

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 CURRENT AND FORMER STUDENT  
SCHOOL BOARD MEMBERS AS *AMICI*  
*CURIAE* SUPPORTING RESPONDENTS**

---

Hyland Hunt  
*Counsel of Record*  
Ruthanne M. Deutsch  
DEUTSCH HUNT PLLC  
300 New Jersey Ave. NW  
Suite 900  
Washington, DC 20001  
(202) 868-6915  
hhunt@deutschhunt.com

---

---

## TABLE OF CONTENTS

INTEREST OF <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	6
The First Amendment Prohibits Expanding A School’s Regulatory Ambit To Cover Virtually All Student Speech. ....	6
A. Permitting Schools to Regulate Off-Campus Speech “Directed” at the School Would Chill Core Political Speech. ....	6
B. Granting Schools Authority to Regulate Non-Threatening, Non-Harassing Off-Campus Speech Would Be an Unprecedented Intrusion into Students’ Personal Lives. ....	19
CONCLUSION .....	23
APPENDIX .....	1a

## TABLE OF AUTHORITIES

### Cases

<i>Bethel School District No. 403 v. Fraser</i> , 478 U.S. 675 (1986).....	20, 21
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988) .....	10
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988).....	19
<i>Morse v. Frederick</i> , 551 U.S. 393 (2007).....	6, 7, 20
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	18, 22
<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017).....	16
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	16, 22
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	8, 17
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012).....	18
<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	15, 17

*Tinker v. Des Moines Ind. Cmty. Sch. Dist.*,  
393 U.S. 503 (1969).....*passim*

*West Virginia Bd. of Educ. v. Barnette*,  
319 U.S. 624 (1943)..... 14

**Other Authorities**

Lateshia Beachum, *Georgia school reverses suspension of teen who shared viral photo of hallway packed with students*,  
Wash. Post (Aug. 7, 2020)..... 7

Meg Benner, et al., *Elevating Student Voice in Education*, Ctr. for Am. Progress  
(Aug. 14, 2019) ..... 11

Cal. Student Bd. Mbr. Ass’n, *Newsroom*  
(Mar. 29, 2021) ..... 13

CivXNow, *Founder* ..... 3

*Directory of State Laws Affecting Students on School Boards*, SoundOut..... 1

Linda Jacobson, *Students Bring Youthful Perspective to State Ed. Boards*, Educ. Week  
(Jan. 21, 2004)..... 11

Avani Kalra, *Covering misconduct allegations as a student journalist*, Columbia Journalism Review U.S. Project (Oct. 3, 2019)..... 10

Rebecca Klein, <i>Wesley Teague, Kansas Student, Suspended After Tweeting About High School's Sports Program</i> , HuffPost (May 9, 2013) .....	15
Los Angeles Unified Dist., <i>Fingertip Facts 2020-21</i> .....	12
Juliet Macur, <i>Gymnasts Worldwide Push Back on Their Sport's Culture of Abuse</i> , N.Y. Times (Aug. 3, 2020) .....	9
Nat'l Sch. Bd. Ass'n, <i>Students Serving on School Boards: Democratic Education in Action</i> (Feb. 4, 2021) .....	11, 12, 14
Michael Niehoff, Int'l Soc'y for Tech. in Educ., <i>9 ways real students use social media for good</i> (Oct. 2, 2019) .....	14
Stephen Sawchuk, <i>Few Student Board Members Can Vote. Should That Change?</i> , Educ. Week (June 11, 2019) .....	12
Ashley E. Stirling & Gretchen A. Kerr, <i>Initiating and Sustaining Emotional Abuse in the Coach–Athlete Relationship</i> , 23 J. Aggression, Maltreatment & Trauma 116 (2014) .....	9
David Wheeler, <i>Do Students Still Have Free Speech in School?</i> , The Atlantic (Apr. 17, 2014) .....	9, 10
Alexander Wolff, <i>Is the era of abusive college coaches finally coming to an end?</i> , Sports Illustrated (Sept. 29, 2015) .....	10

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

To ensure that school governance reflects students' perspectives, most States authorize or require local school districts to include student members on their local school boards. *See Directory of State Laws Affecting Students on School Boards*, SoundOut, <https://tinyurl.com/f64pf26>. Many States have student positions on the board of education at the state level as well. *Id.* Student members may be elected or appointed, depending on the State, and in some States have the same voting rights as other school board members. *Id.* *Amici* are 192 current and former student school board members from across the country, who serve or have served on school boards for local school districts in 28 States and territories or as student representatives on state boards of education. *Amici's* experience reflects a broad range of school settings, from large urban school districts in California and Florida to small districts in Montana and Alaska, and everything in between. The names of *amici* are listed in an appendix to this brief.

To *amici's* knowledge, this brief marks the first time that current and former student school board members have organized nationally—here to advocate before the United States Supreme Court on a pressing legal issue and provide their unique perspective as student school board members. Why now? Because the question presented poses grave risks not only to

---

<sup>1</sup> Counsel of record for all parties consented to the filing of this brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

students' free speech rights, but also to school boards' ability to learn of and respond to problems in their districts. In recent years, many school districts have permitted students greater voice and responsibility in school decision-making. But such systems work only if students are free to express opinions on school policies, events, and decisions—especially opinions distasteful to administrators or unpopular with other students.

As students who have participated in both setting school policy as school board members and abiding by that policy as students, *amici* strongly endorse school districts' legitimate interests in regulating off-campus behavior that directly impairs the ability of other students to learn, such as threats, bullying, or harassment. Respondents rightly note that nothing in the Third Circuit's decision disturbs school districts' well-established authority to address those concerns; school districts have ample constitutional avenues to regulate such harmful conduct.

*Amici* write separately to emphasize that the expansive and unprecedented authority to regulate off-campus speech claimed by the school district here would subject a great deal of core political speech to regulatory scrutiny and chill students from critiquing the school or freely using their voices to advocate for change. Such student speech is essential not only as a constitutionally protected interest itself, but also because it helps preserve the critical role that schools can play as laboratories of civic engagement where students can practice democracy (including the right to criticize) and learn to use their voices effectively and responsibly to advocate for needed changes.

## INTRODUCTION AND SUMMARY OF ARGUMENT

As Justice O'Connor explained, the “practice of democracy is not passed down through the gene pool. It must be taught and learned anew by each generation of citizens.” CivXNow, *Founder*, <https://tinyurl.com/628bes66>. That teaching and learning takes place while young people are students, but not necessarily, and certainly not exclusively, in classrooms. Instead, practical experiences shape learning, and such shared moments include students using their voices to express dissent about school issues—to mobilize others, and to advocate for and achieve change.

Although a disgruntled Snap about failure to make the varsity cheerleading team might seem far afield from the “practice of democracy,” the distance is not so great. The school district’s effort to police a profane Snap in the interest of “team unity” embraces an unprecedented expansive authority to regulate core political speech by students about their governing body, the school. And the claimed authority to suppress speech is not subject to limits of time or place, but only to a much diminished and increasingly vague standard for constitutional protection: *Tinker’s* “substantial disruption” test.

By definition, the very speech that triggers school authority, in Petitioner’s view—speech about the school—is likely to be political. The school is students’ community, where they spend most of their waking hours. And school decisions and policies on a wide variety of issues are hotly contested political topics or



matters of great public concern to the members of that community: reopening schools during the pandemic, budget cuts, school discipline, abusive coaching practices, staff misconduct—the list goes on.

If past is prologue, schools will not hesitate to use their newfound authority to censor, punish, or pressure students who express dissenting or controversial views on such core governance issues. And even if only a few suspensions are handed down, the mere knowledge that the school is scrutinizing every statement a student makes on social media for signs of possible disruption will cast a pall over student speech and lead many students to self-censor.

Such chilling effects could silence speech that spurs needed reforms. *Amici* student school board members depend upon robust and open channels of communication with other students to help them identify and address issues of concern to the school community. If fear of punishment stifles student speech, student school board members cannot perform that function, and school governance will suffer.

Not all student off-campus speech is political, of course. Sometimes a profane Snap is just that. But students, no less than adults, are entitled to the breathing space provided by the First Amendment to engage in even silly or intemperate speech. Off campus, it is (if anyone) parents, not schools, that should set the guidelines for good taste and civility.

Of course, when off-campus student behavior crosses the line to harassing or bullying another student (or teacher or school staff person), or threatening violence, that is a different story. No one wants to disable schools from being able to address

such conduct, least of all *amici*, many of whom have fought hard for schools to take seriously the problem of harassment. But the Third Circuit's rule takes nothing away from schools' ability to address that problem. And the well-established tools that schools have at their disposal to deal with harassment or bullying—unlike the unprecedented power grab claimed here—do not subject vast swaths of protected speech to the chilling effect of government scrutiny.

Like any medium of communication, social media can be used for bad ends. But it is mostly used by students in beneficial ways, from political speech and organizing to collaborating on school projects and volunteer efforts, to displaying creativity and maintaining interpersonal relationships. And during the past year, in the face of a pandemic, when virtual student gatherings have often been the only ones available, ensuring students' right to express dissent is even more important. The First Amendment shields such student communication, away from school and outside the school day, from school regulation.

**ARGUMENT****The First Amendment Prohibits Expanding A School's Regulatory Ambit To Cover Virtually All Student Speech.****A. Permitting Schools to Regulate Off-Campus Speech "Directed" at the School Would Chill Core Political Speech.**

1. Make no mistake: students' off-campus core political speech is threatened here. Even when it takes place on campus, political speech "implicat[es] concerns at the heart of the First Amendment." *Morse v. Frederick*, 551 U.S. 393, 403 (2007). *A fortiori*, political speech off campus is "at the core of what the First Amendment is designed to protect." *See id.* (internal citation and quotation marks omitted). Yet Petitioner and its *amici* claim authority to scrutinize such speech in search of disruptive effects whenever the speech is "directed" at the school, Pet. Br. 13, or "directly relate[s] to on-campus classes, extracurricular activities, or members of the school community," *see* Amicus Br. of Nat'l Sch. Bd. Ass'n, et al., at 11–12 ("NSBA Br."). In other words, whenever students talk about school to the public or another member of the school community, particularly on social media. Which is to say, virtually all student speech.

Attempting to minimize the degree to which this sweeping authority would intrude on political speech, Petitioner and its *amici* delimit "political speech" as something that, by definition, does not involve the school. *See, e.g.*, NSBA Br. 4 (describing "political

speech” as involving “subjects that have no direct connection to the school”). But the opposite is true. Much of the time, speech about the school is political—by definition. Public schools are agents of the State; when students comment about the actions of a school administrator or school policy, they are engaging in core political speech about the public officials and state policies that have the most impact in their lives. *Cf. Morse*, 551 U.S. at 424 (Alito, J., concurring) (“When public school authorities regulate student speech, they act as agents of the State[.]”).

No one can deny that the question of whether and how schools should reopen during the pandemic, for example, is a political issue. Yet student speech on these issues has not infrequently drawn the ire of school administrators. Two students in Georgia were suspended for posting a picture on social media of students crowding the hallway in their high school without masks; the school reversed itself only after a media outcry. *See* Lateshia Beachum, *Georgia school reverses suspension of teen who shared viral photo of hallway packed with students*, Wash. Post (Aug. 7, 2020), <https://tinyurl.com/mh8j7rtd>. And one *amicus* student school board member reports that the county’s activities director attempted to pressure him to cease organizing off-campus protests with other students against the forced return of the most medically vulnerable teachers to physical campuses, citing non-existent rules against his advocacy and threatening to write them into policy.

There are many other examples of off-campus political speech that would be considered “directed” at the school under Petitioner’s test, or “intentionally

target[ed]” at “specific school functions or programs” under the Solicitor General’s taxonomy (SG Br. 24). One *amicus* student school board member has witnessed a robust social media discussion among students in his district about the district’s worst-in-the-State record for suspending male African-American students. Another witnessed how students flocked to social media to protest when the district responded to budget cuts by abruptly eliminating several teacher positions, prompting the reassignment of many of the most effective teachers.<sup>2</sup>

Off-campus posts on social media critical of staff treatment of students or classroom policies are likewise “political” in the public-school context and are examples of speech on “matters of public concern” to the school community falling within the heartland of First Amendment protection, *see Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Yet under the regulatory regime proposed by Petitioner and its *amici*—where any critique can be framed as a significant disruption—such complaints posed to any other member of the school community at any time or place

---

<sup>2</sup> The Solicitor General attempts to cabin her “intentionally targets” test by requiring the speech to relate to “matters essential to or inherent in the functions or programs ... such that the speech has the potential to substantially undermine the function or program.” SG Br. 24. But this essentiality criterion provides no limit at all, much less fences out school regulation of off-campus political speech. Take student speech about racial discrimination in school suspensions. Fairness—and the perception of fairness—are presumably “essential” to an effective school discipline program, and a school could easily claim that student speech questioning the even-handedness of suspensions “substantially undermined” the school discipline program.

would be subject to school regulation, and likely heavy-handed regulation at that. See David Wheeler, *Do Students Still Have Free Speech in School?*, The Atlantic (Apr. 17, 2014), <https://tinyurl.com/wrydc6pu> (describing how a school forced a student to turn over her Facebook password after she posted that a school employee was “mean” to her). Given inherent power imbalances, students reasonably fear that schools will not look kindly on efforts to publicize problems within the school to the broader community. One *amicus* student school board member reports that after the student raised concerns outside the school about school counselors being stretched too thin, the principal ordered the student to his office, yelled at the student for “going over his head,” and said the student was a “child” who “had no right” to bring up this issue.

Extracurriculars like school sports are not immune from issues of public concern, either. Take the well-recognized problem with abusive coaching practices. See Ashley E. Stirling & Gretchen A. Kerr, *Initiating and Sustaining Emotional Abuse in the Coach–Athlete Relationship*, 23 J. Aggression, Maltreatment & Trauma 116, 117 (2014) (estimating that “emotionally abusive coaching practices are experienced by 22% to 25% of competitive athletes”). Students are often reluctant to report these painful experiences. *Id.* A student who has been enmeshed in a sport for years where harsh coaching is the norm may well question whether what they are experiencing is abuse or normal, and social media can provide a welcome means of reaching out to others for support. See Juliet Macur, *Gymnasts Worldwide Push Back on Their Sport’s Culture of Abuse*, N.Y. Times (Aug. 3,

2020), <https://tinyurl.com/3shx7b5b> (reporting how gymnasts were “embolden[ing]” others to share abuse experiences on social media using a hashtag). At the college level, abuse is more often “coming to light because more players, empowered by digital tools, are standing up for themselves.” Alexander Wolff, *Is the era of abusive college coaches finally coming to an end?*, Sports Illustrated (Sept. 29, 2015), <https://tinyurl.com/4s52jyf5>.

High school students, too, deserve the breathing space to object to coaching methods or simply to ask, “is this right?” But it is easy to imagine such posts cast as being harmful to “team morale and chemistry” (Pet. Br. 31) and punished by schools, especially if other teammates think the coach is simply applying “tough love.”

Beyond sports, just as student journalism has often revealed serious crimes within schools, off-campus student speech “directed at” the school is an important avenue for transparency and accountability. See Wheeler, *supra* (describing examples where high school students uncovered a security breach related to standardized test answers and a school’s attempt to minimize an alleged rape). Unless limited by state law, schools usually have authority to constrain what is published in school-sponsored media. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988). And they have exercised that authority to censor publication of stories about staff misconduct. See Avani Kalra, *Covering misconduct allegations as a student journalist*, Columbia Journalism Review U.S. Project (Oct. 3, 2019), <https://tinyurl.com/3jkdpndh> (describing school’s

initial censorship of a story alleging a guidance counselor engaged in unprofessional conduct). These constraints on other avenues for transparency and accountability make protecting students' off-campus social media reporting all the more critical.

2. We should encourage, not chill, the political speech that would be caught up in the 24-7 school-discipline dragnet proposed by Petitioner and its *amici*. Giving students space to speak freely about matters of public concern that arise in their schools is essential to student engagement in school governance, of which student school board members are a crucial component. All school board members—but especially student school board members—need to be able to hear from students themselves, at the earliest opportunity, to identify and resolve issues affecting the school community.

Student involvement in school governance “provides a point of view that is often underrepresented,” “shed[s] light on new approaches or solutions,” and “creates a sense of ownership that can lead to higher student performance.” Meg Benner, et al., *Elevating Student Voice in Education*, Ctr. for Am. Progress (Aug. 14, 2019), <https://tinyurl.com/29x3aa3u>. As part of a movement toward greater student participation in school governance, the majority of States (34) authorize or require local school districts to include student positions on their school boards. See NSBA, *Students Serving on School Boards: Democratic Education in Action* (Feb. 4, 2021), <https://tinyurl.com/pazze2v4> (NSBA, *Students Serving*). At least 13 States have student members on their state boards of education. Linda Jacobson, *Students Bring*



*Youthful Perspective to State Ed. Boards*, Educ. Week (Jan. 21, 2004), <https://tinyurl.com/ym56nppz>. Although research is limited, “there is a consensus on the positivity of having students serve on the board.” NSBA, *Students Serving*. Student school board members “represent and advocate for their communities and use their role to improve education for all students of their districts.” *Id.*

“[S]tudent board members have to be diligent in representing their constituencies just as their adult colleagues do: They conduct regular school visits and submit to interviews with school newspapers.” Stephen Sawchuk, *Few Student Board Members Can Vote. Should That Change?*, Educ. Week (June 11, 2019), <https://tinyurl.com/53u3jcmf>. This is not an easy task—some *amici* served on school boards for districts with more than 650,000 enrolled students. See Los Angeles Unified Dist., *Fingertip Facts 2020-21*, <https://tinyurl.com/5hcdzhrw>.

Student board members can only represent and advocate for students districtwide, however, if they can hear from those students about what is troubling them about their schools. *Amici* student board members indicate that they use multiple means to gather student input, including surveys, student forums, and public comment at board meetings. But unsurprisingly, they report that social media is a crucial information-gathering method.

Just as moving from class to class in the hallway, or standing in the cafeteria line, or sitting in the bleachers in sporting events, allows student board members to keep their fingers on the pulse of issues of concern at their own school, so can participating on

social media (if speech is not unduly chilled) allow student school board members to keep up to date on issues of concern in their districts. Especially because students who might not feel comfortable making formal complaints—at least in the first instance—may be willing to raise issues in conversations on social media. Social media posts can then call the attention of student board members, who are empowered to help investigate further.

As the California Student Board Member Association explains, if schools can limit the “right of students to share their concerns, speak out, and have open dialogue off campus,” it “would damage [their] ability as Student Board Members to present a full picture of student experience to school districts across the state.” Cal. Student Bd. Mbr. Ass’n, *Newsroom* (Mar. 29, 2021), <https://tinyurl.com/ddys257u>. Because they are far more likely than adult school board members to be present in the social media forums where students gather and discuss their schools (just as they are far more likely to be standing on the cafeteria line, or sitting in the bleachers during the games), student school board members are well-positioned to observe where there are groundswells of discontent and problems to be addressed. But student board members can be attuned to their peers’ concerns only if students feel free to express their discontent and dissent.

When it works well, the ability of students to engage with their student school board members, and of the student school board members to channel those concerns to the full governing boards, is a training ground for civic engagement. One *amicus* student

board member described how the abrupt elimination of teaching positions caused “students who never cared about student government [to] become invested” and how the social media debate on those issues “encouraged students to be more civically engaged.” As the NSBA agrees, “[o]ne way to nurture democratic citizenship is to engage students in the governing process of local school boards.” NSBA, *Students Serving*. But if students are chilled in their ability to speak about their schools, and especially to express dissatisfaction—as will certainly be the case under the expansive speech-regulation regime proposed on Petitioner’s side—true training in democratic citizenship will be neglected, not nurtured.

As this Court explained many decades ago, that schools “are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual,” not their diminishment, lest we “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

**3.** Students also use social media for more quotidian communication, of course. Social media, now more than ever, allows students to collaborate, gather data for projects, and showcase their work and creativity. See Michael Niehoff, Int’l Soc’y for Tech. in Educ., *9 ways real students use social media for good* (Oct. 2, 2019), <https://tinyurl.com/24hcf2ss>. Sometimes students use social media just for joking around, like a tweet for which a student was suspended, stating that his high school sports program “is equivalent to WSU’s football team”—a university team that had

been disbanded. See Rebecca Klein, *Wesley Teague, Kansas Student, Suspended After Tweeting About High School's Sports Program*, HuffPost (May 9, 2013), <https://tinyurl.com/vd43acn5>. Much of the communication on social media is just ordinary conversations among friends—including grumbling about teachers, homework, and coaches—conversations that might have taken place on the phone or in person years ago, but now take place online (and especially so during the pandemic).

As for all of us, “[m]ost of what [students] say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value).” *United States v. Stevens*, 559 U.S. 460, 470 (2010) (internal quotation marks omitted). But “it is still sheltered from Government regulation,” *id.*; and so too should be non-harassing, non-violent student off-campus speech.<sup>3</sup> The fact that schools can now more easily see, and therefore regulate, vast realms of interpersonal communication does not mean they should. “In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

4. The combination of Petitioner’s “directed” test with *Tinker*’s “substantial disruption” standard provides no real safeguards for students’ speech—including core political speech. Granting schools the

---

<sup>3</sup> Everyone agrees that schools can regulate off-campus harassment of members of the school community, but that authority is not at risk here. See pp. 21–22, *infra*.

expansive authority Petitioner seeks will unreasonably chill speech on matters of public concern.

As for the “directed” test, it is a low bar, satisfied whenever the student can “reasonably foresee” that speech related to the school would reach the school. *See* Pet. Br. 28. Petitioner does not give a single example of a realistic social media communication that would *not* be so “directed.” *See id.* (giving only examples of “[o]rdinary conversations with family or neighbors” and sketches/graphics that were not intended to be shared at all). With good reason. Most students’ social media friends and followers commonly include other students. *See also* SG Br. 23 (agreeing that “anything [students] post online reasonably could be expected to ‘reach’ the school”).

And for today’s students, few conversations take place entirely outside of social media, as students may post about even casual in-person conversations, or loop remote friends into the conversation, using ever-present cell phones. As this Court has recognized, “the most important places (in a spatial sense) for the exchange of views .... 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) (citation and internal quotation marks omitted). Even more than adults, students “employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” *Id.* at 1735–36 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997)). The upshot is that pretty much any

student speech even tangentially related to the school will meet Petitioner’s “directed” test.

The district’s protest (Pet. Br. 29–30) that only “disruptive” speech will be punished does nothing to hold back the chill. Given the expansive conception of disruption pressed here, including impairment of “team morale,” Pet. Br. 31, there is little reason to trust in schools’ restraint, and every reason to believe that any newfound authority will reach far beyond campus into students’ homes, parks, shopping malls, or, in other words, every corner of the virtual public square. *Cf. Stevens*, 559 U.S. at 480 (“[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*.”).

What’s worse, because the “substantial disruption” test must, in the off-campus context, hinge on listeners’ reactions (or feared reactions), it is all the more likely that schools will unconstitutionally punish students for speech that is merely controversial. *See* Resp. Br. 17–18. In an on-campus scenario, where the speaker may cause the disruption, *e.g.*, when a student interrupts physics class to deliver an anti-war speech, the test may at least sometimes be applied without resort to the listeners’ reactions (though it also does—in a major break with First Amendment core principles, *see* Resp. Br. 10—permit regulation of speech based on listeners’ reactions in the unique context of the school environment). But when the speaker is off campus, any disruption within the school can be caused *only* by the perceived reaction of listeners. Like any standard based on listeners’ reactions, this standard is “highly malleable” and has “an inherent subjectiveness about it.” *See Snyder*, 562

U.S. at 458 (internal quotation marks omitted). Just as a malleable standard leaves juries too much room to punish speech based on viewpoint, the disruption standard, when applied to off-campus speech, risks the imposition of punishment “on the basis of the [school administrators’] tastes or views, or perhaps on the basis of their dislike of a particular expression.” *Id.* (citation and internal quotation marks omitted). Because it is so hard to judge *ex ante* when school administrators will view speech as so upsetting that listeners’ reactions justify shutting it down, the “substantial disruption” test will have a widespread chilling effect on students’ off-campus speech.

Regardless of whether they are ever punished for their speech, students would have to contend with the fact that regulators are watching anything they say on social media that mentions the school, a school-sponsored activity, or a member of the school community—which is to say, nearly everything they say—24 hours a day, 7 days a week. As with other expansive assertions of government authority to punish speech, the “mere potential for the exercise of that power casts a chill ... the First Amendment cannot permit.” *United States v. Alvarez*, 567 U.S. 709, 723 (2012). And the chill would not be felt evenly. Those students who have been especially critical of administrators would have extra reason to be careful. Or those students who are members of groups disproportionately censured by schools for nebulous offenses like “disrespect.” *See* SG Br. 21.

“First Amendment freedoms need breathing space to survive.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). As applied to off-campus speech, the

“substantial disruption” test provides none. Petitioner claims (Pet. Br. 43–46) that it is simply too difficult to draw lines at the outer edges of what counts as the “school context.” But the answer cannot be to erase all lines between school and home, and simply assert school authority to punish any speech that “involves the school” (*id.* at 46), limited, if at all, only by a malleable “disruption” standard. This would leave students with effectively no space where they are entitled to full First Amendment protection, even when they engage in core political speech.

**B. Granting Schools Authority to Regulate Non-Threatening, Non-Harassing Off-Campus Speech Would Be an Unprecedented Intrusion into Students’ Personal Lives.**

1. As with adults, it is to be expected that not all student speech critical of a school will be “reasoned or moderate,” and schools might be “subject to vehement, caustic, and sometimes unpleasantly sharp attacks.” *See Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988) (internal citation and quotation marks omitted). Some critiques might be in bad taste, use profanity, or memes meant to grab the audience’s attention—the modern-day equivalent of the often “slashing and one-sided” political cartoon, *see id.* at 54. This speech still carries real value because the depth of student feeling—perhaps manifest in over-the-top rhetoric or vulgar expression—may convey the urgency of a problem or the deep impact some school decision has on the student body. As the *amicus*



involved in protesting the district's overnight elimination of teaching positions described it, many students who posted on social media about that issue "used profane language because they were emotional and unhappy about the situation." Even such posts, however, contributed to organizing a movement to protest, and ultimately reverse, the teaching cuts.

The concerned students' posts might, in some cases, have exceeded the bounds of good taste and civility. But until now, it has been settled that teaching (and policing) "the boundaries of socially appropriate behavior," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), outside of school is the job of parents, not schools. *Cf. Morse*, 551 U.S. at 424 (Alito, J., concurring) ("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.").

If schools were granted the authority sought by Petitioners, however, it would be schools, not parents and students, who police large swaths of students' off-campus speech for bad manners and offensiveness. Despite this Court's warning that schools cannot regulate even *in-school* speech simply because it is "offensive," *Morse*, 551 U.S. at 409, the facts of this case demonstrate that schools effectively seek the authority to punish off-campus speech that listeners find offensive, because that is all the so-called "disruption" amounts to here. *See* Pet. Br. 6–7 (noting that other students were "upset" by B.L.'s post).

But the First Amendment is a "hazardous freedom ... that is the basis of our national strength

and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” *Tinker*, 393 U.S. at 508–09. On campus, schools need not afford students the “same latitude” that adults enjoy to utter “vulgar and offensive terms,” and may choose to inculcate “habits and manners of civility.” *Fraser*, 478 U.S. at 682–83. Outside of school, the bounds of proper decorum and the latitude to offend should be left up to students and their parents as they learn to navigate the “permissive, often disputatious, society” we share. *See Tinker*, 393 U.S. at 509.

2. Harassing another student (or teacher, or staff member) is, of course, a different behavior altogether than giving offense. In their capacities as both school leaders and students, *amici* wholeheartedly agree with both parties to this case that schools require the authority to protect students, staff, and teachers from threats, harassment, and bullying. *See* Pet. Br. 31–39; Resp. Br. 25–26. Many student school board members took strong stances against bullying and harassment on social media as part of their platforms well before schools took the issue seriously. In *amici*’s view, schools should have—and do have—ample authority under traditional First Amendment doctrine to address such harmful conduct without needing to invoke *Tinker*. *See* Resp. Br. 25–26 (summarizing different ways schools can counteract threats, bullying, and harassment).

The trouble with Petitioner’s emphasis on the need to protect against harassment is that the Third Circuit’s rule leaves intact school districts’ well-established ability to do so. That court expressly held

that “off-campus student speech threatening violence or harassing particular students or teachers” was not addressed by its holding and “would no doubt raise different concerns and require consideration of other lines of First Amendment law.” Pet. App. 34a. Everyone agrees that protecting students from harassment is vitally important. But schools can do that without extending *Tinker* to any student speech, made in any place and at any time, that mentions any aspect of the school or school community. Seizing such a broad authority to regulate virtually all student speech to protect against harassment is not the “[p]recision of regulation” that the First Amendment demands. *See NAACP*, 371 U.S. at 438. Rather, it “amount[s] to burning the house to roast the pig.” *Reno*, 521 U.S. at 882 (internal citation and quotation marks omitted). With respect to non-harassing, non-violent speech—the only speech governed by the Third Circuit’s rule—Petitioner has put forward no conceivable interest that could justify such a sweeping intrusion into students’ personal lives where family, neighbors, religious leaders, or other guiding influences, are the lodestar—not schools.

\* \* \* \* \*

Reading Petitioner’s brief, and especially its *amici*, one might be forgiven for believing that social media is a dystopian hellscape for students where little occurs that is *not* bullying and harassment. *See, e.g.*, NSBA Br. 15–17. The same “virtual megaphone” that can be used for ill (NSBA Br. 15) can be, and more often is, used for good: to organize protests, to raise awareness of social and political issues, and simply to engage in the wide variety of communication essential

to interpersonal relationships. Student school board members depend on the ability to listen to students within a space where students can debate school issues without fear of punishment, providing critical inputs that improve school governance and student outcomes. Outside of school, students, no less than adults, deserve the breathing space the First Amendment provides to develop and exercise their voices on matters great and small, without fear of government sanction.

### **CONCLUSION**

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

Hyland Hunt  
Ruthanne M. Deutsch  
DEUTSCH HUNT PLLC

March 31, 2021

## APPENDIX<sup>1</sup>

Omari Jahi Aarons  
Prince George's County Public Schools, Maryland  
2002-03

Haleemat Adekoya  
Baltimore County Public Schools, Maryland, 2018-19

James Aguilar  
San Lorenzo Unified School District, California  
2017-18

Tessa Aguilar  
Corona-Norco Unified School District, California  
2020-21

Michelle Alas  
Mt. Diablo Unified School District, California  
2020-21

Haley Allen  
Portland Public Schools, Maine, 2020-21

Kathya Correa Almanza  
San Francisco Unified School District, California  
2020-21

Julia Amann  
Madison Metropolitan School District, Wisconsin  
2020-21

Margarita Amezcua  
State Board of Education, Washington, 2019-21

William Anderson  
Frederick County Public Schools, Maryland, 2017-18

Heidi Andrade  
San Benito High School District, California, 2020-21

---

<sup>1</sup> All *amici* are signing this brief only in their individual capacities and not as representatives of the boards on which they serve or have served. Board names are listed only for purposes of identification. In some cases, no board is listed at the request of the individual *amicus* or the respective board.

Olivia Ang-Olson  
Sacramento City Unified School District, California  
2019-20

Lihame Arouna  
New Haven Public Schools, Connecticut, 2019-21

Nicholas Asante  
Montgomery County Public Schools, Maryland  
2020-21

Itzary Avalos  
Marshalltown Community School District, Iowa  
2020-21

Zoe Babbit  
Shaler Area School District, Pennsylvania, 2019-21

Noureen Badwi  
State Board of Education, Maryland, 2019-20

Mete Bakircioglu  
Lake Oswego School District, Oregon, 2020-21

Anchal Bhaskar  
Capistrano Unified School District, California  
2020-21

Caroline Binkley  
Delaware City Local School District, Ohio, 2018-19

Aidan Blain  
Santa Monica Malibu Unified School District  
California, 2019-20

Brad Bloodworth  
Howard County Public Schools, Maryland, 1989-90

Kevin Bokoum  
Washington County Public Schools, Maryland  
2020-21

Alice Arcieri Bonner  
Baltimore County Public Schools, Maryland, 1998-99

Aislinn Bratt  
Baltimore County Public Schools, Maryland, 2016-17

Joseph Brawdy  
Saint Helena Unified School District, California  
2019-21

Alexya Brown  
Calvert County Public Schools, Maryland, 2014-16

Kamarie Brown  
Los Angeles Unified School District, California  
2020-21

Emily Bylsma  
Poway Unified School District, California, 2020-21

Joshua Camarillo  
Fresno Unified School District, California, 2019-20

Austin Cantu  
Waukegan Community Unit School District #60  
Illinois, 2019-20

Sabrina Capoli  
State Board of Education, New Jersey, 2020-21

Gema Quetzal Cardenas  
State Board of Education, California, 2018-19

Drew Carter  
Charles County Public Schools, Maryland, 2017-18

Isaiah Christopher Marquies Carter  
Travis Unified School District, California, 2019-21

Ethan Castillo  
Las Virgenes Unified School District, California  
2019-20

Katherine Catulle  
Garrett County Public Schools, Maryland, 2018-20

Katie Cheng  
Dublin Unified School District, California, 2020-22

Emily Cheung  
Portland Public Schools, Maine, 2020-22

Mackenzie Collett  
Delaware City Local School District, Ohio, 2020-21

Ethan Collier-Moreno  
Sweetwater Union High School District, California  
2019-20

Léo Corzo-Clark  
Albany Unified School District, California, 2020-21

Jasper Coughlin  
Board of Elementary and Secondary Education  
Massachusetts, 2020-21

Adera Craig  
Conejo Valley Unified School District, California  
2020-21

Andrew Crosten  
Allegany County Public Schools, Maryland  
2004-05

Mark Crusante  
Prince George's County Public Schools, Maryland  
1999-00

Elyssa Cuevas  
Island-wide Board of Governing Students, Guam  
2020-21

Brittney Davis  
Prince George's County Public Schools, Maryland  
2005-06

Forrest Davis  
Juneau School District, Alaska, 2020-21

Alpha Ibrahim Diallo  
Washington County Public Schools, Maryland  
2017-18

Rocco Diaz  
Broward County Public Schools, Florida, 2020-21

Griffin Diven  
Howard County Public Schools, Maryland, 2016-17

Claire Downing  
Helena Public Schools, Montana, 2020-21



Else Drooff  
Anne Arundel County Public Schools, Maryland  
2013-14

Hunter Drost  
State Board of Education, Nevada, 2017-18

Nora Faverzani  
State Board of Education, New Jersey, 2018-19

Anthony Fiore  
New Haven Public Schools, Connecticut, 2020-22

Breana Fowler  
Charlotte-Mecklenburg Schools, North Carolina  
2020-21

Erin Fox  
Howard County Public Schools, Maryland, 2000

Roel Jacob Nechaldas Francisco  
Fairfield-Suisun Unified School District, California  
2020-21

Julia Frank  
School District of Philadelphia, Pennsylvania  
2018-19

Daniel Furman  
Howard County Public Schools, Maryland, 2000-02

Jonathan Galla  
Baltimore County Public Schools, Maryland, 2013-14

Ally Gallant  
Folsom Cordova Unified School District, California  
2020-21

Alex Gallegos  
State Board of Education, Nevada, 2020-21

Sahil Ganatra  
State Board of Education, New Jersey, 2019-20

Andrew Gavelek  
Howard County Public Schools, Maryland, 2007-08

Carter Gipson  
Frederick County Public Schools, Maryland, 2016-17

Alexa Gonzales  
Pittsburg Unified School District, California, 2018-20

Eric Guerci  
Montgomery County Public Schools, Maryland  
2015-17

William Guisbond  
Jamesville-Dewitt Central School District, New York  
2019-20

Rachel Halbo  
Sacramento City Unified School District, California  
2018-19

Ava Hamelburg  
Windsor Unified School District, California, 2020-21

Amiah Hanson  
Durango School District 9-R, Colorado, 2020-22

Ian Herd  
Charles County Public Schools, Maryland, 2020-21

Klaudia Hernandez  
Marshalltown Community School District, Iowa  
2020-21

Shavonne Hines-Foster  
San Francisco Unified School District, California  
2020-21

Joe Hofman  
State Board of Education, Washington, 2017-19

Benjamin Holtzman  
Los Angeles Unified School District, California  
2017-18

Julia Hondal  
Burlington School District, Vermont, 2020-21

Peter Horowitz  
Ocean City School District, New Jersey, 2018-19

Jacob William Horstkamp  
Anne Arundel County Public Schools, Maryland  
2015-16

Dahlia Huh  
Montgomery County Public Schools, Maryland  
2014-15

Isam Hussaini  
Waukegan Community Unit School District #60  
Illinois, 2020-21

Ilhaam Ikramullah  
Hillsboro School District, Oregon, 2020-21

Anna Impellitteri  
Boone County School District, Kentucky, 2018-19

Khymani James  
Boston Public Schools, Massachusetts, 2020-21

Omar Jamil

Dustin Jeter  
Montgomery County Public Schools, Maryland  
2001-02

Angel Jimenez  
El Monte Union High School District, California  
2019-20

Sebastian D. Johnson  
Montgomery County Public Schools, Maryland  
2005-06

Fatima Kamara  
Fontana Unified School District, California, 2020-21

Yoni Kashanian  
Beverly Hills High School District, California  
2020-21

Hope Stacey Khodaei  
Prince George's County Public Schools, Maryland  
1985-86

Dana Kim  
Worcester County Public Schools, Maryland, 2018-19

Justin Kim  
Montgomery County Public Schools, Maryland  
2013-14

Yeonjie Michelle Kim  
Irvine Unified School District, California, 2020-22

Marcus Klein  
Howard County Public Schools, Maryland, 1996-97

Jackson Klingenberg  
Carroll County Public Schools, Maryland, 2019-20

Genavieve Koenigshofer  
Capistrano Unified School District, California  
2019-20

Caroline Krum  
Oakdale Joint Unified School District, California  
2020-21

Mika Renee Labadnoy  
Island-wide Board of Governing Students, Guam  
2019-20

Amber LaFranboise  
San Jose Unified School District, California, 2020-21

Madison Lane  
Grand Island Public Schools, Nebraska, 2019-20

Alexis Lashbaugh  
Allegany County Public Schools, Maryland, 2017-18

Harris LaTeef  
Fairfax County Public Schools, Virginia, 2014-15

Maxine Latterell  
Portland Public Schools, Oregon, 2019-20

Nicholas Lefavor  
Anne Arundel County Public Schools, Maryland  
2012-13

Brian Lin  
Alameda Unified School District, California, 2020-21

Rachel Lin  
Howard County Public Schools, Maryland, 2015-16

Joshua Lynn Jr.  
Baltimore City Public Schools, Maryland, 2018-20

Christopher Mackley  
Washington County Public Schools, Maryland  
2018-20

Casey Maddock  
State Board of Education, Maine, 2019-21

Audrey Mallah  
Albany Unified School District, California, 2018-21

Jamie Martin  
Howard County Public Schools, Maryland, 2003-04

Raven May  
Waukegan Community Unit School District #60  
Illinois, 2018-19

Bailey McCallister  
Tahoma School District, Washington, 2019-21

Saanvi Mehrotra  
Tahoma School District, Washington, 2020-21

Kelsey Meis  
Cecil County Public Schools, Maryland, 2019-20

Rick Mikulis  
Howard County Public Schools, Maryland, 2014-15

Miles Miller  
Berkeley Unified School District, California, 2020-21

Henry Mills  
Alameda Unified School District, California, 2019-22

Maxwell Mimaroglu  
Jamesville-Dewitt Central School District, New York  
2020-21

Sarah Moir  
Baltimore County Public Schools, Maryland, 2002-03

Tinni Mukherjee  
Dublin Unified School District, California, 2018-20

Paytan Murray  
Snoqualmie Valley School District, Washington  
2019-20

Omaer Naeem  
Allegany County Public Schools, Maryland, 2019-20

Sarah Nguyen  
Sacramento Unified School District, California  
2017-18

Sathvik Nori  
Sequoia Union High School District, California  
2020-21

Sabine Noyes  
Nevada Joint Union High School District, California  
2020-21

Tyler Okeke  
Los Angeles Unified School District, California  
2019-20

Joshua Oltarzewski  
Harford County Public Schools, Maryland, 2018-19

Yota Omosowo  
Oakland Unified School District, California, 2018-19

Greyson Orne  
State Board of Education, Maine, 2021-22

Coral Ortiz  
New Haven Public Schools, Connecticut, 2015-17  
State Board of Education, Connecticut, 2017

Amanya Paige  
Prince George's County Public Schools, Maryland  
2017-19

Xitlalic Palacios  
El Monte Union High School District, California  
2020-21

Brenna Pangelinan  
State Board of Education, California, 2019-20

Hollie Pastorino  
Dexter Community School District, Michigan  
2017-19

Zachary Patterson  
San Diego Unified School District, California  
2019-21

Sarah Perez  
Frederick County Public Schools, Maryland, 2015-16

Derrick L. Plummer, Jr.  
Prince George's County Public Schools, Maryland  
1998-99

Matt Post  
Montgomery County Public Schools, Maryland  
2017-18

Alfredo Praticò  
School District of Philadelphia, Pennsylvania  
2018-19

Benjamin Press  
Fairfax County Public Schools, Virginia, 2015-16

Caroline Quevedo  
Tahoma School District, Washington, 2019-21

Jane Ragland  
Marshalltown Community School District, Iowa  
2018-19

Jessica Ramos  
Oakland Unified School District, California, 2020-21

Omer Reshid  
Baltimore County Public Schools, Maryland, 2019-20

Thomas Ridenour  
Calvert County Public Schools, Maryland, 2017-19

Mattie Ridgway  
Western Placer Unified School District, California  
2019-21

Lucie Roach  
Calvert County Public Schools, Maryland, 2016-17

McKenna Roberts  
State Board of Education, Washington, 2020-22

Jon Jeffrey Robinson  
Anne Arundel County Public Schools, Maryland  
1974-75

Luis Rodriguez  
Grand Island Public Schools, Nebraska 2018-19

Ela Ruf  
Ojai Unified School District, California, 2020-21

Kendall Sanders  
Charlotte-Mecklenburg Schools, North Carolina  
2018-19

Gabriel Schuhl  
Charlotte-Mecklenburg Schools, North Carolina  
2019-20

Anna Selbrede  
Howard County Public Schools, Maryland, 2017-18

Alison Serino  
Montgomery County Public Schools, Maryland  
1989-90

Josie Shaffer  
Baltimore County Public Schools, Maryland, 2017-18

Isa Sheikh  
Sacramento City Unified School District, California  
2020-21

Nathaniel Shue  
Portland Public Schools, Oregon, 2020-21

Beau Simon  
Broward County Public Schools, Florida, 2018-20

Monica Simonsen  
Howard County Public Schools, Maryland, 1995-96

Ishan Singh  
Fresno Unified School District, California, 2020-21

Mica Smith-Dahl  
Oakland Unified School District, California, 2019-20

Sage Snider  
Anne Arundel County Public Schools, Maryland  
2007-08

Tianna Staten  
Wucomico County Public Schools, Maryland, 2018-19

Hailie Stevens  
Riverside Unified School District, California, 2019-20



Viveca Stucke  
Bourne School District, Massachusetts, 2020-21

Frances Suavillo  
Los Angeles Unified School District, California  
2019-20

David Josiah Texeira  
State Board of Education, Hawai'i, 2018-19

Emery Thul  
Eau Claire Area School District, Wisconsin, 2020-21

Matthew Tibbitts  
Board of Elementary and Secondary Education  
Massachusetts, 2019-20

Nathaniel Tinbite  
Montgomery County Public Schools, Maryland  
2019-20

Maizie Tucker  
Port Angeles School District, Washington, 2020-21

Doug Ulman  
Howard County Public Schools, Maryland, 1994-95

Josie Urrea  
Anne Arundel County Public Schools, Maryland  
2018-19

Kate Voltz  
Corvallis School District, Oregon, 2019-21

Jakob Wade  
Fairbanks North Star Borough School District  
Alaska, 2019-20

Deeksha Walia  
Baltimore County Public Schools, Maryland, 2015-16

Michaela Klein Weinstein  
Albany Unified School District, California, 2019-20

Daniella White  
State Board of Education, Hawai'i, 2019-20

Autymn Wilde  
State Board of Education, Washington, 2018-20

Oluwatomi Williams  
Howard County Public Schools, Maryland, 2011-12

Elijah Witt  
Albemarle County Public Schools, Virginia, 2019-20

Jason Wu  
State Board of Education, Maryland, 2020-21

Alan Xie  
Montgomery County Public Schools, Maryland  
2010-12

Amy Zhang  
Charles Zimmerman  
Delaware City Local School District, Ohio, 2017-18

Pallas Snider Ziporyn  
Anne Arundel County Public Schools, Maryland  
2005-06