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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a public high school violated the First Amendment when it punished a student for her colorful expression of frustration, made in an ephemeral Snapchat on her personal social media, on a weekend, off campus, containing no threat or harassment or mention of her school, and that did not cause or threaten any disruption of her school.

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INTRODUCTION

This case stems from a momentary expression of frustration, voiced by a disappointed student, B.L., on a weekend, far from school, on Snapchat, a medium designed for temporary, self-deleting messages. After failing to make the varsity cheerleading team, and while shopping with her friend, B.L. typed a message, which disappeared in 24 hours, that read "fuck school fuck softball fuck cheer fuck everything." The message did not identify any particular school or any official associated with the school. It did not cause any disruption at the school. But when another student took a screenshot of the message to preserve it and showed it to her mother, a cheerleading team coach, the school suspended B.L. from the team for the year.

Both the district court and all three judges on the court of appeals agreed that such off-hand, private, off-campus, ephemeral expression cannot be the basis for punishment under the First Amendment. That unsurprising resolution of a necessarily fact-bound case does not warrant the Court's review.

First, there is no circuit split. While many factors affect a school's authority to regulate student speech off campus, the courts of appeals regularly look to the same set of factors in making that assessment and have reached generally consistent results in doing so. Applying those factors, none of the courts of appeals would have reached a different result from the Third Circuit with respect to the speech in this case.

Second, even if the Court were inclined to address whether and to what extent the standard for regulating on-campus speech established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), applies off-campus, this would be

an inappropriate vehicle for doing so. Because there was nothing disruptive about B.L.'s speech, and the school officials conceded as much, it would be protected from the school's punishment even if *Tinker* were applied—as both the district court and the concurring judge on the court of appeals concluded. Resolving the question presented by Petitioner would not alter the outcome, making this case an inappropriate vehicle for certiorari.

Third, the decision below is plainly correct. In a weekend comment in an evanescent Snapchat message, B.L. swore in expressing her disappointment at not making the varsity team to her friends. The notion that a school can discipline a student for that kind of spontaneous, non-threatening, non-harassing expression is contrary to our First Amendment tradition, and finds no support in this Court's student speech cases. Petitioner's argument to the contrary would apply equally had B.L. made the comment in person to a group of friends, and if one of them then reported the remark to the cheerleading coach. Surely such harmless off-campus speech cannot be punished by a public school; the fact that it was expressed on Snapchat rather than at a weekend party is not of constitutional magnitude.

STATEMENT OF THE CASE

When this case arose in 2017, B.L. was a high school cheerleader in the Mahanoy Area School District (the "School District"). Close to the end of her freshman year, she failed to make her school's varsity cheerleading team for the second year in a row. Frustrated, she posted a disappearing Snapchat message ("Snap") on a Saturday, while shopping with her friend far from school. She posted the Snap from

her personal cell phone, on her personal social media. The message did not include any school logos, did not name the school or any school officials, and was not harassing, threatening, or disruptive. Pet. App. 15a, 34a.

Snapchat is a social media platform expressly designed to share ephemeral messages. Snapchat posts, or "Snaps," are automatically self-deleting. B.L. testified that 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. Prelim. Hr'g Tr. 14, 17, Oct. 2, 2017, ECF No. 39-1, No. 3:17-cv-1734 (M.D. Pa.).

To express her frustration, B.L. and her friend took a photo of themselves sticking their tongues out and extending their middle fingers. B.L. then posted it to Snapchat with the text "fuck school fuck softball fuck cheer fuck everything" superimposed over the image. She was not wearing her cheerleading uniform, and there was nothing in the photo to suggest any affiliation with her school, her team, or the Mahanoy Area School District. She did not name the school, much less any teachers, coaches, or administrators associated with the school. Pet. App. 51a.

Only B.L.'s Snapchat "friends"—the specific set of individuals whom she allows to see her posts—could see the Snap, and they could view it only during the 24 hours after it was posted. The Snap self-deleted from Snapchat on Sunday. That likely would have been the end of the matter, had not another cheerleader—one of B.L.'s Snapchat "friends"—taken a "screenshot" of the Snap in order to preserve the image after it self-deleted. That cheerleader then

brought the screenshot to the attention of her mother, a cheerleading coach. *Id.* at 52a.

The School District admitted, through the testimony of its 30(b)(6) witnesses, that the Snap did not disrupt any school activity, and that the School District did not expect the Snap to cause any disruption. *See* Luchetta-Rump Dep. 58–60, Oct. 10, 2018, ECF No. 40-13, No. 3:17-cv-1734 (M.D. Pa.). One coach testified that her attention was briefly diverted from the class she was teaching by other cheerleaders asking her whether she intended to punish B.L. for the Snap. *Id.* But both coaches testified that "electronic squabbling amongst cheerleaders . . . 'is a fairly typical occurrence,'" so this was not out of the ordinary. Pet. App. 52a. And one coach testified that "she punished B.L. for profanely referencing cheerleading, not because of any possibility of disruption." *Id.* at 74a.

The cheerleading coaches decided that B.L.'s use of profanity in connection with the word "cheer" violated two "cheerleading rules" they had imposed on cheerleaders: the "respect" and "no negative information" rules. The "respect" provision reads:

> Please have respect for your school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced[;] this includes foul language and inappropriate gestures.

Id. at 51a. The "no negative information" provision states that "[t]here will be no toleration of any

negative information regarding cheerleading, cheerleaders, or coaches placed on the internet." *Id.*

The coaches suspended B.L. from the junior varsity cheerleading team for her entire sophomore year as punishment for the Snap. After B.L.'s parents unsuccessfully urged the School District to reconsider, maintaining that the punishment violated B.L.'s First Amendment rights, B.L. and her parents filed suit against the School District seeking declaratory and injunctive relief and nominal damages.

The district court granted a temporary restraining order, restoring B.L. to the cheerleading team. After an evidentiary hearing, it granted a preliminary injunction extending that relief. At the preliminary injunction hearing, the School District "made no argument that the Snap sent by Plaintiff B.L. would substantially disrupt the operation of the school" and instead "solely relie[d] upon [B.L.'s] use of profanity" to justify suspending her from the cheerleading team. Mem. 5 n.7, Oct. 5, 2017, ECF No. 12, No. 3:17-cv-1734 (M.D. Pa.).

The district court subsequently granted B.L.'s motion for summary judgment. The court explained that *Tinker* set a "baseline" protecting students' First Amendment right not to be punished for their speech *in school*, absent evidence of disruption. Pet. App. 55a. It noted further that *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393 (2007), established "exceptions to [that] broad dictate" that allow schools to regulate certain kinds of student speech at school or school-supervised events. Pet. App. 55a–57a.

The district court ruled that, under this framework, the School District's punishment of B.L.'s Snap violated her First Amendment rights. The School District's primary argument relied on *Fraser*, maintaining that it had the authority to penalize B.L. merely because she used profanity. The district court rejected that contention, holding that schools may not rely on *Fraser*, which upheld punishment of a student for a lewd speech delivered at a school assembly, to punish students for profanity expressed entirely outside of school activities. *Id.* at 68a. Turning to the school's second argument, the court held that, even assuming *Tinker* could be applied to out-of-school speech without any evident connection to the school, the School District had not satisfied *Tinker* because the undisputed record showed that the Snap did not cause, or pose a foreseeable risk of causing, a substantial, material disruption. *Id.* at 73a–75a.

The Third Circuit unanimously affirmed. Applying this Court's settled law regarding school regulation of student speech, it acknowledged that the school's heightened authority to regulate student speech is not limited to the "bricks and mortar" of the school property itself. *Id.* at 11a (quoting *Layshock ex rel. Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205, 216 (3d Cir. 2011) (en banc)). At the same time, the court noted, the authority of the school to regulate student speech off campus is not unlimited. *Id.* at 12a. "School officials," it noted, "may not '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.'" *Id.* (quoting *Layshock*, 650 F.3d at 216). It explained that drawing this line, "tricky from the beginning," has been made more difficult by social media. *Id.* But it

held that on the facts of this case, "we easily conclude that [B.L.'s] snap falls outside the school context." Pet. App. 15a. In so concluding, the court noted that B.L.'s message was neither threatening nor harassing and was expressed on a weekend, off-campus, without school resources, and outside any school-sponsored event or forum. *Id.*

The court of appeals noted that, just as in the district court, the School District "principally defends its actions based on its power 'to enforce socially acceptable behavior' by banning 'vulgar'" words. *Id.* at 16a. The court held, however, that *Fraser* could not be extended to off-campus speech. *Id.* at 16a–21a. It then rejected the School District's fallback argument, namely that the Snap could be regulated as disruptive under *Tinker*. Assessing multiple factors, the court concluded that *Tinker* does not apply to speech like B.L.'s that occurs off-campus, on the weekend, outside of any school-owned, -operated, or -supervised channels, and without any appearance of the school's imprimatur. In so concluding, the court expressly "reserve[ed] for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others." *Id.* at 25a, 34a–35a. Thus, the majority held that the School District's punishment of B.L. for the Snap must be governed by ordinary First Amendment principles, and that outside of the school setting, the government lacks the power to punish private speech simply because it is profane. *Id.* at 36a–37a.

Judge Ambro, concurring in the judgment, concluded that the Snap "is not close to the line of student speech that schools may regulate," even assuming *Tinker* applied. *Id.* at 45a. Describing the

case as "straightforward," Judge Ambro explained that:

> B.L. was suspended from her school's cheerleading team as punishment for a Snap that said "fuck cheer," which she created on her own smartphone, on her own time on a weekend, while off-campus, and not participating in any school-sponsored activity. The Snap did not mention the School District, the school, or any individuals, and did not feature any team uniforms, school logos, or school property. It caused complaints by a few other cheerleaders but no "substantial disruptions," and the coaches testified that they did not expect the Snap would substantially disrupt any activities in the future.

Id. Judge Ambro therefore would have simply affirmed the district court based on the lack of any evidence that B.L.'s Snap caused, or presented a foreseeable risk of, substantial disruption within the school. *Id.* at 48a.

REASONS TO DENY THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE THIRD CIRCUIT'S OPINION AND DECISIONS OF THE OTHER FEDERAL COURTS OF APPEALS.

There is no circuit split to resolve here. Petitioner asserts that there is a split regarding whether *Tinker*'s "substantial disruption" standard applies to student speech that takes place off-campus. Pet. App. 11. While some courts have applied

Tinker to off-campus speech, the Third Circuit's decision not to do so in this case does not create a circuit split because no other court of appeals would have held that *Tinker* applies to B.L.'s Snap under the circumstances presented here. And contrary to Petitioner's contention, the Third Circuit did not foreclose the possibility that public schools have heightened authority to regulate students' off-campus speech, particularly when, unlike here, it involves threats or harassment, appears on a school-sponsored forum, or carries the school's imprimatur. It merely concluded that such authority ought not extend to the facts presented here, on the basis of considerations that are consistent with other courts of appeals' decisions.

To conjure a "split," the Petition oversimplifies both the Third Circuit's opinion and the decisions of other circuits. The court of appeals below did *not* hold, as the Petition claims, that "off-campus student speech is beyond the school's power to discipline…even if that off-campus speech is closely connected to campus, seriously disrupts the school environment, and threatens or harasses other students or administrators." *Id.* at 3. Rather, consistent with other circuits' decisions addressing student speech, the Third Circuit's holding rested narrowly on the particular facts of this case. *See Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1049 (2d Cir. 1979) (acknowledging that, in cases involving regulation of student speech, "much depends on the specific facts before [the court]"). The panel majority held only that the First Amendment does not permit public school officials to punish off-campus speech that (1) does not constitute harassment or a threat of violence; (2) took place off

campus on a weekend outside of school hours; (3) was not disseminated through school-owned, -operated, or -supervised channels or at a school event; and (4) did not bear the school's imprimatur. Pet. App. 31a, 34a.

The Petition ignores all of these critical factors and treats the decision below as simply applying an on-off switch based on whether speech takes place on or off campus. Indeed, the School District argues that the panel's decision prevents schools from regulating off-campus speech that "threatens or harasses other students or administrators," *id.* at 3, even though the court of appeals expressly *declined* to so rule. *Id.* at 25a ("reserving for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others."); *id.* at 34a (noting that a case involving a school's regulation of a student threat or harassment off campus would "raise different concerns and require consideration of other lines of First Amendment law"); *id.* at 35a ("our opinion takes no position on schools' bottom-line power to discipline speech [that threatens or harasses].").

The Petition similarly misconstrues the decisions of other courts of appeals. Although the courts of appeals have not used identical rubrics to characterize their inquiries, their approaches are largely consistent. They all look to certain features in assessing whether a school can regulate a student's off-campus speech. These features include whether the speech constitutes harassment or a threat of violence; targets specific students, teachers, or school administrators; is explicitly directed at the school with the intention of causing disruption; occurs on a school-supervised forum or at a school-sponsored event; and carries the school's imprimatur. Every circuit court

decision cited in the Petition relied on one or more of these features in holding that schools had authority to regulate the speech at issue. But *none* of these features was present in this case. Tellingly, the Petition does not identify a single circuit court decision applying *Tinker* to the type of off-campus speech at issue here. That is because there are none.

The vast majority of the cases cited by Petitioner in which courts held that school officials could punish off-campus speech under *Tinker* involved threatening, intimidating, or harassing speech that was posted online but intentionally directed toward the school community—*i.e.*, speech that the Third Circuit explicitly said its decision was *not addressing*, *id.* at 34a–35a—and most involve speech that posed a serious threat of violence to members of the school community. *See, e.g.*, *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 36 (2d Cir. 2007) (upholding punishment for student's instant messaging icon showing a gun firing at a person's head with blood coming out of it above the words "Kill Mr. VanderMolen," the student's teacher); *Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011) (upholding punishment for MySpace page directly harassing a specific classmate); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015) (en banc) (upholding punishment for a rap that contained "threats to, and harassment and intimidation of, two teachers"); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (upholding punishment for overtly racially and sexually harassing comments targeting specific classmates); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757–59, 765–67 (8th Cir. 2011) (upholding punishment for instant messages

describing student's desire to buy a gun and shoot specific classmates before shooting himself); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1070, 1071 (9th Cir. 2013) (upholding punishment for MySpace messages describing a planned school shooting and targeting specific classmates); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 (Pa. 2002) (upholding punishment for creation of website that contained violent, threatening, and derogatory comments about student's teacher and principal, including soliciting money to pay for a hitman to kill his teacher, which the student accessed and showed to another student at school).

The same is true for the cases cited by Petitioner in which courts have applied *Tinker* to *off-line*, off-campus speech. *See McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 703, 708–09 (9th Cir. 2019) (per curiam) (upholding punishment for a "hit list" in student's journal of classmates that "must die" where "it was reasonable for School District officials to conclude that [student] presented a credible threat of severe harm to the school community"); *C.R. ex rel. Rainville v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150–52 (9th Cir. 2016) (upholding punishment for sexual harassment of other students minutes after school ended for the day on property that was "not obviously demarcated from the campus itself").[1]

[1] Indeed, only a single case involves no direct threat of violence or harassment, and even that case involved speech explicitly directed at the school community with the intent to cause disruption. In *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), the Second Circuit upheld punishment of a student who urged other students in a blog post to contact the school superintendent to "piss her off more," resulting in a deluge of phone calls and emails to the school. *Id.* at 45.

Additionally, in determining whether *Tinker* or another of this Court's student speech precedents applies, the courts of appeals consistently consider two other factors: whether the speech took place on a school-supervised forum, *see, e.g.*, *D.J.M.*, 647 F.3d at 760–61; *Bell*, 799 F.3d at 393–94, and whether the speech carried the school's imprimatur, *cf. Kuhlmeier*, 484 U.S. at 271; *see Wynar*, 728 F.3d at 1067; *J.S.*, 807 A.2d at 861–63, 864–65. The court below considered those factors as well, and concluded that they were not present here. *See* Pet. App. 31a.

None of these cases conflicts with the decision below, because B.L.'s Snap featured no harassing, intimidating, or threatening speech. B.L.'s speech did not *mention*, much less target, the school or any individuals associated with it, nor was it directed at the school with the purpose of causing disruption. It did not take place on a school-sponsored forum, or carry the school's imprimatur. B.L.'s Snap was nothing more than an off-hand, ephemeral expression of frustration on a personal social media platform designed to facilitate such transitory communications. No court of appeals has held that schools can regulate such speech when it occurs off campus. And based on these facts, the Third Circuit had no occasion to consider whether schools have heightened authority to punish off-campus speech that is threatening, harassing, or closely connected to the school. Pet. App. 15a (noting that the "few points of contact" between the Snap and the school were "not enough" to convert it into speech that can be punished under *Tinker*).

Thus, there is no clear split among the circuits. The courts of appeals generally agree with the Third Circuit that there is no "bricks and mortar" on-off switch that determines whether schools have

heightened authority to regulate speech beyond the schoolhouse gate. All agree that several factors should be considered in that assessment. The court below considered those factors, consistent with the approach taken by other courts of appeals to resolving such necessarily fact-bound inquiries. On the facts presented here, the Third Circuit arrived at the same conclusion that every other circuit would have reached: *Tinker* does not apply, and B.L.'s speech cannot be punished.

II. THIS CASE IS A POOR VEHICLE FOR DECIDING WHETHER *TINKER* APPLIES TO OFF-CAMPUS SPEECH BECAUSE B.L.'S SNAP DID NOT CAUSE OR THREATEN ANY MATERIAL DISRUPTION.

Petitioner urges the Court to hear this case to rule that *Tinker* applies to off-campus speech, allowing schools to regulate any and all student expression that causes or is likely to cause a material and substantial disruption, even if, as here, it occurs at a convenience store on the weekend and does not even *mention* the school, much less threaten or harass anyone associated with it. Even if the Court were inclined to address that question at some point, this case is an inappropriate vehicle to do so because a ruling in Petitioner's favor on that question would not alter the outcome.

There is no evidence in the record on which a reasonable person could conclude that B.L.'s Snap caused or was reasonably likely to cause a material and substantial disruption of school activities sufficient to meet the *Tinker* standard. The School District's witnesses admitted before the district court

that the Snap did not cause a material and substantial disruption and that they had no reason to expect that it would. Indeed, at the only evidentiary hearing in the case, the School District did not even argue that the speech caused disruption. Mem. 5 n.7, Oct. 5, 2017, ECF No. 12, No. 3:17-cv-1734 (M.D. Pa.). The School District subsequently advanced a novel *Tinker*-lite argument only as a fallback, contending that the speech's relationship to an extracurricular activity should permit the punishment even if no disruption was threatened or occurred. Pet. App. 31a–36a.

Petitioner was wise to concede the absence of disruption given the innocuous character of the speech, the fact that it did not even mention the school or anyone at the school, and the testimony of school officials. On this record, even if the Court were to conclude that *Tinker* applies, the School District's punishment of B.L. would still violate the First Amendment—as both the district court and the concurrence on appeal concluded. Because the question presented is not outcome-determinative, the petition should be denied. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013).

Comparing the operative facts of *Tinker* and this case shows that the school could not punish B.L.'s non-disruptive speech. *Tinker* considered whether a student could be penalized for wearing a black armband to school to protest the Vietnam War. This Court held that, while students do not shed their First Amendment rights at the "schoolhouse gate," schools have broader authority over students on campus than does the state generally with respect to the citizenry. *Tinker*, 393 U.S. at 506–07. Therefore, it ruled that schools may punish students for on-campus speech, but only if that speech causes or is likely to cause a

"material and substantial" disruption of school activities. *Id.* at 511. Because Marybeth Tinker's armband caused no disruption, the school could not punish her for wearing it. *Id.* at 514.

For the same reason, the School District's punishment of B.L. violated her First Amendment rights even if *Tinker* applied to her off-campus speech: it simply caused no disruption. In granting B.L's motion for summary judgment, the district court concluded that it was undisputed that B.L.'s Snap did not create any substantial disorder, or likelihood thereof, and that the cheerleading coaches did not reasonably predict any substantial disruption from the Snap. Pet. App. 75a. In support of that determination, the district court pointed to the cheerleading coach's testimony that "she punished B.L. for profanely referencing cheerleading, not because of any possibility of disruption." *Id.* at 74a. The court reasoned that it did not need to determine whether *Tinker* applied to B.L.'s speech because, even assuming it did, the undisputed evidence showed that the *Tinker* standard was not met. *Id.* at 75a.

While the Third Circuit majority concluded that *Tinker* did not apply to B.L.'s speech, *id.* at 31a–36a, and that therefore it did not have to answer the "disruption" question, *id.* at 22a, Judge Ambro addressed the issue in his concurring opinion. Like the district court, Judge Ambro analyzed the record and concluded that, even if *Tinker* applied, B.L.'s Snap did not cause a material and substantial disruption or reasonable risk thereof. *Id.* at 45a. Judge Ambro said there was no need to decide whether *Tinker* applied to the Snap because it was "not close to the line of student speech that schools may regulate" even under *Tinker*. *Id.* He noted that B.L.'s Snap was "created on

her own smartphone, on her own time on a weekend, while off-campus, and not participating in any school-sponsored activity." *Id.* The Snap did not mention the school or anyone associated with it, caused "no 'substantial disruption,'" and "the coaches testified that they did not expect the Snap would substantially disrupt any activities in the future." *Id.* Judge Ambro therefore would have affirmed the district court decision based on the record showing that B.L.'s Snap did not cause or threaten a substantial disruption within the school. *Id.* at 48a.

On this record, no reasonable trier of fact could conclude that B.L.'s Snap met the disruption standard set forth in *Tinker*. Accordingly, the School District would lose, and B.L. would prevail, whether or not *Tinker* applies. This Court does not grant certiorari to resolve legal questions that would not change the result below. *See Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied where the resolution of a circuit split could not change the outcome); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (declining to resolve split among circuits where doing so would not affect the outcome of the case); Shapiro et al., *supra*, at 249.. The Petition therefore does not present an issue warranting this Court's review, even if the Court thought at some point it should address *Tinker*'s application off-campus.

III. THE DECISION BELOW IS CORRECT.

Finally, the decision below is correct. The court of appeals applied settled precedent to hold that a school could not punish a student for a juvenile but harmless and ephemeral off-campus expression of frustration that did not even mention the school, much less threaten or harass anyone associated with it. As

detailed above, on these facts, no court of appeals in the country would have reached a different result. While Petitioner focuses on one aspect of the court's reasoning—its conclusion that *Tinker* ought not apply to this speech—the Petition barely addresses whether the ultimate decision is correct. It surely is.

The court of appeals' decision is a straightforward and painstaking application of this Court's prior decisions involving school regulation of student speech. The court properly ruled that on these facts B.L.'s speech could not be punished under those precedents. The School District primarily argued below that it could punish B.L.'s speech because it was vulgar, relying on *Fraser*. But as the court of appeals correctly ruled, *Fraser* is limited to on-campus speech, and Petitioner does not even challenge that aspect of the court's ruling.

The court also correctly rejected the School District's fallback, *Tinker*-lite argument that even off-campus speech that does not disrupt can be punished in these circumstances. The court concluded that *Tinker* did not apply because B.L.'s speech took place off-campus, was not connected with any school-sponsored event or forum, and involved no threat or harassment. Indeed, no other court has extended *Tinker* to allow public schools to punish students for speech of this sort. And in any event, the School District concedes that the speech was not disruptive; therefore it would be protected even if *Tinker* had been applied, as the district court and Judge Ambro concluded.

The Court's other two student-speech precedents, *Morse* and *Kuhlmeier*, do not support the punishment here, either. The speech in *Morse*—a

student's display of a banner reading "BONG HiTS 4 JESUS" —took place during a school-sponsored event and thus was treated as on-campus speech. 551 U.S. at 400–01. And *Kuhlmeier*, involving a school newspaper, has no applicability because B.L. did not post her message on a forum run by the school for a pedagogical purpose. 484 U.S. at 272–73 (allowing school to regulate speech in a school newspaper where there is legitimate pedagogical reason for doing so).

Permitting school officials to regulate student expression that occurs on a weekend, off-campus, with no specific connection to the school would severely diminish students' free-speech rights in the world at large. The School District's argument would apply with equal force had B.L. simply voiced her frustration to a group of friends while hanging out on the weekend, and had one of the friends then reported it to the school. Surely such speech could not be punished. The fact that B.L. expressed her irritation not orally but through an ephemeral, disappearing Snap is not a constitutionally significant difference. The Third Circuit's decision that the School District violated B.L.'s First Amendment rights is fully consistent with this Court's student-speech precedent and First Amendment jurisprudence, and there is no reason to disturb it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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