

No. 20-255

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IN THE  
**Supreme Court of the United States**

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MAHANoy AREA SCHOOL DISTRICT,  
*Petitioner,*

v.

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

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

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**BRIEF OF SCHOOL DISCIPLINE PROFESSORS AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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

*Amici curiae* are 32 academics and researchers whose scholarship focuses on identifying evidence-based methods of preventing bullying and similar behavior by students that disrupts schools.<sup>2</sup> *Amici* respectfully submit this brief to advocate for a ruling recognizing that schools can address student bullying that occurs off campus without imposing strict punishments that restrict students in speaking freely outside the school environment. *Amici*'s research also establishes that inflexible "zero-tolerance" punishment for bullying is often ineffective and that alternative and superior techniques exist to prevent and respond to behavior that affects a school even if the behavior takes place off campus.

**INTRODUCTION AND SUMMARY  
OF ARGUMENT**

This case asks the Court to consider the power public schools have both to punish and to suppress student speech and expression—particularly student speech outside of the proverbial "schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The Third Circuit concluded that courts must scrutinize government suppression of student speech outside the schoolhouse gate as they would assess any other government attempt to punish

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

<sup>2</sup> A complete list of *Amici* appears in an appendix to this brief.

speech—*i.e.*, by applying the tiers of First Amendment scrutiny this Court has long deployed. *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 192 (3d Cir. 2020) (holding that off-campus speech “enjoy[s] the full scope of First Amendment protections”). In this Court, Petitioner and its *amici* warn that a ruling like the Third Circuit’s would leave schools powerless to combat bullying and harassment. They premise their arguments on the flawed assumption that inflicting strict punishment is necessary to deter bullying and other forms of student misconduct.

*Amici* submit this brief to address precisely that argument. *Amici* have established through decades of academic research and exploration that the rigid approach to punishment Petitioner asks the Court to endorse does not deter bullying. Worse, these so-called “zero-tolerance” tactics actively *harm* students. As confirmed in *Amici*’s academic works—including research the United States cites in its own *amicus* brief filed in this very case, inflexible punishment for speech does not make schools safer. See Brief for the United States as Amicus Curiae Supporting Petitioner at 21, *Mahanoy Area Sch. Dist. v. B.L.*, No. 20–255 (U.S. Mar. 1, 2021). Instead, punishing student speech diminishes students’ wellbeing, academic potential, and long-term prospects. And it proves most damaging to students of color.

This Court has long recognized that one of the most “important part[s] of the educational process” is the “personal intercommunication” in which students engage both in and outside the classroom. *Tinker*, 393 U.S. at 512. Off-campus communication among our nation’s students in particular is critical to their social development. Cellphones, social media, and personal interactions have long allowed students to form and

strengthen friendships, collaborate with peers on schoolwork and extracurricular activities, and engage with their communities.

But these channels of off-campus student communications have a dark side—one that government officials have spent years working to address. Student cyberbullies have abused the anonymity and accessibility of the internet to target and denigrate their classmates.

In response, schools and state legislatures have fallen back on a familiar but ineffective technique: making an “example” out of a student’s misbehavior by meting out extreme penalties disproportionate to the purported misconduct. *See, e.g.*, Frank D. Lomonte, *Zero Tolerance for Online Bullying Can Hamper Free Speech*, Am. Bar Ass’n (Sept. 28, 2012), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2012/zero-tolerance-online-bullying-can-hamper-free-speech>. Most dangerous among these techniques are policies founded on a zero-tolerance response to any misbehavior. Broadly speaking, zero-tolerance policies rigidly impose strict punishment on students for engaging in speech or conduct the school deems wrongful, regardless of context or mitigating factors. But as *Amici*’s research shows, zero tolerance simply doesn’t work. *See, e.g.*, Nat’l Acads. of Scis., Eng’g, & Med., *Preventing Bullying Through Science, Policy, and Practice* 9, 262 (2016). In fact, zero tolerance does far more harm than good. *See id.*

The First Amendment requires government restrictions of speech to be tailored to achieve a certain governmental interest. Sometimes that tailoring needs to be “narrow[]”: “[i]f a less restrictive alterna-



tive would serve the Government’s purpose, the [government] must use that alternative.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). Other times, the tailoring need not be as close a fit. *See Tinker*, 393 U.S. at 509 (requiring a “finding” or “showing” that “engaging in the forbidden conduct would ‘materially and substantially interfere with’ school discipline).

But as *Amici*’s research shows, schools often punish student speech using restrictions not adequately tailored to respect First Amendment activity. *First*, zero-tolerance punishments—including suspensions and expulsions—fail to serve the legitimate government interests in deterring and preventing bullying and maintaining school order. The policies just don’t work. *Second*, zero-tolerance punishments affirmatively cause students harm. *Third*, there are numerous evidence-based alternative means that schools can adopt that maintain order and decorum better than zero-tolerance penalties.<sup>3</sup> Regardless of what tier of scrutiny this Court decides to apply in this case and others like it, schools have ample means available to address bullying and misconduct while still preserving students’ rights to speak. Punishing students’ First Amendment protected expression—especially expression that occurs outside the schoolhouse gate—is not a needed tool. Petitioner is wrong to suggest otherwise.

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<sup>3</sup> *Amici* do not take a position on how courts should define “off-campus” speech.

## ARGUMENT

### I. PUNITIVE APPROACHES TO BULLYING ARE INEFFECTIVE AND HARMFUL TO STUDENTS.

#### A. Punishment-Based Policies Do Not Alleviate Bullying or Harassment in Schools.

As schools have faced new threats to student well-being from illegal drugs to gun violence to cyberbullying, educators have crafted an “ever-expanding list of behaviors for which there are zero tolerance mandates.” Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 Ariz. L. Rev. 783, 791 (2003). They have coupled those lists with an “ever-expanding” authority over student conduct and speech. *Id.* Zero tolerance is a form of “strict liability,” where “uniform punishment is levied against individuals premised only upon a showing that they have broken the rules.” James M. Peden, *Through a Glass Darkly: Educating with Zero Tolerance*, 10 Kan. J.L. & Pub. Pol’y 369, 371 (2000).

For instance, under a school rule that prohibits bringing knives to school, educators suspended an eighth grader who took a knife away from a suicidal friend “in an effort to save her life.” *Ratner v. Loudoun Cty. Pub. Sch.*, 16 F. App’x 140, 143 (4th Cir. 2001) (Hamilton, J., concurring). Other zero-tolerance administrators suspended a six-year-old who brought a utensil to spread butter on his sandwich at lunchtime. Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 Minn. L. Rev. 823, 899 (2015). Under these policies, teachers and administrators have punished a broad range of nonviolent, nonthreatening speech and behavior. They have done that even when their punishments “stifle a young voice that may be crying for help, or trying to show

society its inadequacies, or merely expressing anger through creative expressions.” Lynda Hils, “*Zero Tolerance*” for Free Speech, 30 J.L. & Educ. 365, 365 (2001). The *in terrorem* threat of zero tolerance likely inhibits some speech that, while perhaps disagreeable, should be recognized as constitutionally protected.<sup>4</sup>

The sanctions associated with zero-tolerance disciplinary systems can be harsh. “Whether a student’s misbehavior is serious, trivial, intentional, or accidental, the response in many districts is the same: exclusion from school.” Black, *supra*, at 825. As *Amicus* Professor Chris Curran has observed, these programs favor the use of exclusionary discipline, which entails temporarily suspending children from school or, for the most serious offenses, permanent expulsion. See F. Chris Curran, *Estimating the Effect of State Zero Tolerance Laws on Exclusionary Discipline, Racial Discipline Gaps, and Student Behavior*, 38 Educ. Evaluation & Pol’y Analysis 647, 655–58 (2016). In

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<sup>4</sup> The COVID-19 pandemic has also exposed the overbreadth of zero-tolerance policies in punishing harmless student behaviors. Educators, for instance, have suspended students or sent the police to their homes when teachers could see a toy BB gun or nerf gun in the background of a student’s remote learning webcam. *E.g.*, Tim Elfrink, *A Teacher Saw a BB Gun in a 9-Year-Old’s Room During Online Class. He Faces Expulsion.*, Wash. Post (Sept. 25, 2020), <https://www.washingtonpost.com/nation/2020/09/25/louisiana-student-bbgun-expulsion/>; Kristie Cattafi, *Edgewater School Called Police After Sixth-Grader Had Nerf Gun During Zoom Class*, NorthJersey.com (Sept. 11, 2020), <https://www.northjersey.com/story/news/bergen/edgewater/2020/09/11/edgewater-nj-police-called-after-student-had-nerf-gun-during-zoom-class/3468499001/>. Although children alone at home have no way of physically endangering others in their virtual “classrooms,” administrators nonetheless inflexibly applied zero-tolerance rules and doled out these harsh punishments.

addition, some states have attached criminal consequences to infractions in the classroom, allowing or requiring schools to refer troublesome students to law enforcement for violating school rules. See Alison E. Cuellar & Sara Markowitz, *School Suspension and the School-to-Prison Pipeline*, 43 Int'l Rev. L. & Econ. 98, 98–99, 105–06 (2015).

Zero-tolerance punishments, however, have not produced the theorized benefits of better in-school behavior. Decades of research confirms that punitive discipline does not make schools safer or reform students who bully or harass their classmates. In fact, the U.S. Department of Health's official bullying prevention website recognizes that "[z]ero tolerance and expulsion are not effective approaches" in solving bullying. *Facts About Bullying*, StopBullying.gov, <https://www.stopbullying.gov/resources/facts> (last updated Aug. 12, 2020).

"Zero tolerance has not been shown to improve school climate or school safety." Am. Psychological Ass'n, *Are Zero Tolerance Policies Effective in the Schools?* 113 (2008), <https://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf>. To the contrary, schools with greater faculty support for zero tolerance have higher rates of out-of-school suspension, and both students and teachers in those schools report feeling less safe at school, as *Amicus* Professor Dewey Cornell's research has shown. See Francis L. Huang & Dewey G. Cornell, *Teacher Support for Zero Tolerance Is Associated With Higher Suspension Rates and Lower Feelings of Safety*, Sch. Psychol. Rev. (forthcoming 2021) (manuscript at 13–14). Schools with higher rates of punitive discipline also report lower ratings for school climate, faltering academic achievement, and worse ratings on school governance measures.

See Am. Psychological Ass'n, *supra*, at 4–5. Accordingly, extensive studies from the National Academies of Sciences, Engineering, and Medicine and the American Psychological Association have failed to produce any evidence that zero-tolerance policies make school environments safer or curb bullying. See Nat'l Acad. of Scis., Eng'g, & Med., *supra*, at 262, 284–85; Am. Psychological Ass'n, *supra*, at 96. One survey of Philadelphia schools, for instance, revealed that despite the “significant disciplinary issues” facing the schools, “more often than not, the zero-tolerance approach [did] not solve” the schools’ issues and instead “exacerbate[d] the situation and create[d] new problems.” Youth United for Change et al., *Zero Tolerance in Philadelphia* 26 (2011). “Zero tolerance policies create an unwelcoming school environment for all students, leading to feelings of detachment from school and a greater willingness to leave the school environment.” *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 184 n.8 (4th Cir. 2018) (quoting Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. Sch. L. Rev. 1374, 1401 (2012)).

Nor does punishing bullies for hurtful or threatening speech mold them into better people. In fact, punitive discipline actually appears to *increase* a student’s likelihood of committing offenses again in the future, as *Amicus* Professor Thomas Mowen and others have found. See, e.g., Thomas J. Mowen et al., *The Effect of School Discipline on Offending Across Time*, 37 Just. Q. 739, 752 (2020); Sheryl A. Hemphill et al., *The Effect of School Suspensions and Arrests on Subsequent Adolescent Antisocial Behavior in Australia and the United States*, 39 J. Adolescent Health 736, 741 (2006). When she is suspended or expelled, a student is “separated from the educational process, and

the school district may not be obligated to provide any further educational or counseling services for the student.” Jeffrey H. Lamont et al., *Out-of-School Suspension and Expulsion*, 131 *Pediatrics* e1000, e1002 (2013). This suggests that “suspending students from school may disconnect them from a positive social environment and increase their exposure to other risk factors for antisocial behavior.” Hemphill et al., *supra*, at 741. Exclusionary punishments may also expose students to ostracism from their peers. *Id.* As doctors explained in the official journal of the American Academy of Pediatrics, “[i]ronically, out-of-school suspension and expulsion often place the child back into the very environment that may have contributed to the antisocial behaviors in the first place, thereby negating the effectiveness of a ‘lesson-learned’ from out-of-school suspension and expulsion.” Lamont et al., *supra*, at e1002.

A zero-tolerance remedy implemented in-school for out-of-school speech is not an effective remedy—let alone a remedy tailored to meet the questioned speech. Petitioner here, however, seeks to extend its ability to apply those strict punishments to speech beyond its campus. The Court should reject that position and affirm the Third Circuit’s judgment.

**B. Punishing Students For Speech Actively Harms Their Educational Experiences and Long-Term Prospects.**

Zero-tolerance, exclusionary discipline also seriously harms students’ wellbeing, education, and future potential, as *Amici*’s research confirms.<sup>5</sup> Far

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<sup>5</sup> Much of the research identifying these impacts has accounted for the effects of other variables such as poverty and

from being necessary to achieve school interests in combatting bullying or preventing student disruption, zero tolerance is, by definition, not tailored and counterproductive. The harms attendant to zero-tolerance policies make clear that punishing B.L. for her off-campus speech in this case was unconstitutional.

**1. Zero-Tolerance Systems Adversely Affect Students' Educational Experiences and Make Children More Likely to Struggle Long Term.**

This Court should treat skeptically Petitioner's attempts to preserve the ability of schools to punish students for off-campus speech in light of the serious harms those punishments can cause. As the courts below recognized, given the negative consequences of zero-tolerance policies, expulsion and suspension of students for off-campus speech in particular will often be insufficiently tailored restrictions on speech to sustain any First Amendment scrutiny.

Punishment inflicts real emotional trauma on students and their families. *Amici* Professors Aaron Kupchik and Thomas Mowen have both seen that students who are suspended tend to suffer from low self-esteem and depression and feel frustrated, isolated, and angry. See Aaron Kupchik, *The Real School Safety Problem* 56–72 (2016); Thomas J. Mowen, *The Collateral Consequences of "Criminalized" School Punishment on Disadvantaged Parents and Families*, 49 Urb. Rev. 832, 835–36 (2017). These effects are to be expected, as the experience of suspension excludes

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prior infractions. Punitive discipline, therefore, is *in and of itself* a risk factor for a variety of negative outcomes.

students from positive influences at school and incites other students to label them as troublemakers. See Janet E. Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension*, 52 *Youth & Soc’y* 515, 530 (2020). Their parents share these burdens: the families of suspended children often struggle with anxiety and distress and face disruption in their own lives when students are forced to stay home from school. See Mowen, *supra*, at 846–47. As a result, zero-tolerance “appear[s] to run counter to our best knowledge of child development.” Am. Psychological Ass’n, *supra*.

Punishment-based disciplinary policies also disrupt the academic development of children by excluding them from the classroom. In the 2015–2016 school year, for instance, 2.7 million children in the U.S. missed a total of more than *11 million days* of school as a result of suspensions. See Daniel J. Losen & Paul Martinez, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* 6 (2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>; U.S. Dep’t of Educ., *2015-16 Civil Rights Data Collection* 13 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>.

These absences cause significant damage, depriving children of crucial educational opportunities and impeding their ability to succeed in school. See Losen & Martinez, *supra*, at iv–v. “[S]tudents who experience the harsh effects of these policies are more likely



to struggle in classes, drop out, and suffer other negative effects on their educations.” *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245 (10th Cir. 2014) (Lucero, J., concurring). Children who get in trouble and face suspension are typically already struggling academically, and suspending them only exacerbates their learning challenges. See Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 *Educ. & Urb. Soc’y* 359, 366–68 (2006). Accordingly, students are less likely to pass standardized exams if they have been disciplined—even just one time. Miner P. Marchbanks III et al., *Assessing the Role of School Discipline in Disproportionate Minority Contact with the Juvenile Justice System* 6 (2018). The consequences of falling behind in class can be severe: children who are suspended have lower rates of on-time graduation and are more likely to drop out of school. See Russell W. Rumberger & Daniel J. Losen, *The High Cost of Harsh Discipline and Its Disparate Impact* 14–18 (2016), [https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA\\_HighCost\\_6-2\\_948.pdf](https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/the-high-cost-of-harsh-discipline-and-its-disparate-impact/UCLA_HighCost_6-2_948.pdf); Talisha Lee et al., *High Suspension Schools and Dropout Rates for Black and White Students*, 34 *Educ. & Treatment Child.* 167, 182, 186 (2011).

Disciplined students are not the only ones whose learning suffers as a result of zero-tolerance policies. As *Amici* Professors Brea Perry and Edward Morris have found, schools with higher rates of suspensions see declining academic performance over time among

children who have not been punished, even after accounting for schools' baseline levels of violence and disorganization. See Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 Am. Soc. Rev. 1067, 1082–83 (2014). That schoolwide impact “contradict[s] the most common rationale for maintaining ‘tough’ exclusionary discipline policies—namely, that removing disruptive students creates a safe, orderly environment conducive to learning for students who conform to school rules.” *Id.*

The effect of strict in-school punishment lingers long after individuals have left the school environment. Being suspended in grade school is associated with a lower level of educational attainment, as reflected in depressed college attendance rates. See Rosenbaum, *supra*, at 515, 529–31; Andrew Bacher-Hicks et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 26257, 2019), [https://www.nber.org/system/files/working\\_papers/w26257/w26257.pdf](https://www.nber.org/system/files/working_papers/w26257/w26257.pdf).

Suspending or expelling students also puts them at heightened risk for being swept into the criminal justice system, a phenomenon known as the “school-to-prison pipeline.” See Kathryn C. Monahan et al., *From the School Yard to the Squad Car: School Discipline, Truancy, and Arrest*, 43 J. Youth Adolescence 1110, 1118–20 (2014); Ofer, *supra*, at 1401–03. By one measure, being suspended more than *doubles* a child's likelihood of later committing a criminal offense. Cuellar & Markowitz, *supra*, at 105–06. These effects are not limited to problematic students—rather, children *without* early behavioral issues are more likely

to be arrested after being suspended than those children who do show early problem behaviors, suggesting that it is the experience of being disciplined itself that puts them on a path toward future criminal behavior. Monahan et al., *supra*, at 1118. Often, it is school-related misbehavior itself that lands children in jail for violating zero-tolerance state laws:

If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention.

*A.M. v. Holmes*, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J., dissenting).

Researchers have observed a link between school discipline of a child and later criminal activity as an adult. Students who are removed from school through suspension or expulsion are more likely to become incarcerated well into adulthood, a result that “strongly suggests that school suspensions serve as a negative turning point that places youth at much greater risk of experiencing incarceration as they transition into adulthood.” Paul Hemez et al., *Exploring the School-to-Prison Pipeline: How School Suspensions Influence*

*Incarceration During Young Adulthood*, 18 Youth Violence & Juv. Just. 235, 248 (2020). And students who attend schools with more punitive disciplinary systems are more likely to have been arrested or incarcerated and have more arrests and incarceration spells. Bacher-Hicks et al., *supra*, at 4–5. Punitive discipline at schools, then, serves as a negative “turning point” for some youth—isolating them from positive influences in the classroom, making it harder for them to learn and thrive in school, and setting them on a path toward adverse outcomes and contact with the criminal justice system. See Thomas Mowen & John Brent, *School Discipline as a Turning Point: The Cumulative Effect of Suspension on Arrest*, 53 J. Res. Crime & Delinquency 628, 645–48 (2016).

Petitioner asks this Court to give schools the leeway to impose zero-tolerance penalties on students for engaging in off-campus speech. But the harms these punishments impose should give the Court pause as it assesses whether schools should be entitled to that deference. The harm that zero-tolerance, exclusionary penalties cause students should often render suspensions and expulsions punishing student speech (and particularly off-campus speech) insufficiently tailored to withstand any constitutional scrutiny, as the lower courts concluded in this case.

## **2. Using Exclusionary Anti-Bullying Policies Disproportionately Harms Students of Color.**

Petitioner’s efforts to preserve the ability of schools to punish students for engaging in off-campus speech should be even less persuasive in light of the

serious harm suspension and expulsion cause to students of color. Students in marginalized communities bear the most serious negative effects of punishment-based efforts to combat bullying, including zero-tolerance policies and exclusionary discipline. For example, nearly one in six Black students was suspended nationwide during the 2009-2010 school year, while only one in 20 White students received that same punishment. Daniel J. Losen & Jonathan Gillespie, *Opportunities Suspended: The Disparate Impact of Disciplinary Exclusion from School* 12 (2012), <https://civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-ccrr-research/losen-gillespie-opportunity-suspended-2012.pdf>. The gap in discipline between Black and White children has actually grown over time: in the 1970s, Black students were twice as likely as White students to be suspended out of school. See Children's Defense Fund, *School Suspensions: Are They Helping Children?* 9, 63 (1975). By 2016, the U.S. Department of Education's Office for Civil Rights found that the Black–White discipline gap had grown, so that Black children were three to three and a half times more likely to face suspension. U.S. Dep't of Educ., *supra*.

Disciplinary disparities between Black and White students cannot be explained by poverty or any allegations of higher Black rates of misbehavior. Although students who are disadvantaged are more likely to be suspended, race remains a significant predictor of disciplinary exclusion even when controlling for socioeconomic status. See John M. Wallace Jr. et al., *Racial Ethnic and Gender Differences in School Discipline Among U.S. High School Students: 1991-*

2005, 59 Negro Educ. Rev. 1, 10–11 (2008). Additionally, Black students committing the *same* infractions as White students receive *longer* suspensions on average in the very same schools. See Kaitlin P. Anderson & Gary W. Ritter, *Disparate Use of Exclusionary Discipline: Evidence on Inequities in School Discipline from a U.S. State*, Educ. Pol’y Analysis Archives, May 22, 2017, at 22. As *Amici* Professor Russell Skiba and Reece Peterson’s research confirms, while the reasons for which White students are most likely to be punished stem from objective events, such as smoking or vandalism, Black students are more often punished for violations requiring subjective judgment—including subjective judgment of student speech—like “disrespect” or “loitering.” See Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 Urb. Rev. 317, 332, 334 (2002); Stephen Hoffman, *Zero Benefit: Estimating the Effect of Zero Tolerance Discipline*, 28 Educ. Pol’y 69, 81 (2014).<sup>6</sup>

Other minority populations also face pronounced consequences from zero-tolerance policies. Although Black males are disproportionately subject to school suspension and expulsion, the size of the racial disci-

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<sup>6</sup> In fact, the school policy at issue in this case requires educators to make these types of subjective judgments. B.L. was suspended for off-campus speech that was deemed to violate the school’s cheerleader “Respect Rule,” which compels students to show “respect for [their] school, coaches, teachers, other cheerleaders and teams.” See *B.L.*, 964 F.3d at 193. Subjecting off-campus speech to zero-tolerance punishment under rules like this would give school administrators power to suppress a wide range of First Amendment-protected expression.

pline gap is even greater for girls than for boys. Wallace et al., *supra* at 9. In addition, *Amici* Professors Stephen Russell and Russell Skiba have found that LGBTQ students are at a heightened risk for facing exclusionary discipline—even though these are the very same students that are more likely to experience discriminatory bullying. See Mariella Arredondo et al., *Documenting Disparities for LGBTQ Students: Expanding the Collection and Reporting of Data on Sexual Orientation and Gender Identity*, Discipline Disparities, Mar. 2016, at 1, 2. Schools relying on punitive disciplinary solutions to protect students that already feel alienated from the rest of the student body actually risk causing further isolation and harm to those children.

Zero-tolerance policies also exacerbate existing disparities in students' academic achievement. *Amici* Professors Edward Morris and Brea Perry have observed ample evidence that the Black–White discipline gap intensifies the racial achievement gap. See Edward W. Morris & Brea L. Perry, *The Punishment Gap: School Suspension and Racial Disparities in Achievement*, 63 Soc. Probs. 68, 81–82 (2016). In fact, researchers have estimated that 20 percent of the statistical difference in academic achievement between Black and White students can be attributed to school suspensions. *Id.* These higher rates of discipline can take their toll on the ability of children of color to thrive at school: as discussed above, students who are suspended are vulnerable to developing self-esteem issues, likely to underperform on standardized tests, and fall further and further behind in their academic achievement over time, as the research of scholars including *Amici* Professors Chris Curran and Benjamin

Fisher has confirmed. *Id.* at 79–81; Francis A. Pearman II et al., *Are Achievement Gaps Related to Discipline Gaps? Evidence from National Data*, AERA Open, Oct.–Dec. 2019, at 1; Johanna Lacoë & Matthew P. Steinberg, *Do Suspensions Affect Student Outcomes?*, 41 *Educ. Eval. Pol’y Analysis* 34, 46 (2019).

The negative short-term and long-term outcomes for students who are suspended or expelled, *see supra* Section I.B.1, are experienced disproportionately by students of color. Schools that rely more heavily on zero-tolerance exclusionary practices such as suspension or expulsion in response to off-campus speech are also more likely to show greater racial disparities in suspensions. *See, e.g.*, Hoffman, *supra*. Exclusionary discipline also increases the likelihood of adult incarceration for Black students more than it does for White students. *See* Cuellar & Markowitz, *supra*, at 98–106. In addition, school suspensions have collateral effects on disadvantaged families: poor, single Black mothers report significant negative effects on their families, including job loss, emotional stress, and lowered expectations for their children. *See* Mowen, *supra*, at 839, 846–47.

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Ultimately, the type of intervention that Petitioner asks this Court to endorse to address inappropriate off-campus speech is an unwarranted restriction on student expression—regardless of the degree of scrutiny this Court applies to school regulation of student speech off campus. *Amici’s* research has demonstrated that zero-tolerance penalties cause serious harms—whether applied to punish on-campus



speech, off-campus speech, or other behavior. That does not mean that suspensions and expulsions should be categorically off limits. But given these serious consequences, this Court should be skeptical of affording Petitioner the broad authority it seeks to regulate the off-campus speech of its students with these damaging punishments. Zero-tolerance expulsions and suspensions fail to make schools safer places for children to learn. Nor do they eradicate the problem of bullying. And if school districts are allowed to further extend these tactics to off-campus speech or bullying, students—particularly children of color and other marginalized populations—will suffer a range of short- and long-term educational and life-course harms. Far from being a needed or important tool for addressing off-campus behavior, then, the intervention Petitioner seeks to use has been shown to be both ineffective and harmful.

## **II. SCHOOLS CAN ADDRESS BULLYING THROUGH OTHER, MORE EFFECTIVE METHODS THAT DO NOT INFRINGE ON STUDENT EXPRESSION.**

In response to the evidence of the ineffectiveness and disproportionate impact of zero tolerance, federal and state education officials across the country have developed and implemented alternative strategies. These efforts gained significant traction in 2014 when the U.S. Department of Education issued a federal guidance calling for a reduction in the use of exclu-

sionary discipline and the widespread implementation of constructive and preventive alternatives.<sup>7</sup> See Civil Rights Div., U.S. Dep’t of Justice, and Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Nondiscriminatory Administration of School Discipline (Jan. 8, 2014). The following year, Congress passed the Every Student Succeeds Act, the nation’s primary law governing K-12 public education, which requires states and public school districts to take steps to reduce both “incidences of bullying and harassment” and the use of “discipline practices that remove students from the classroom.” See 20 U.S.C. §§ 6311(g)(1)(C), 6312(b)(11) (2018). Most states have passed laws limiting exclusionary discipline and promoting bullying prevention and intervention. Alyssa Rafa, *50-State Comparison: State Policies on School Discipline*, Educ. Comm’n (Aug. 28, 2018), <https://www.ecs.org/50-state-comparison-state-policies-on-school-discipline/>. And a number of school districts, including some of the largest districts in the nation, have revised their disciplinary policies to focus on preventive alternatives to suspension and expulsion. Russell J. Skiba & Daniel J. Losen, *From Reaction to Prevention: Turning the Page on School Discipline*, *Am. Educator*, Winter 2015–2016, at 4, 7.

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<sup>7</sup> This guidance was rescinded by the Trump Administration on December 21, 2018 but remains a prominent guiding influence in states and school districts across the country. See Civil Rights Div., U.S. Dep’t of Justice, and Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Withdrawing Dear Colleague Letter on Nondiscriminatory Administration of School Discipline (Dec. 21, 2018).

The alternative disciplinary methods schools have used to replace zero tolerance and exclusionary discipline generally aim to address the underlying causes of student misbehavior, such as bullying, rather than to impose punishments for alleged misconduct like disfavored student expression. These methods include three approaches: (1) universal; (2) selective; and (3) indicated.

The results of these alternative discipline practices have been promising. Suspension rates have decreased across the nation as non-zero-tolerance methods of discipline have become more common. Kristen Harper et al., *Black Students and Students with Disabilities Remain More Likely to Receive Out-of-School Suspensions, Despite Overall Declines*, Child Trends (Apr. 29, 2019), <https://www.childtrends.org/publications/black-students-disabilities-out-of-school-suspensions>. And some elements of anti-bullying programs have been associated with significant reductions in bullying perpetration and victimization. See, e.g., Maria M. Ttofi & David P. Farrington, *What Works in Preventing Bullying: Effective Elements of Anti-Bullying Programmes*, 1 J. Aggression, Conflict & Peace Res. 13, 15, 21–22 (2009) (conducting a comprehensive international meta-analysis of thirty programs). The availability of these specific methods, as well as the evidence confirming their success, makes clear that Petitioner errs in contending that government punishment of student off-campus speech through zero-tolerance tactics is a necessary mode of discipline. It is not.

### A. Universal Preventive Approaches

Universal approaches operate “at the schoolwide and classwide levels [and] focus on teaching and reinforcing positive, prosocial behavior.” Amanda B. Nickerson, *Preventing and Intervening with Bullying in Schools: A Framework for Evidence-Based Practice*, 11 Sch. Mental Health 15, 19 (2019). This means that all students are exposed to the program, regardless of their risk for bullying. See Nat’l Acads. of Scis., Eng’g, & Med., *supra*, at 182. As *Amicus* Professor Russell Skiba has explained, universal preventive approaches generally aim to improve school climate and reduce school discipline by focusing on three core components: (1) student-teacher “relationship building” to show students that they will be treated fairly and supported; (2) “social-emotional learning approaches that improve students’ ability to understand social interactions and regulate their emotions,” and (3) “structural interventions” to replace lists of behaviors that lead to exclusionary discipline with comprehensive, alternative plans. Skiba & Losen, *supra*, at 6–7. Universal preventive approaches include the following programs:

**Positive Behavioral Interventions and Supports (PBIS):** PBIS typically involves the following steps: (1) “defining school-wide positive behavioral expectations (e.g., be safe, be responsible, be respectful);” (2) “proactively teaching what [those] expected behaviors look like in various school settings;” (3) “consistently rewarding students who comply with behavioral expectations;” (4) “consistently assigning a continuum of consequences to students who do not comply;” and (5) “collecting office discipline referral (ODR) data to assess students’ responsiveness to the

supports provided and offer feedback to implementers.” Claudia G. Vincent et al., *School-wide Positive and Restorative Discipline (SWPRD): Integrating Schoolwide Positive Behavior Interventions and Supports and Restorative Discipline, in Inequality in School Discipline* 115, 116 (Russell J. Skiba et al. eds., 2016). Recent studies on PBIS from *Amicus* Kent McIntosh, see Eoin Bastable et al., *Do High Schools Implementing SWPBIS Have Lower Rates of Illegal Drug and Alcohol Use?* 4 (2015), and other researchers have reported significant effects on bullying and peer rejection, see, e.g., Tracy E. Waasdorp et al., *The Impact of Schoolwide Positive Behavioral Interventions and Supports on Bullying and Peer Rejection: A Randomized Controlled Effectiveness Trial*, 166 *Archives Pediatrics & Adolescent Med.* 149, 152–54 (2012); improved social and academic outcomes for students with or at risk of emotional or behavioral disorders, see Timothy J. Lewis et al., *Schoolwide Systems of Positive Behavior Support: Implications for Students at Risk and With Emotional/Behavioral Disorders*, *AERA Open*, Apr.–June 2017, at 1, 5–6; and decreased rates of student-reported drug and alcohol use, see Bastable, *supra*, at 4. Moreover, the Baltimore City Public Schools, which implemented PBIS in 2008, reported that “suspensions have dropped by about two-thirds, from more than 26,000 in 2004 to 8,600 in 2013.” Skiba & Losen, *supra*, at 10.

**Bullying Prevention in Positive Behavioral Interventions and Supports (BP-PBS):** While PBIS alone has been shown to reduce bullying, its framework in elementary and middle schools often integrates another universal program, BP-PBS, which

is specifically intended to “teach appropriate responses to bullying for would-be victims, bystanders, and educators.” See Chris P. Good et al., *Integrating Bullying Prevention into Schoolwide Positive Behavior Support*, 44 *Teaching Exceptional Children* 48, 51 (2011). Studies from *Amicus* Kent McIntosh, see Good, *supra*, at 51, and other researchers have found that BP-PBS has been associated with improved student behavior, according to teacher and staff reports, see Scott W. Ross & Robert H. Horner, *Bully Prevention in Positive Behavior Support: Preliminary Evaluation of Third-, Fourth-, and Fifth-Grade Attitudes Toward Bullying*, 22 *J. Emotional & Behav. Disorders* 225, 231 (2014); improved perceptions of school safety and school climate, *id.* at 231–32; and decreases in the number of office discipline referrals for bullying behaviors and school suspensions, see Good, *supra*, at 51.

**Social Emotional Learning (SEL):** SEL programs “generally build students’ skills to (a) recognize and manage their emotions, (b) appreciate the perspectives of others, (c) establish positive goals, (d) make responsible decisions, and (e) handle interpersonal situations effectively.” Skiba & Losen, *supra*, at 7. *Amicus* David Osher found that after schools in Cleveland implemented an SEL program along with other support systems and planning centers, the district saw improved student attendance districtwide, a decrease in negative behavioral incidents, and a districtwide reduction in use of out-of-school suspension. David Osher et al., *Avoid Simple Solutions and Quick Fixes: Lessons Learned From a Comprehensive Districtwide Approach to Improving Student Behavior and School Safety*, 5 *J. Applied Res.*

on Children 1, 12–14 (2014); *see also* Skiba & Losen, *supra*, at 7. Several studies have linked the completion of SEL programs to an increase in prosocial behaviors and a decrease in misbehaviors, including bullying, victimization, argumentative behavior, and physical aggression. *See e.g.*, Karin S. Frey et al., *Observed Reductions in School Bullying, Nonbullying Aggression and Destructive Bystander Behavior: A Longitudinal Evaluation*, 101 *J. Educ. Psychol.* 466, 472–73, 477 (2009); *see also* Nickerson, *supra*, at 10–12 (collecting studies).<sup>8</sup>

### **B. Selective and Indicated Preventive Approaches**

Selective approaches “target youth who are at risk for engaging in bullying or . . . at risk of being bullied” and “have not responded adequately to the universal preventive intervention.” *See* Nat’l Acads. of Scis., Eng’g, & Med., *supra*, at 184. “Such programs may include more intensive social-emotional skills training, coping skills, or de-escalation approaches.” *Id.* Indicated approaches “are of greater intensity as compared to the two previous levels of prevention” and are usually tailored to meet the needs of students who are “displaying bullying behavior or have a history of being bullied and are showing early signs of behavioral, academic, or mental health consequences.” *Id.* Most experts recommend that these methods should be implemented simultaneously through a tiered model.

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<sup>8</sup> Other universal programs include the Olweus Bullying Prevention Program, *see* Nickerson, *supra*, at 11; the KiVa Antibullying Program, *see id.* at 12; the Good Behavior Game, *see* Nat’l Acads. of Scis., Eng’g, & Med., *supra*, at 199–200; and Raising Healthy Children, *id.* at 200.

See Nickerson, *supra*, at 18. While addressing some cases of bullying may require coupling these programs with direct sanctions, such as serious talks and loss of privileges, research confirms that exclusionary discipline should be used only in the most severe cases, due to the extreme consequences associated with those policies. See Nickerson, *supra*, at 17; see also *supra* Section I.B. Selective and indicated approaches that schools can use to address specific incidences of bullying include the following programs:

**Restorative Practices:** Restorative practices “assume that subjective experiences of harmful acts need to be acknowledged and that it is worthwhile to harness the power of the collective for resolution and repair.” Yolanda Anyon et al., *Restorative Interventions and School Discipline Sanctions in a Large Urban School District*, 53 Am. Educ. Res. J. 1663, 1666 (2016). When used to intervene in a bullying situation, these practices are generally held in a small conference or larger circle format. *Id.* at 166. According to *Amicus* Professor Yolanda Anyon, “[t]hose affected by an infraction or crime [voluntarily] come together to identify how people were impacted by the incident,” the facilitator asks those individuals a structured set of questions to encourage the “voic[ing] [of] perspectives,” and students are encouraged to “jointly” solve problems and “share the emotional experiences of the incident.” *Id.* at 166–67. *Amicus* Professor Russell Skiba has reported that such practices have been associated with better student-teacher relationships, improved academic achievement and conflict management skills, and fewer exclusionary discipline referrals. Skiba & Losen, *supra*, at 7. For example, after restorative practices were implemented in Denver



Public Schools, “suspension rates were reduced by nearly 47 percent across the district,” and “the suspension gap between black and white students decreased from a 12- to an 8-point gap.” *Id.* at 7, 10 (citing Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline through Restorative Justice*, in *Closing the School Discipline Gap* 151 (Daniel J. Losen ed., 2015)). The Oakland Unified School District in California also “saw an 87 percent decrease in suspensions in three years,” after it initiated a pilot program of restorative justice a middle school in 2005. *Id.* at 10.

**Target Bullying Intervention Program (T-BIP):** T-BIP requires that the student who engages in bullying “participates in an individual three-hour session with a mental health professional that includes an assessment, educating the child about bullying through a lesson with video and teaching more effective ways of behaving, and a follow-up report and meeting with parents where recommendations are made for intervention.” Nickerson, *supra*, at 18 (citing Susan M. Swearer et al., *Bullying Prevention and Intervention: Realistic Strategies for Schools* (2009)). *Amicus* Professor Susan Swearer’s research shows that T-BIP is associated with reduced office referrals. See Susan M. Swearer et al., *Bullying: A School Mental Health Perspective*, in *Handbook of School Mental Health* 341, 352 (Mark D. Weist et al. eds., 2d ed. 2014).

**Coping Power Program (CPP):** CPP is “a cognitive-based intervention delivered to aggressive children and their parents during the children’s transition to middle school.” *Coping Power Program*, Youth.gov, <https://youth.gov/content/coping-power->

program. Counselors “aim[] to increase competence, study skills, social skills, and self-control in aggressive children as well as to improve parental involvement in their child’s education.” *See id.* The program has demonstrated significant improvements in aggressive-disruptive behaviors and social interactions, *see* John E. Lochman et al., *Three Year Follow-Up of Coping Power Intervention Effects: Evidence of Neighborhood Moderation?*, 14 *Prevention Sci.* 364, 373–74 (2012), as well as potential reductions in depression, *see* Sheryl A. Hemphill et al., *Protective Factors Against the Impact of School Bullying Perpetration and Victimization on Young Adult Externalizing and Internalizing Problems*, 13 *J. Sch. Violence* 125, 135, 137 (2014).<sup>9</sup>

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Universal, selective, and indicated preventive programs provide schools with evidence-based tools to respond to inappropriate speech, bullying and harassment, or school disruption. Such alternatives are more effective than zero tolerance and exclusionary discipline at curbing the underlying misconduct, decreasing the need for suspensions, and yielding more positive social, emotional, and academic outcomes for

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<sup>9</sup> Other approaches include Social Emotional Learning Intervention Team (SELiT), *see* Kathleen P. Allen, *A Bullying Intervention System: Reducing Risk and Creating Support for Aggressive Students*, 54 *Preventing Sch. Failure* 199, 200 (2010); threat assessment, *see* JustChildren & Dewey Cornell, *Prevention v. Punishment: Threat Assessments, School Suspensions, and Racial Disparities* 9 (2013); cognitive-behavioral intervention, *see* Nat’l Acads. of Scis., Eng’g, & Med., *supra*, at 208; the Incredible Years Program, *see id.* at 209; The Family Check-Up, *see id.*; and Trauma Focused Cognitive Behavioral Therapy (TF-CBT), *see id.* at 210.

students. These non-exclusionary methods provide alternative, effective mechanisms that schools can use to respond to student misconduct without infringing upon student speech and expression.

**CONCLUSION**

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