

No. 20-255

IN THE
Supreme Court of the United States

MAHANoy AREA SCHOOL DISTRICT,
Petitioner,

v.

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

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

**BRIEF FOR THE INDEPENDENT WOMEN'S
LAW CENTER AS *AMICUS CURIAE*
SUPPORTING RESPONDENTS**

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INTEREST OF THE *AMICUS CURIAE*¹

Independent Women’s Law Center (“IWLC”) is a project of Independent Women’s Forum (“IWF”), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women’s interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for individual liberty, equal opportunity, and respect for the American constitutional order.

Amicus believes that allowing school administrators to regulate off-campus speech as if it occurred at school during the school day will result in outright censorship of speech on significant issues of public concern—the type of political speech regulation that the government would never be able to square with the First Amendment in the context of any other citizens. Amicus is particularly concerned that allowing school officials to punish student speech on the basis of its content will disproportionately chill the speech of female students at a time when many are just starting to use their voices to advocate—online and elsewhere—for themselves and for others.

¹ No counsel for a party authored any part of this brief; 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 *amicus curiae*, its members, or its counsel made a monetary contribution to this brief’s preparation or submission. All parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just because a school principal, a teacher, some students, or a Twitter mob may be annoyed by what a student has to say on social media and on her own time does not mean that the school has “constitutionally valid reasons to regulate” her speech. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

In the present case, petitioner school district claims that it has authority to regulate student speech that “targets” the school community. Petitioner uses the word “targets” as a vaguely sinister euphemism for “talks about.” But “talks about” is what petitioner actually means. *See* Pet. Br. 30 (B.L. “referred to her school” and “mentioned a[] classmate”). Under petitioner’s rule, if you talk about the school or other students critically, the school can punish you for it, plain and simple. But a thin-skinned principal has no more valid reason to punish his critics for their criticism than a thin-skinned politician does.

In fact, petitioner’s suggested rule would empower school administrators to punish any and all student speech, no matter where it occurs, when it occurs, what it is about, or how it comes to the school’s attention, so long as the administrator subjectively determines that the speech is “disruptive.” And “disruption” that justifies punishing the speaker, apparently, can result if *other students* decide to bring up the speech in algebra class. *See* Pet. Br. 6-7.

Under such a regime, the only secure way to avoid punishment is to make sure that no one connected with the school hears the speech. That is worse than a heck-

ler's veto. After all, a heckler's veto causes the government to stifle speech based on *actual live heckling*, rather than people talking about the speech at school the next day.

A rule like petitioner's would never pass muster for adults, but the impact is even worse on students, given how pervasively students use social media platforms to express their opinions. These platforms allow users to share and reshare messages with the click of a button, enabling thousands of people to view the message and making it impossible for the speaker to control where her speech may be heard or viewed. If "speaking where a fellow student may hear you" is equivalent to on-campus speech, *all* social-media speech is on-campus speech. Petitioner's rule would thus expose an enormous amount of student speech to punishment and would chill students' free participation in the marketplace of ideas.

Petitioner claims that its rule is limited by the requirement that the speech cause "disruption," but that is no limitation at all. In today's cultural climate, even sincere debate on controversial issues of public concern can easily be deemed "disruptive" (read: "offensive"), thus triggering school discipline.

This is not mere speculation: school officials in circuits that follow petitioner's proposed rule already exercise their authority to punish student speech, including speech on significant matters of public concern. And their exercise of authority is anything but evenhanded. Often, the "disruption" these school officials have invoked is nothing more than the offended sensibilities of the listener.

These concerns are particularly salient for young women. On subjects from abolition to abortion, school-age women like Mary Beth Tinker have been passionate and effective advocates for controversial causes. Indeed, many young women raise their voices about how they are treated at school itself. Adopting petitioner’s proposed rule would risk chilling vast quantities of speech by young women, when the First Amendment protects their right to stand up and speak out.

ARGUMENT

I. The First Amendment Protects Young People’s Right To Participate Fully In The Marketplace Of Ideas.

This Court has consistently recognized that the First Amendment’s protection of free speech is essential for the preservation of a self-governing society. “Speech,” the Court has said, “is an essential mechanism of democracy.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339 (2010). This protection extends even to—indeed, especially to—unpopular and controversial speech. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

Significantly, this protection extends even to speech that risks causing (or does cause) disruption or unrest. In fact, “*a function* of free speech under our system of government is to invite dispute,” because it is often by “induc[ing] a condition of unrest, creat[ing] dissatisfaction with conditions as they are, or even stir[ring] people to anger” that an unpopular idea or view gains ac-

ceptance. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (emphasis added).

Adhering to these principles, the Court has repeatedly enforced the First Amendment to safeguard controversial or unpopular expression, from flag burning, *Johnson*, 491 U.S. 397, to profane language, *Cohen v. California*, 403 U.S. 15 (1971), protests at military funerals, *Snyder v. Phelps*, 562 U.S. 443 (2011), and Nazi parades, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977).

These First Amendment protections equally apply to American teenagers. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 794 (2011) (stating that “[m]inors are entitled to a significant measure of First Amendment protection,” and that the government does not have “a free-floating power to restrict the ideas to which children may be exposed”) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)). Indeed, *Tinker* confirmed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. at 506. Instead, this Court in *Tinker* recognized only a *narrow* limitation on students’ robust free speech rights in light of the “special characteristics of the school environment.” *Id.*; see also *Brown*, 564 U.S. at 794 (describing *Tinker* and its progeny as a “relatively narrow and well-defined” exception to robust First Amendment protections for minors); *Citizens United*, 558 U.S. at 341 (describing *Tinker* and its progeny as allowing “a narrow class of speech restrictions”).

Of course, students’ freedom of speech is not unlimited. The First Amendment does not forbid schools from punishing student online speech that “is directed to inciting or producing imminent lawless action and is

likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Further, while at school, students cannot invoke the First Amendment to “substantial[ly] disrupt” or “material[ly] interfer[e] with school activities.” *Tinker*, 393 U.S. at 514. But school districts likewise cannot leverage their fear of disruption into 24/7 power to punish students for the content of their speech. Any such rule risks silencing student speech on important issues of public concern. See pp. 16-26, *infra*.

The Court should be particularly vigilant in guarding against censorship by schools—institutions that ostensibly serve the important role of “educating the young for citizenship” in a free society. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The more schools punish and chill student speech—particularly because of the controversial nature of that speech—the less prepared students will be to participate effectively in a society based on the free exchange of ideas. Rather than preparing students for citizenship, the vast power to censor petitioner seeks risks leading students “to discount important principles of our government”—including freedom of speech itself—“as mere platitudes.” *Id.*

II. Empowering Schools To Punish Off-Campus Student Speech Would Diminish Young Women’s Ability To Participate Fully In Our Public Discourse.

Allowing school officials to punish students based on the content of their off-campus speech would chill young people from expressing their opinions on important issues simply because that speech happens to be controversial. Students, and particularly young women, make valuable contributions to our public dis-

course. Today, that expression occurs most often on social media. Petitioner’s test would treat such student speech as the equivalent of an in-class outburst whenever that speech mentions the school in a negative light or someone from school sees it. But such speech is not the same as an in-class outburst for a multitude of reasons. And the Court should not bless this startling intrusion on First Amendment protections, particularly where there is little reason to believe that school administrators can be trusted to exercise their authority in a politically neutral way.

A. School-Age Women Have A Long History Of Speaking On Important And Controversial Issues Outside The School Context.

Too young to vote does not mean too young to voice an opinion. Throughout American history, school-age women have been active combatants in the battle of ideas. Today, large parts of that battle are waged online, through social media. The ideas expressed in a Snap today might once have been written in a leaflet or handbill, but the First Amendment draws no distinction. A young speaker’s ideas may be provocative, and they may discomfit the speaker’s principal or school superintendent—but that is why we have a First Amendment.

1. Mary Beth Tinker was a 13-year-old student in junior high school when she decided to protest the Vietnam War by wearing a black armband to school. *See Tinker*, 393 U.S. at 504. She is in distinguished company, among a host of young women who found controversial causes to champion while still in school.

Anna Dickinson—one of the most renowned orators of the mid-19th century—was giving speeches and publishing articles opposing slavery and supporting women’s rights at a young age. Her first article was published in an anti-slavery newspaper when she was 14 years old, in which she advocated abolition and decried violence against those who spoke against slavery. See Judith Anderson, *Anna Dickinson, Antislavery Radical*, 3 Pa. Hist.: A J. of Mid-Atl. Studies 147, 149-50 (July 1936); J. Matthew Gallman, *America’s Joan of Arc: The Life of Anna Elizabeth Dickinson* 10-11 (2006).

Young, school-age women also were vocal during the suffrage movement. Dorothy Frooms from Bayonne, New Jersey was “[h]ailed as the youngest campaigner for woman’s suffrage in the United States.” McKenzi Christensen, *‘Baby Suffragettes’: Girls in the Women’s Suffrage Movement across the Atlantic*, 48 *The Thetean: A Student J. for Scholarly Hist. Writing* 73, 86 (2019) (quoting *She Talks for Votes at 15*, *Jeffersonville Daily Reflector*, Mar. 30, 1911). She gave her first street-side address in support of women’s suffrage at the age of 11 and continued to deliver speeches throughout her teens. *Id.* at 87; see Robert M. Thomas Jr., *Dorothy Frooms, Lawyer and Suffragist*, *Dies*, *N.Y. Times*, Apr. 19, 1997. At the age of 15, and while attending high school, she formed the Equal Justice League for Young Women and lobbied her fellow classmates to support voting rights for women. Christensen, *supra*, at 87.

Similarly, Mabel Ping-Hua Lee—a Chinese immigrant living in New York City—became involved in the suffrage movement while in high school. See Kerri Lee Alexander, *Mabel Ping-Hua Lee*, *Nat’l Women’s History*

Museum (2020).² In 1912, when she was 16 years old, Lee led a parade through the streets of New York City in support of women’s suffrage, riding a white horse and wearing a sash bearing the words “Votes for Women.” See Jia Lynn Yang, *Overlooked No More: Mabel Ping-Hua Lee, Suffragist With a Distinction*, N.Y. Times, Sept. 19, 2020.³ This was one of the largest suffrage marches in U.S. history, with an estimated 10,000 participating. See *Suffrage Army Out On Parade*, N.Y. Times, May 5, 1912, at 1.⁴

Young women, particularly women of color, were involved in demonstrations opposing racial segregation during the Civil Rights Era. In 1955—nine months before Rosa Parks refused to give up her seat on a Montgomery bus—a 15-year-old high school student named Claudette Colvin protested Montgomery laws segregating public transportation by refusing to give her seat up for a white women. See Margot Adler, *Before Rosa Parks, There Was Claudette Colvin*, NPR, Mar. 15, 2009⁵; see *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (overturning convictions for sit-in protests on First Amendment grounds). A few years later, school-age youth in Birmingham—including girls like 9-year-old Audrey Faye Hendricks—participated in the “Children’s Crusade” to protest segregation. See Charlayne

² <https://www.womenshistory.org/education-resources/biographies/mabel-ping-hua-lee>.

³ <https://www.nytimes.com/2020/09/19/obituaries/mabel-ping-hua-lee-overlooked.html>.

⁴ <https://timesmachine.nytimes.com/timesmachine/1912/05/05/sue.html>.

⁵ <https://www.npr.org/2009/03/15/101719889/before-rosa-parks-there-was-claudette-colvin>.

Hunter-Gault, *Fifty Years After The Birmingham Children's Crusade*, *New Yorker*, May 2, 2013.⁶

And young women were advocates for a host of other causes as well. For example, high school women in the 1960s and 1970s spoke off-campus on numerous issues affecting young women—such as school dress codes. See Kera Lovell, *Girls Are Equal Too: Education, Body Politics, and the Making of Teenage Feminism*, 33 *Gend. Issues* 78, 89-90 (2016). “Many articles by teenage feminists . . . were reprinted in adult-edited collections,” and teenage women also wrote in their own newspapers and underground feminist publications. *Id.* Further, young women, “including Black teenage girls, played a significant role in lowering the nation’s voting age” through ratification of the 26th Amendment. Mae C. Quinn, *Black Women and Girls and the Twenty-Sixth Amendment: Constitutional Connections, Activist Intersections, and the First Wave Youth Suffrage Movement*, 43 *Seattle U. L. Rev.* 1237, 1246 (2020). And school-age woman also voiced opposition to the Vietnam War, including 17-year-old Jane Rose Kasmir, who participated in a protest in Washington, DC and was photographed holding a flower while standing in front of a National Guardsman. See Samantha Cooney, *Vietnam Protester From Iconic Photo Talks Trump, Pepsi Ad and Today's Resistance*, *Time*, Apr. 5, 2017.⁷

2. Today, school-age women continue to speak out—in print, in person, and on social media platforms—about issues of public importance. Sometimes their speech is blunt—as impolite or crude as the Snaps that

⁶ <https://www.newyorker.com/news/news-desk/fifty-years-after-the-birmingham-childrens-crusade>.

⁷ <https://time.com/4695248/vietnam-war-protester-trump-pepsi/>.

petitioner sought to punish here. But sometimes impolite speech packs a punch by being impolite.

After the shooting at Marjory Stoneman Douglas High School in 2018, high-school women advocated for changes in gun laws at the state and federal level. Numerous young women spoke at protests and rallies addressing gun regulation, including at the “March for Our Lives” rally in Washington, DC, where an 11-year-old female student was among those who addressed the crowd. *E.g.*, Eliza Relman, *Meet the 6 impressive teenagers who are leading a massive gun-control movement after the Parkland massacre*, Business Insider, Mar. 27, 2018.⁸ These young women also used social media platforms to express their views and to respond to those who disagreed. *See* Jonah E. Bromwich, *How the Parkland Students Got So Good at Social Media*, N.Y. Times, Mar. 7, 2018.⁹ For example, one female student responded to a tweet from President Trump, saying “I don’t want your condolences you fucking piece of shit. . . . Prayers won’t fix this. But Gun control will prevent it from happening again.”¹⁰ Another female student tweeted in reaction to a school shooting: “How many f***ing times do we have to turn on the news and

⁸ <https://www.businessinsider.com/who-are-young-people-leading-march-for-our-lives-gun-control-movement-2018-3#emma-gonzalez-18-fight-for-your-lives-before-its-someone-elses-job-1>.

⁹ <https://www.nytimes.com/2018/03/07/us/parkland-students-social-media.html>.

¹⁰ <https://twitter.com/chamath/status/965266282089082881?lang=en>; Jennifer Sangalang, *Florida school shooting: Student’s Trump tweet ‘I don’t want your condolences’ goes viral*, Fla. Today, Feb. 15, 2018, <https://www.floridatoday.com/story/news/2018/02/15/florida-school-shooting-viral-trump-tweet/340395002/> (reporting on the tweet and the young woman who posted it).

be so fueled with rage that our bodies almost physically snap.”¹¹

Other school-age women took a different view and advocated against gun restrictions. For example, 17-year-old Kenya Rodriguez spoke at a rally in Phoenix, Arizona in opposition to gun regulation. See Bree Burkett, *Heard at rally for 2nd Amendment rights: ‘We aren’t letting our guns go’*, azcentral, July 8, 2020.¹² Similarly, 15-year-old Michele DeGroot participated in a march in favor of gun rights in Los Angeles and served as the communications chair for that event. See Lois Beckett, *‘Gun rights are human rights’: pro-gun rally counters gun control movement*, The Guardian, July 8, 2018.¹³ Needless to say, their message is not universally taken as innocuous.

Many high school students also have used social media to campaign on both sides of the abortion issue. Lila Rose became involved in the pro-life movement when she was 15 years old, forming her own advocacy organization and speaking publicly against abortion. See Krissah Thompson, *Two young women drive antia-*

¹¹ <https://twitter.com/Emma4Change/status/968956685829230593>; Valerie Strauss, *This Parkland student quickly amassed more Twitter followers than the NRA. Here’s what she’s been writing*, Wash. Post, Mar. 1, 2018, <https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/01/this-parkland-student-quickly-amassed-more-twitter-followers-than-the-nra-heres-what-shes-been-writing/> (reporting on the tweet and the young woman who posted it).

¹² <https://www.azcentral.com/story/news/local/phoenix/2018/07/07/march-our-rights-arizona-students-march-2nd-amendment/765391002/>.

¹³ <https://www.theguardian.com/us-news/2018/jul/08/march-4-our-rights-pro-gun-rally-los-angeles>.

bortion movement's revival, Wash. Post, Jan. 21, 2014¹⁴; Robin Abcarian, *Abortion foe goes undercover*, L.A. Times, Apr. 26, 2009.¹⁵ Numerous other teenage women have engaged in public protest and debate on the issue of abortion. See Nicole Knight Shine, *'Your neighbor is a killer': the anti-abortion summer camp teaching teens to protest*, The Guardian, July 14, 2015¹⁶; Anna Johnson, *Teen's anti-abortion plea leads to shouting, crying at Raleigh City Council meeting*, The News & Observer, June 5, 2019.¹⁷ High school women also have spoken publicly against the participation of transgender students in women's sports. E.g., Pat Eaton-Robb, *Girls sue to block participation of transgender athletes*, ABCNews, Feb. 12, 2020¹⁸; Talia Kaplan, *'We are fighting for fairness in women's sports,' says Connecticut student suing over transgender policy*, Fox News, Feb. 11, 2020.¹⁹

Like their predecessors, school-age women today continue to be involved in efforts to promote racial equality, including through social media. A group of 6 teenage girls in Nashville—ranging from 14 to 16 years of age—utilized social media to advocate for racial jus-

¹⁴ https://www.washingtonpost.com/lifestyle/style/two-woman-central-figures-in-antiabortion-resurgence/2014/01/21/8cfd21e-7ef9-11e3-95c6-0a7aa80874bc_story.html.

¹⁵ <https://www.latimes.com/archives/la-xpm-2009-apr-26-na-abortion26-story.html>.

¹⁶ <https://www.theguardian.com/world/2015/jul/14/anti-abortion-summer-camp-teenagers-protest>.

¹⁷ <https://www.newsobserver.com/news/local/article231201838.html>.

¹⁸ <https://abcnews.go.com/Sports/wireStory/girls-sue-block-participation-transgender-athletes-68941543>.

¹⁹ <https://www.foxnews.com/sports/fairness-womens-sports-student-suing-transgender-athlete-policy>.

tice and to organize a protest in response to the death of George Floyd, with over 10,000 participating. See Margaret Rankl, *These Kids Are Done Waiting for Change*, N.Y. Times, June 15, 2020.²⁰ See also, e.g., Nicole Bales, *Warrenton teen behind local Black Lives Matter protests: 'I like doing what is right'*, The Astorian, June 9, 2020.²¹ Young women also have used social media to express their views on race issues. For example, 15 and 16-year-old women posted videos on TikTok (a popular social media platform among young people) in which they decried “racist fucks” and described the death of George Floyd as “f-cking terrible.”²²

In the information age, sociopolitical movements like #MeToo live and are born on social media, and young women seeking to participate take part from their social media accounts. See, e.g., Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, Atlantic, Mar. 24, 2019²³ (documenting the origins of the #MeToo movement on Twitter). Students' speech in this context often relates directly to school, with tags like “#MeTooK12” identifying posts relating

²⁰ <https://www.nytimes.com/2020/06/15/opinion/nashville-teens-protests.html>.

²¹ https://www.dailyastorian.com/news/local/warrenton-teen-behind-local-black-lives-matter-protests-i-like-doing-what-is-right/article_b3f104ce-a9d8-11ea-8384-f7e74f9ac191.html.

²² <https://twitter.com/safyhallanfarah/status/1267614336106803201> (sharing “racist fucks” TikTok video to Twitter); Hanna Lustig, *Teens on TikTok are exposing a generational rift between parents and kids over how they treat Black Lives Matter protests*, Insider, June 3, 2020, <https://www.insider.com/tiktok-george-floyd-black-lives-matter-teens-parents-racist-views-2020-6> (reporting on the TikTok videos and the young women who created them).

²³ <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>.

to sexual assault or harassment in primary and secondary schools. See Valerie Strauss, *#MeTooK12: A New Hashtag for Students Sexually Assaulted or Harassed in K-12 Schools*, Wash. Post, Jan. 3, 2018.²⁴ For example, after sexual-assault allegations against both teachers and students roiled Lowell High School in San Francisco, senior Shavonne Hines-Foster used her Instagram account to amplify the stories of fellow students. See Holly McDede, *Lowell Students Say #MeToo*, KQED, Feb. 11, 2021.²⁵ The Lowell High School allegations became a flashpoint for students, *id.*, with some taking to social media to express sentiments like “Fuck Lowell predators” and to demand to know “what else is our school hiding[?]”²⁶

School-age women have contributed—and continue to contribute—to the marketplace of ideas by expressing their views outside the school environment on a variety of issues. Many, if not all, of the positions they have advanced are (or were) controversial in some quarters and risked causing “disruption.” And, like B.L., these women often use forceful language to voice their opinions.

²⁴ <https://www.washingtonpost.com/news/answer-sheet/wp/2018/01/03/metook12-a-new-hashtag-for-students-sexually-assaulted-or-harassed-in-k-12-schools/>.

²⁵ <https://www.kqed.org/news/11859164/lowell-students-say-metoo-sexual-abuse-allegations-spark-reckoning-at-sf-high-school>.

²⁶ <https://twitter.com/angrykavin/status/1269716201942454273?s=21>.

B. Allowing School Administrators To Punish Off-Campus Social Media Posts Would Empower Community Mobs And Unduly Inhibit Young Women’s Right To Express Themselves.

Social media has dramatically changed the dynamic of student speech, resulting in an enormous amount of off-campus speech occurring through social media. Approximately 95 percent of teenagers have a smartphone or access to one. Pew Research Center, *Teens, Social Media & Technology 2018*, at 1 (May 2018) (“Pew”).²⁷

Social media use is higher among young women, with 70 percent of young women reporting they use social media every day. Common Sense, *The Common Sense Census: Media Use By Tweens And Teens*, at 7 (2019) (“Common Sense”).²⁸ This is noticeably higher than their male counterparts, only 56 percent of whom report using social media on a daily basis. *Id.* There also are gender differences in the use of certain social media platforms: young women are more likely to use platforms such as Snapchat than their male counterparts. Pew, *supra*, at 1. These social media platforms provide users with an outlet to “express . . . opinions and emotions, and connect with people who feel the same way.” *Id.*

The constant use of social media means that students are engaging in enormous amounts of off-campus speech, and that their speech is reaching larger audi-

²⁷ <https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/>.

²⁸ <https://www.commonensemedia.org/sites/default/files/uploads/research/2019-census-8-to-18-full-report-updated.pdf>.

ences. Students are using social media platforms like Snapchat, Facebook, and Twitter to discuss a wide range of issues, from important topics of public policy, pp. 10-15, *supra*, to high school drama, pp. 22-24, *infra*.

The ubiquitous nature of social media and the corresponding ability of a single post to spread like wildfire increases the likelihood that off-campus speech will find its way onto campus. Certain platforms, such as Snapchat, Twitter, and Facebook, are built to allow a network of users to instantly share thoughts and photographs. Content created on these platforms can be shared and re-shared with dozens or thousands of users with a simple click of a button, making it particularly easy for speech on these platforms to be disseminated to a large audience. Thus, a tweet or Snap made off-campus could easily find its way onto school grounds, cause a “disruption,” and result in school officials taking disciplinary action against the speaker.²⁹

In our current era of cancel culture, in which outrage spreads as quickly as the posts themselves, any off-campus speech is vulnerable to the accusation that it causes on-campus “disruption.” Indeed, even innocuous speech can offend others who, in some cases, may intentionally bring that speech on-campus for the very purpose of creating a disruption. That was the case

²⁹ Petitioner suggests that limiting discipline to speech that “foreseeably” reaches campus is a “guardrail” protecting due process. Pet. Br. 27. Given the ubiquity and omnipresence of social media, this is no limit at all. As petitioner itself has asserted, “technology acts as a megaphone for off-campus speech, *ensuring* that it reverberates throughout the classroom and commands the school’s attention.” Pet. 4 (emphasis added). Notably, in its discussion of what could be beyond schools’ reach, petitioner does not identify *any* speech on social media that would not foreseeably reach the school. Pet. Br. 28-29.

here: another cheerleader learned of B.L.’s Snap and brought it to the attention of her mother, one of two cheerleading coaches, who subsequently suspended B.L. from the cheerleading team. *See* Resp. Br. 4. School administrators should not be permitted to regulate off-campus speech in order to appease those who are, in fact, the on-campus disruptors. Granting administrators that power “would confer broad powers of censorship in the form of a [busybody’s] veto.” *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

Giving community mobs power over student speech particularly imperils young women, who face disproportionate consequences for violating cultural norms by expressing themselves in “negative” or “angry” terms. For example, a 2018 study for the ABA’s Commission on Women in the Profession and the Minority Corporate Counsel Association concluded that men feel much freer to express anger in the workplace and that they suffer fewer repercussions for doing so than do women. Joan C. Williams, et al., *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession* 11, 21, 24–25, 29 (2018).³⁰ In petitioner’s own words, B.L.’s punishment arose from her improvident decision to “express[] disdain and anger” over the weekend from a private personal social media account. Pet. Br. 30. That young women like B.L. sometimes punctuate their sincerity with profanity, pp. 11, 14-15, *supra*, is all the more reason to fear school censorship of profane off-campus speech.

A restriction on young women’s speech that “mandat[es] positivity” threatens to “silence dissent and distort the marketplace of ideas.” *Matal v. Tam*, 137 S. Ct.

³⁰ https://www.abajournal.com/files/Bias_interruption_report_compressed.pdf.

1744, 1766 (2017) (Kennedy, J., concurring). If young women are taught that they cannot express anger or frustration with teachers, coaches, and school administrators who arbitrate the majority of their lives, they will learn not to express “negative” emotions when directed at politicians, institutions, or the social order.³¹

The protections afforded to students’ off-campus speech should not depend on either the ease and likelihood of dissemination or the whim of community outcry and concomitant disruption on campus. Off-campus student speech should be afforded the same, robust protections as any other speech to prevent the already long arm of the school administrator from suppressing vast quantities of speech.

C. School Administrators Have Already Used Their Power To Punish And Chill Students’ Online Speech.

The risk that schools will overstep in regulating off-campus social media expression is not hypothetical—it is a present reality. Examples abound of schools punishing students who speak their minds off campus on personal social media accounts, in the absence of any real or threatened on-campus “disruption.” These examples disprove petitioner’s optimistic suggestions that “[p]rinciples of due process and fair notice, along with the substantial-disruption test, ensure that schools cannot misuse their authority and stifle students’ private expression” or that schools will not “ban speech simply because other students find the speech unwel-

³¹ The Court recognized such a concern in *Barnette*, cautioning against the risk that unduly restricting young persons’ speech will “teach youth to discount important principles of our government as mere platitudes.” 319 U.S. at 637.

come or offensive.” Pet. Br. 26, 30. In reality, schools are more concerned with appeasing online outrage mobs and preserving their own image than in protecting students’ constitutional right to free expression or in applying their own rules evenhandedly.

In their efforts to avoid negative attention from the community (or, heaven forbid, viral national media outrage), schools have been quick to trample students’ rights to express personal political views on their social media accounts. For example, Minnesota’s Edina High School disbanded the Young Conservatives Club (YCC) after members took to social media to criticize classmates who sat or lay down in protest while “Taps” was played in observance of Veterans Day. Brianna Smith, *Edina High School’s Young Conservative Club Wins Free Speech Lawsuit*, legalreader.com, Mar. 14, 2018.³² This punishment was imposed after the students’ posts caused a “social media firestorm,” drawing the ire of an “Antifa EHS” YouTube account that posted a video of an individual wearing a Guy Fawkes mask and decrying the conservative students’ “alt-right agenda.” *Id.* “Tensions” online reportedly “escalated” over Veterans Day weekend (during which school was, of course, not in session), ending with the school’s decision to punish (only) the YCC members. *Id.*

Off-campus student speech also has been curtailed when it relates to controversial issues of public policy, such as the legalization of marijuana. A rising senior at Clear Fork High School in Bellville, Ohio was suspended from the soccer team after he re-tweeted content from a pro-legalization Twitter account, which said “marijuana is my favorite.” Linda Martz, *Senior Ath-*

³² <https://www.legalreader.com/edina-high-school-young-conservative-club-free-speech-lawsuit/>.

lete Suspended for Weed-Related Retweet Sues District, Mansfield News J., Apr. 10, 2014.³³ He shared that tweet over summer vacation, using his own Twitter account, which he accessed from his home computer. *Id.* The student's retweet was deemed a violation of the school's morality and drug policies, and he was suspended from the soccer team for a significant part of his senior year. *Id.* The student, who had a 4.0 grade point average and was the second-highest scorer on his team, was being considered by several colleges for their soccer teams. *Id.* Predictably, his college prospects diminished after the suspension. *Id.*

Schools' willingness to punish students for sharing personal opinion also extends to sincere criticisms of school policy. Last summer, for example, 15-year-old Hannah Watters, a 10th grade student at North Paulding High School in Dallas, Georgia, was suspended after she participated in a debate about what the new school year should look like in the midst of the COVID-19 pandemic. Ms. Watters used her Twitter account to criticize her school's lack of safety precautions. *Back to school amid coronavirus: Georgia student suspended for viral photo of crowded school hallways*, Cox Media Group, Aug. 7, 2020.³⁴ She posted two photographs of hallways crowded with mask-less students, along with a message listing the percentage of students in each of her classes who wore masks. *Id.*

³³ <https://www.mansfieldnewsjournal.com/story/news/2014/04/10/clear-fork-senior-suspended-for-weed-related-retweet-sues-district/7566503/>.

³⁴ <https://www.fox13memphis.com/news/trending/back-school-amid-coronavirus-georgia-student-suspended-viral-photo-crowded-school-hallways/K6LCTBJ25NAFVAN4QYGL3PN3BY/>.

Although Ms. Watters created her posts outside school hours, administrators still judged this a violation of school rules and suspended her. *Id.* Afterward, the school superintendent wrote to parents that Ms. Watters's posts were "taken out of context to 'criticize our school reopening efforts,'" and the school announced to other students that they too would be punished if they criticized the school on social media. Jim Massara, *North Paulding Teens Suspended For Viral Images of Packed Hall*, MSN.com, Aug. 7, 2020.³⁵ Another unnamed student was suspended for a similar offense. *Id.* Although Ms. Watters's suspension was later lifted and expunged from her record after a national outcry, *see Back to school amid coronavirus, supra*, her suspension and the school's warning that other critics would likewise be punished undoubtedly sent a strong, chilling message to students about the risks of expressing their views on issues of immense public concern.³⁶

At the other end of the spectrum, everyday expressions of the frustrations and anxieties of young people also have been swept up into schools' regulation of off-campus student speech. New Jersey eighth grader Ryan Dwyer, for example, was suspended for a week from Maple Place Middle School, removed from the school's baseball team for a month, and barred from a school trip—all for creating a personal website calling

³⁵ <https://www.msn.com/en-us/lifestyle/lifestyle-buzz/north-paulding-teens-suspended-for-viral-images-of-packed-hall/ar-BB17LmpL>.

³⁶ Ms. Watters was lucky; the average student cannot expect that an unfair punishment will make national news and shame school administrators into backing down. Indeed, like B.L., many students' rights are vindicated only if they have both the will and the means to litigate. *See, e.g.*, pp. 20–21, *supra*; p. 23, *infra*.

the school “downright boring.” Student Press Law Center, *New Jersey student receives \$117,500 in First Amendment claim settlement*, Nov. 1, 2005.³⁷ Mr. Dwyer titled his webpage “Anti-Maple Place” and invited visitors to sign a guest book in which they could express their displeasure with the school, while requesting that commentors neither use profanity nor threaten teachers. *Id.* Mr. Dwyer envisioned an off-campus “forum for students to criticize school officials and show students ‘why their school isn’t what it’s cracked up to be.’” *Id.* The website was online for less than a week before Mr. Dwyer was instructed by school officials to take it down. *Id.*

Students also have been punished for speech related to the interpersonal dramas and conflicts that have characterized middle and high school from time immemorial. For example, 12-year-old Riley Stratton complained on her personal Facebook page that she “hated” a hall monitor who was being “mean” to her. Lydia Coutré, *Minnesota school that demanded student’s Facebook password settles First Amendment lawsuit*, Student Press Law Center, Mar 28, 2014.³⁸ Ms. Stratton was given detention after a screenshot of her post made its way to the Minnewaska Area Middle School principal. *Id.* When Ms. Stratton vented her feelings about the situation on Facebook, posting “I want to know who the f%\$# told on me,” she was suspended from school and prohibited from attending a class trip. *Id.*

Neither has student rumor and gossip been spared from school administrators’ speech regulations. In

³⁷ <https://splc.org/2005/11/new-jersey-student-receives-117500-in-first-amendment-claim-settlement/>.

³⁸ <https://splc.org/2014/03/minnesota-school-that-demanded-students-facebook-password-settles-first-amendment-lawsuit/>.

South Carolina, Hartsville High School senior Demi Grant was suspended for five days after “favoriting” gossip tweets posted by an anonymous “HS Confession SC” Twitter account. Nick Sturdivant, *“Favorited” tweet gets Hartsville High school student suspended, she says*, WBTW.com, Feb. 10, 2014.³⁹ Ms. Grant defended “favoriting” the tweets by explaining she “just favorited them because [she] thought they were funny,” not in order to indicate a belief that “they were true.” *Id.* Still, Ms. Grant and 30 of her peers were censured by the school for “interacting” with the Twitter account. *Id.* “Dozens” of these students, Ms. Grant included, were further “disciplined.” *Id.*

As the above examples demonstrate, petitioner’s vision of school authority over off-campus student speech has extended the already-long arm of the school administrator to virtually every instance of student speech, threatening to “strangle the free mind at its source.” *Barnette*, 319 U.S. at 637. The willingness of schools to punish students for speaking their minds spans the full spectrum of young adult speech, from the high-minded to the banal. The thread that unites these examples is that the “disruption” at hand is little more than the offended sensibilities of the listener.

In B.L.’s case, school administrators concluded that her expression of frustration warranted censure when weighed against the “visible upset” of other students, which they determined was tantamount to “chaos.” Pet. Br. 6–7. On the facts below, petitioner’s proposed

³⁹ <http://wbtw.com/2014/02/10/favorited-tweet-gets-hartsville-high-school-student-suspended-she-says/>; *archived at* <https://web.archive.org/web/20160130011840/http://wbtw.com:80/2014/02/10/favorited-tweet-gets-hartsville-high-school-student-suspended-she-says/>.

test elevates “upset” or hurt feelings of other students—a daily reality for secondary school students⁴⁰—to substantial disruption. That would collapse the central distinction the Court drew in *Tinker* between mere “discomfort and unpleasantness,” 393 U.S. at 509—which are necessary consequences of a truly free marketplace of ideas and expression—and the type of “material[] and substantial[] disrupt[ion of] the work and discipline of the school” that warrants limiting student speech. *Id.* at 513. The subjectivity and unpredictability of this standard not only invites restrictions on speech that exceed constitutional bounds, it also breeds the “vagueness” that the Court has cautioned “raises special First Amendment concerns because of its obvious chilling effect on free speech.” *Reno*, 521 U.S. at 871-72.

For example, can a high school junior arriving home from school send a private, self-deleting Snapchat message to her six closest friends, bemoaning that “social studies was beyond lame” that morning? What if one of her friends screenshots the message and sends it to their teacher? Or posts it in a Facebook group related to the school with a larger audience? What if the original sender used colorful language to express the depth of her irritation, or singled out her teacher by name? Might she be kicked off the Model United Nations team? That a student must ask herself these questions and not know the answer illustrates how easily petitioner’s rule would chill young persons’ speech.

Should the Court adopt petitioner’s rule, any “negative information” on a personal social media account (this was B.L.’s crime, Pet. Br. 7) can cause a “substan-

⁴⁰ Petitioner conceded below that “electronic squabbling . . . is a fairly typical occurrence.” Pet. App. 52a.

tial disruption” if there is any tangential “nexus” to school—a practical certainty for young students, who spend most of their waking hours at school, doing homework, and participating in school-affiliated extra-curriculars.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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