercised on social media. The First Amendment demands precisely the opposite. *Reno v. ACLU*, 521 U.S. 844, 870, 885 (1997); *Packingham*, 137 S. Ct. at 1736-37.

C. Social Science Evidence Disproves That Social Media Contributes to Student Misbehavior.

Federal court opinions tend to reflect a dystopian conception of public secondary education, erroneously attributed to the prevalence of social media, as justification for the claim that prevention of public schools' degeneration into chaotic havens overrun with undisciplined and uncontrollable students requires new First Amendment exceptions. *See, e.g., J.S. ex rel Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 950-51 (3d Cir. 2011) (*en banc*) (Fisher, J., dissenting) ("But with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment."); *Bell v. Itawamba Cnty. Sch. Bd*., 799 F.3d 379, 435 (5th Cir. 2015) (*en banc*) (Prado, J., dissenting) ("I share the majority opinion's concern about the potentially harmful impact of off-campus online speech on the on-campus lives of students. The ever-increasing encroachment of off-campus online speech and social-media speech into the campus, classroom, and lives of school students cannot be overstated."). However, empirical evidence does not support this view of the nation's public schools.

Disruptions in the classroom existed long before the advent of social media and have been the subject of extensive studies. *See, e.g*., David Coulby, Tim Harper, PREVENTING CLASSROOM DISRUPTION: POLICY,

PRACTICE AND EVALUATION IN URBAN SCHOOLS (Routledge 2012) (first published in 1987); Robert Everhart, *Understanding Student Disruption and Classroom Control*, 57 HARVARD EDUCATIONAL REVIEW 77 (1987). The introduction of social media has had little if any impact on in-school student behavior. To the contrary, students are in fact less violent and better behaved than at any time in modern history. In its comprehensive report on school crime and safety released in July 2020, the United States Department of Education engaged in a detailed analysis of the school environment in elementary and secondary schools throughout the United States. National Center for Education Statistics, U.S. Dep't of Educ., NCES 2020-063, *Indicators of School Crime and Safety: 2019* (2020). The study found that during the period from 1999-2000 to 2017-2018, student bullying defined as occurring at least once a week decreased from 29 percent to 14 percent, and student verbal abuse of teachers defined as occurring at least once a week decreased from 13 percent to 6 percent. *Id*. at 48. Further, student sexual harassment of other students defined as occurring at least once a week decreased from 4 percent in 2003–2004 (the first year of data collection for this issue) to 1 percent in 2017-2018. *Id*. at 66-68.

As this data demonstrates, the learning environment in our nation's public schools has not become unruly or unmanageable. *Cf. Tinker*, 393 U.S. at 525 (Black, J., dissenting) ("One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already

running loose, conducting break-ins, sit-ins, lie-ins and smash-ins."). In that same Department of Education study, teachers were asked to rate their ability to manage classroom behavior. *Id*. The study found that "93 percent of teachers reported that they were able to make expectations about student behavior clear quite a bit or a lot;" "88 percent reported that they were able to get students to follow classroom rules quite a bit or a lot;" "85 percent reported that they were able to control disruptive behavior in the classroom quite a bit or a lot;" and "80 percent reported that they were able to calm a student who is disruptive or noisy quite a bit or a lot." *Id*. at 66. These statistics hardly indicate that the public school system has become something resembling a discipline-free zone because of students' social media usage.

The misconceptions tainting the issue of off-campus student digital expression simply do not stand up against social science data collected over the years. The evidence supports that social media usage has not contributed to a decline in student behavior, nor has it adversely impacted the school environment. The reality is just the opposite, as numerous studies have emphasized that social media is a powerful tool that can be used to improve students' learning experience.[2]

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[2] *See, e.g*., Antoine Van Den Beemt, Marieke Thurlings & Myrthe Willems, *Towards An Understanding Of Social Media Use In The Classroom: A Literature Review*, 29 TECHNOLOGY, PEDAGOGY AND EDUCATION 35 (2020); Christine Greenhow and Emilia Askari, *Learning and Teaching with Social Network Sites: A Decade of Research in K-12 Related Education*, 22 EDUCATION AND INFORMATION TECHNOLOGIES 623 (2017); Kevin M. Thomas , Blanche W. O'Bannon & Natalie Bolton, *Cell Phones in the Classroom: Teachers' Perspectives of Inclusion, Benefits, and Barriers*, 30 COMPUTERS IN THE SCHOOLS 295 (2013) (finding that

II. *TINKER*'S APPLICATION OUTSIDE THE SCHOOL ENVIRONMENT WOULD INFRINGE PUBLIC SCHOOL STUDENTS' FIRST AMENDMENT RIGHTS

A. *Tinker* Should Not Be Extended to Off-Campus Student Speech.

While *Tinker*'s narrow accommodation of the special characteristics of the secondary educational environment is appropriate for student speech within the schoolhouse gate, as well as for student speech at a school-supervised or school-controlled event or setting, it should not be extended to off-campus student expression. To do so would "sweep far too much speech into the realm of schools' authority" and thereby result in the chilling of students' speech in violation of their First Amendment rights. *Levy*, 964 F.3d at 187, 188-89. Indeed, applying *Tinker* outside of the school environment will inhibit students' expressive liberty in contravention of this Court's precedent, which in no way suggests that school suzerainty may extend to student speech in the community at large. To the contrary, this Court's quartet of public student speech cases establishes that high school students' speech outside the school environment is presumptively protected by the First Amendment unless the speech is supervised or sponsored by the school.

As support for the novel proposition that *Tinker* applies to student speech outside the schoolhouse gate, both the School District (Pet. Br. 18-19) and the United States (SG Br. 13-14) cite *Grayned v. City of Rockford*, 408 U.S. 104 (1972). This reliance is misplaced. In *Grayned*, this Court upheld the applica-

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69% of teachers support the use of cell phones in the classroom and presently use them for school-related work).

tion of an anti-noise ordinance to "approximately 200 people" who marched on a sidewalk "about 100 feet from the school building [ ]" and whose activities were noisy and diversionary to the extent that they disrupted normal school activities by causing students to be distracted in class and congregate near windows to look at the protesters. *Id*. at 105. Petitioner and the government aver that, since *Grayned* allowed the punishment of speech by protesting *adults* outside a school that had an impact inside the school, it *a fortiori* supports *Tinker*'s application to punish speech by *students*, irrespective of its location, that has a "similarly disruptive effect" on school activities. SG Br. 14; *see also* Pet. Br. 18-19. This argument glosses over the fundamental point that *Grayned* involved a content-neutral "time, place, and manner" regulation intended to prohibit excessive noise volume from interfering with orderly schoolhouse operations, and in no way restricted expressive activity "*before or after the school session*, while the student/faculty 'audience' enters and leaves the school." *Id*. at 120 (emphasis supplied). The ordinance's application was limited to "[n]oisy demonstrations" "next to a school, while classes are in session[.]" *Id*. Thus, if the protesters had engaged in the same activities a few blocks away from the school — still outside of the schoolhouse gate — the anti-noise ordinance would not have been triggered. *Id*. ("Such expressive conduct may be constitutionally protected at other places or times"). Accordingly, *Grayned* is readily distinguishable and fails to support Petitioner's desire to extend *Tinker* to off-campus speech wherever, whenever, and however it occurs.

Further, in arguing that *Tinker* has never been strictly confined to on-campus expression, the School District attempts to evade *Thomas v. Bd. of Educ.,*

Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980), by contending that the decision "did not need to consider whether *Tinker* applied to off-campus speech[.]" Pet. Br. 20. We respectfully submit that this misreads the Second Circuit's holding in *Thomas*, which expressly restricted *Tinker*'s application to student speech deliberately introduced inside the school environment because "when those charged with evaluating expression have a vested interest in its regulation, the temptation to expand the otherwise precise and narrow boundaries of punishable speech may prove irresistible." 607 F.2d at 1048. *Thomas* could hardly be clearer that when "school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id*. at 1050.

B. B.L.'s Speech Away From School Was Impermissibly Punished Based on School Authorities' Disapproval of Her Choice of Language.

It seems unlikely that the School District would have punished B.L. had she Snapchatted "Screw school screw softball screw cheer screw everything," which indicates that school authorities punished her owing to their disapproval of her choice of profane language *outside* of the school environment, where it should be subject solely to parental control. *See Thomas*, 607 F.2d at 1051 ("While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each

afternoon."). Importantly, there was no evidence of disruption to the learning process or school activities in *Levy*, merely the implausible claims that B.L.'s snaps interfered with the "morale" and "chemistry" of the cheerleading squad and violated viewpoint-based team rules imposed by the School District on cheerleaders. *Levy*, 964 F.3d at 184 n.10, 176. In other words, Petitioner appears to have relied on this Court's rationale in *Bethel Sch. Dist. No. 403 v. Fraser*, which allows for the regulation of "lewd, indecent, or offensive" student speech in order to "teach by example the shared values of a civilized social order." 478 U.S. 675, 683 (1986); *see also Cuff v. Valley Centr. Sch. Dist.*, 677 F.3d 109, 188 (2d Cir. 2012) (Pooler, J., dissenting) (summarizing *Fraser* as "explain[ing] what every parent already knows" because the holding was based on "'society's countervailing interest in teaching students the boundaries of socially appropriate behavior'") (quoting *Fraser*, 478 U.S. at 681). However, *Fraser*'s holding was strictly limited to an in-school setting where a student gave a speech during a mandatory assembly that included approximately 600 high school students, including many who were as young as 14, as "part of a school sponsored educational program in self-government." 478 U.S. at 677. As the *Levy* court correctly concluded, "*Fraser* does not apply to off-campus speech." 964 F.3d at 181.

In sharp contrast to *Fraser*, where the school needed to dissociate itself from Matthew Fraser's in-school oratory presented to a captive audience of impressionable students, B.L.'s snap was an off-campus expression of personal frustration by a high school student who did not make her school's varsity cheerleading squad. By imposing punishment based on disapproval of her choice of language *outside* the school environment, the School District impermissibly

extended *Fraser*'s rationale to off-campus speech delivered to a self-selected group of her social media friends. Such an unwarranted expansion of school authority runs headlong into Justice Alito's emphatic admonition in *Morse* that allowing school officials to rely on a public school district's self-defined "educational mission" as a basis for regulating student speech would amount to an alarming invitation to viewpoint-based censorship that ***"strikes at the very heart of the First Amendment."*** *Morse*, 551 U.S. at 423 (Alito, J., concurring) (emphasis supplied). Stated another way, "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech," a wide variety of protected expression could be suppressed by school officials. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting).

The First Amendment prohibits public school officials from censoring student expression outside the school environment that employs objectionable or inappropriate language regarded as incompatible with a school's official stance derived from "the inculcation of whatever political and social views" (*Morse*, 551 U.S. at 423 (Alito, J., concurring)) are held by local school boards — a constitutional imperative scrupulously adhered to by the *Levy* majority.

C. Petitioner's Boundless "Targeting" Rubric Does Not Justify the Extension of School Authority to Off-Campus Public Student Speech.

A common rationale for the extension of school disciplinary authority to social media expression beyond the schoolhouse gate is premised on the notion that schools need to be able to regulate speech that

"targets" the school or that is "aimed" or "directed" at the school. *See, e.g.*¸ *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d at 393. As framed by Petitioner, this would allow *Tinker*'s application to off-campus speech that is "intentionally directed" at the school and that "foreseeably reach[es]"[3] the school environment. Pet. Br. 27. But this elastic proposal provides no limit whatsoever on school authority. For public high school students — whose lives predictably center around their school, school activities, and social connections with their classmates — such an approach will inevitably be over-inclusive.[4] It renders speech that would otherwise be constitutionally protected vulnerable to the regulatory whims of school officials any time the speech is about school affairs, discusses school personnel, or mentions school students, opening the schoolhouse gate to a broad array of student expression in a manner never contemplated by *Tinker* and disallowed by the First Amendment.

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[3] The provenance of the reasonable foreseeability element espoused by Petitioner, which has infiltrated federal appellate court public student digital speech decisions, traces to Judge Newman's suggestion in a footnote to the last sentence of his concurrence in *Thomas*. 607 F.2d at 1058 n.13 (Newman, J., concurring). For a critique of this basic negligence concept's application to off-campus public student social media expression, which has extended far beyond the original narrow parameters proposed by Judge Newman, *see* Michael J. Grygiel, *Back to the Future: The Second Circuit's First Amendment Lessons for Public Student Digital Speech*, 71 SYRACUSE L. REV. 1 (forthcoming April 2021).

[4] The Solicitor General concedes this common-sense point. SG Br. 23 ("Students spend much of their lives in school, or at school activities, or doing schoolwork at home; one might therefore naturally expect much of their speech to 'target' the school environment in some fashion.").

The application of Petitioner's proposed limitation confirms its constitutional infirmity. The School District argues that whenever a student speaker "refer[s] to school affairs or send[s] speech directly to classmates" she is "direct[ing]" the speech at the school. Pet. Br. 28. According to this reasoning, a breathtaking scope of off-campus student expression would be subject to school control.[5] In the social media context, the nature of many digital platforms, including Snapchat, simply does not support the targeting rationale. Posting a snap to a story, or posting something on most social media platforms, is altogether different from intentionally communicating a digital message within a school-controlled environment or a school-supervised setting. It is indistinguishable for First Amendment purposes from a student's commentary about school affairs on a local public affairs cable television program. Even though many of the student's classmates may be included in the broadcast's audience, and anything controversial or critical that is said about the school or its personnel is likely to come to the attention of school authorities, that does not mean the student "targeted her speech at campus" (Pet. Br. 30) merely by offering her viewpoint on the program. The same is true even when considering the features of social media plat-

[5] Notably, the Solicitor General disavows the School District's position in this regard, recognizing that Petitioner's invocation of due process principles will not prevent the exposure of a "large sphere of off-campus student communication" to school discipline, in derogation of *Tinker* and in violation of the First Amendment. SG Br. 21; *see also id*. at 22 ("There is, in short, no basis for treating the immense amount of off-campus speech by students as school speech that would potentially be subject to discipline, even if it is about the school or might have some effect on other students or the school environment.").

forms more in line with "sending speech directly" (Pet. Br. 28) to other students — *e.g.*, by texting a message to someone who happens to be a classmate. The fact that a student may send a social media message expressing frustration about a bad day at school to her classmates, on a personal device after school hours, does not mean that she has "directed" her speech at the school. As the School District would have it, that speech is potentially punishable.

In a pre-social media world, had the facts of this case shown that B.L. delivered 250 leaflets to the homes of the individuals in her social network, school officials would not be authorized to punish her speech, notwithstanding any subsequent disruptive impact on the school environment. As the Third Circuit emphasized in a decision that preceded *Levy*, "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (*en banc*). The First Amendment does not tolerate a student's punishment for off-campus criticism of her teacher or coach communicated to a group of social media users merely because some of her classmates are included in that group.

The Court should reject the misguided "targeting" rationale proposed by the School District, as *Levy* and other courts have. *Levy*, 964 F.3d at 180 ("*J.S.* and *Layshock* yield the insight that a student's online speech is not rendered 'on campus' simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or

reaches the school environment"). In today's world, students' use of social media is ubiquitous.[6] Their social media profiles are nothing less than an extension of their personal voices and identities. In fact, as used by student groups such as the *amici*, social media is today's telephone, underground newspaper, and bullhorn all rolled into one — digital *samzidat* amplifying the voices of the nation's and the world's youth. Given the historical role that young citizens have played in effecting positive change in our country, a role which they will no doubt continue to play through the use of social media platforms, insulating students' off-campus digital speech from school control is vital to ensuring the protection of their First Amendment rights as technologies and methods of communication continue to evolve. *See Levy*, 964 F.3d at 179-80 (noting that the Court consistently applies established First Amendment principles in the face of new communications technologies). Snapchat is not the equivalent of a virtual classroom, nor is it a school-sponsored forum. Posting a snap about school affairs or another student while shopping at the mall, for example, does not convert that shopping mall into the equivalent of a school auditorium or cafeteria. A student does not target her school when she posts on social media any more than she does when she authors an op-ed in a local newspaper, even if the op-ed criticizes a school program or her athletic coach's decision-making.[7] The

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

[7] Student members of the *amici* organizations have often published op-eds in their local newspapers to discuss issues affecting their schools. *See, e.g.*, Emanuelle Sippy & Sanaa

"targeting" rationale undermines the foundation set by *Tinker* by substituting a legal reality in which public schools may potentially regulate anything that student activist groups like the *amici* may say that touches on school affairs, regardless of where or when the group happens to say it, any time a school official decides that the speech is inappropriate or disapproves of its message. Indeed, as perhaps unwittingly acknowledged by Petitioner, the only safe course is if the off-campus digital speaker "does not share the[ir] [communication] with anyone[.]" Pet. Br. 29. It is difficult to conceive of a more serious affront to the First Amendment.

D. Participation in Extracurricular Activities Does Not Relinquish a Student's First Amendment Rights.

The United States contends that off-campus student expression qualifies as "school speech" subject to *Tinker*'s application when it "intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or programs themselves[.]" SG Br. 24. This morphs into the further claim that a public school may punish an

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Kahloon, On the Kentucky school board and in their communities, youth are making their voices heard, COURIER-JOURNAL (Oct. 9, 2020), https://courier-journal.com/story/opinion/2020/10/09/kbe-kentucky-youth-forefront-todays-student-voice-movement/5902792002/; Arivumani Srivastava, School tax credit bill will make Ky schools more unequal. Don't override governor's veto, LEXINGTON HERALD LEADER (Mar. 26, 2021, 8:44 AM), https://www.kentucky.com/opinion/op-ed/article250227545.html; Martha Aguirre Rubio & Raj Salhotra, Students should have a say in next HISD Superintendent, HOUSTON CHRONICLE (Mar. 25, 2018, 10:51 AM), https://www.houstonchronicle.com/opinion/outlook/article/Students-should-have-say-in-next-HISD-12777894.php

athletic team member who calls out the coach's competence on social media, despite acknowledging that the same speech would be protected if posted by another member of the student body who is not a teammate. *Id*. at 25-26. Even putting aside the obvious equal protection concerns raised by such disparate treatment of student speakers, this argument is constitutionally problematic. *See LaTrieste Restaurant and Cabaret, Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (equal protection violation arises when "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as . . . intent to inhibit or punish the exercise of constitutional rights") (internal quotation omitted).

First, it "necessarily expands schools' regulatory authority in situations where off-campus student speech criticizes a school-sponsored program or activity — no matter how valid or legitimate the criticism — and the punishment involves disqualification from or ineligibility for that same program or activity." Michael J. Grygiel, *Back To the Future: The Second Circuit's First Amendment Lessons for Public Student Digital Speech*, 71 SYRACUSE L. REV. 1 (forthcoming 2021). As a prominent commentator has stated, the circularity of the penalty justification is self-evident: "[i]f the student speech opposes some aspect of a school activity, the school — as long as the punishment relates only to the activity in question — can then justify its actions simply by pointing to the speech's potential to interfere with that particular activity. This, of course, will often be easy — almost tautological — to show." Emily Gold Waldman, *Regulating Student Speech: Suppression Versus Punishment*, 85 Ind. L. J. 1113, 1129 (Summer 2010);

see also Levy, 964 F.3d at 188 (criticizing *Tinker*'s "tautological" application to off-campus expression).

Allowing schools to leverage participation in extracurricular activities to conform a student's off-campus speech to a school-approved narrative portends disastrous consequences for a student's willingness to speak up in the face of, for example, sexual misconduct or abusive conduct by a high school coach or other adult in a position of school authority. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (student's YouTube rap video called out two high school teachers/coaches for inappropriate conduct with female students); *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007) (high school football players signed petition criticizing head coach's abusive conduct and violations of school athletic rules). As a result, student speech that offers informed and valuable criticism about a school program or sports team runs a real risk of being suppressed under the guise that it is disruptive to an "essential" or "inherent" school function or program. This would allow school districts to keep under wraps a wide swath of student whistle-blowing exposing matters about which taxpayers are entitled to know.

Second, participation in extracurricular activities cannot equate to a waiver of a student's First Amendment rights. *Levy*, 964 F3d 192-94. It has long been established that "'courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1983) (footnotes omitted); *see also Levy*, 964 F.3d at 183 (rejecting proposition that "B.L. abdicated her First Amendment right to speak as a cheerleader").

Third, in stripping B.L. from participation on the cheerleading team, the School District denied her the ability to participate in a school activity that mattered to her, and did so solely because of what she said in her snaps. When the government punishes someone based on her speech, the comparative leniency of the punishment — *e.g.*, removal from a sports team rather than suspension from school — does not control the constitutional inquiry. *Levy*, 964 F.3d at 183; *see also* Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL OF RTS. J. 591, 610 (2011) ("the notion that the free speech inquiry should be ratcheted down when the punishment relates only to an extracurricular activity" raises significant constitutional concerns) (footnote omitted). As this Court has recognized, "even minor punishments can chill protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). The issue is not whether the speaker was deprived of a government benefit, but whether the punishment at issue would deter protected speech going forward. *Mendocino Envntl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999) ("[T]he proper inquiry asks whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.") (internal quotations omitted).

> The constitutional right at issue is freedom of expression, not that of participation in extracurricular activities. That there is no constitutional right to participate in . . . extracurricular activities may be pertinent to an analysis of other sorts of constitutional claims, . . . but as *Tinker* itself notes, not to a freedom of expression claim.

T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp., 807 F.Supp. 2d 767, 780 (N.D. Ind. 2011) (footnote omitted).

If the government's position were to prevail, students would be confronted with a stark choice: participate in extracurricular activities that are a critical aspect of the competitive college admissions process, or retain their right to unrestricted free speech outside of school. The *Levy* court correctly determined that no high school student should have to make such a choice. 964 F.3d at 182 ("[W]e see no sound reason why we should graft an extracurricular distinction onto our case law.").

III. MISFIRED DISCIPLINARY DECISIONS CAUSE IRREPARABLE HARM TO THE "ONCE IN A LIFETIME" EXPERIENCE REPRESENTED BY HIGH SCHOOL

It is typically impossible as well as impractical for a student to obtain judicial review and meaningful redress prior to being harmed, often irreparably, by a public school's disciplinary decision. *Thomas*, 607 F.2d at 1052 ("Where, as here, the punishment is virtually terminated before judicial review can be obtained, many students will be content to suffer in silence, a silence that may stifle future expression as well."). The moment B.L. was disciplined for her Snapchat in 2017, she became stigmatized as a disruptor with a formal record of the same. Only now, four years later, and representing one of a select few students who has persisted in seeking to vindicate her First Amendment rights through the civil litigation process, will she have the opportunity to shed that label. Unfortunately, whatever negative impact B.L.'s high school record may have had on her immediate

educational or employment prospects cannot be meaningfully undone after the fact by this Court.

A perhaps overlooked but nevertheless important point is that we leave to the same officials who handed down B.L.'s disciplinary decision the authority to memorialize it in her student record. We expect, perhaps naively, that they will do so fairly. This is a critical part of the process because B.L., or any other student in her position, must answer affirmatively in responding to college or employment applications questioning whether they have ever been disciplined. Unfortunately, it is unlikely that a typical student's disciplinary record is worded in a way that provides them with the benefit of the doubt in the eyes of third-party stakeholders who have a hand in shaping a student's future, such as a college admissions officer or potential employer. In such instances it is fair to assume that the student's disciplinary record will state something along the lines of "violated policy on student conduct" rather than "used a swear word on social media while outside of school, in a non-threatening manner and directed at nobody in particular." While each characterization may arguably be considered accurate, there is a tremendous difference in how each statement is likely to be received by the uninformed reader and, as a consequence, how the student is impacted. It is no stretch to assume that a third-party reviewer is more likely to eliminate the student from consideration if presented with the former given that it appears, on its face, to denote a more serious violation, whereas that same individual is perhaps more likely to pause and question the gravity or validity of the sanction if presented with the context afforded by the latter.

Leaving these decisions to the same school administrators responsible for imposing the punishment in the first place is a gamble with the student's future that the public student speech framework should not permit us to undertake. *Thomas*, 607 F.2d at 1050-51. These young people are at a critical point in their formative years, the unique experience of which cannot be recovered by a favorable court decision eventually rendered years down the line. Because judicial redress cannot adequately restore what a school has wrongfully taken away, it is no answer to say that a student punished for off-campus speech can seek correction through the legal process years after the fact. The opportunities lost to the student are irretrievable; she cannot go back and join the cheer squad, take another crack at a high school sports team, recreate the college admissions process, or otherwise redo this important part of her life. Thus, the law should robustly protect in the first instance First Amendment rights exercised outside the public school setting because a student's available remedies are inadequate. The principle upheld in *Levy* does precisely that.

CONCLUSION

Based on the foregoing reasons, the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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March 31, 2021