

No. 20-255

IN THE

Supreme Court of the United States

MAHANoy AREA SCHOOL DISTRICT,

Petitioner,

v.

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

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

**BRIEF OF *AMICI CURIAE* NATIONAL
SCHOOL BOARDS ASSOCIATION, THE
AMERICAN FEDERATION OF TEACHERS,
THE NATIONAL ASSOCIATION OF
ELEMENTARY SCHOOL PRINCIPALS, THE
NATIONAL ASSOCIATION OF SECONDARY
SCHOOL PRINCIPALS, AND AASA,
THE SCHOOL SUPERINTENDENTS
ASSOCIATION IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

The National School Boards Association (“NSBA”) is a non-profit organization founded in 1940 that represents state associations of school boards and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in public education through school board leadership. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA strives to promote public education and ensure equal educational access for all children. Through legal and legislative advocacy, and public awareness programs, NSBA promotes its members’ interests in ensuring excellent public education and effective school board governance. It closely monitors legal issues that affect the authority of public schools and regularly participates as amicus curiae in court cases. It filed an amicus brief in support of the Mahanoy Area School District before the Third Circuit in this case, and has filed amicus briefs in this Court in several cases raising a range of issues. *See, e.g., Easton Area Sch. Dist. v. B.H. ex rel. Hawk*, 572 U.S. 1002 (2014); *Blue Mtn. Sch. Dist. v. J.S. ex rel. Snyder*, 565 U.S. 1156 (2012); *Christian Legal Soc’y Chapter of the Univ. of California v. Martinez*, 558 U.S. 1076 (2009).

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The American Federation of Teachers, AFL-CIO (“AFT”) is a national labor union that represents 1.7 million members nationwide. The largest segment of AFT’s members are public school educators and educational support personnel, many of whom work in school districts that currently are engaging in remote instruction of students.

The National Association of Elementary School Principals (“NAESP”) is the leading advocate for elementary and middle-level principals in the United States and worldwide. NAESP believes that it is critical for school leaders to be able to appropriately respond to student actions that interfere with learning and the operations of the school.

The National Association of Secondary School Principals (“NASSP”) is the leading organization of and voice for principals and other school leaders across the United States. NASSP’s members believe that school officials must retain the legal authority to address student behavior that disrupts school operations.

The School Superintendents Association (“AASA”) represents more than 13,000 school system leaders and advocates for the highest quality public education for all students. Our Nation’s superintendents believe that school officials must continue to have authority to address student behavior that disrupts the learning environment.

The Third Circuit’s decision undermines the authority of public school officials to effectively discipline students who engage in off-campus speech that

harasses others or otherwise foreseeably disrupts the school environment. If schools cannot appropriately discipline harassing and disruptive students, they will be unable to guarantee safe learning environments or proper and equitable educational opportunities for students in general, including those who already face marginalization due to their disability, race, ethnicity, or socio-economic status. And the Third Circuit's decision threatens to undermine not only academic programs that are central to schools' educational missions, but also extracurricular programs that enrich the experience of students with special opportunities to lead and to learn teamwork, and that, properly conducted, are a source of pride to entire communities.

The Third Circuit's decision departs from this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and the decisions of other courts of appeals that amici and their members have relied on to craft school policies and to advise school districts. The lack of uniformity that the Third Circuit's ruling creates in this critical area warrants this Court's review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit's stark line between off-campus and on-campus speech is untenable, especially in the age of social media. In the real world, school officials must navigate the turbulent universe of K-12 schools, where students and staff frequently use online platforms, and where teachers and administrators must be able to make informed judgments about whether

and how to discipline disruptive students without running afoul of the First Amendment.

The costs of a wrong decision cannot be overstated. Every teacher and administrator knows that a decision not to address the behavior of a harassing or disruptive student can have consequences that extend to other students and the larger school community. Not intervening to prevent a student's harassment means losing an opportunity to protect the harassed student's safety and sense of well-being, and likewise losing an opportunity to safeguard the learning environment for others in the community. But a decision to discipline a student for speech that a court might later decide is protected by the First Amendment can lead to protracted litigation and an onerous damages award. The Third Circuit has made that balancing exercise unnecessarily fraught.

The Third Circuit's purported bright-line test for separating off- and on-campus speech is wrong and confusing, and fails to offer any clear-cut answers. Because the ruling below directly conflicts with that of other circuits, it is now unclear if schools can regulate, among other things, racist, vulgar, or sexually harassing speech that occurs online and off campus, even if that speech is directed at other students or school administrators, and even if it is otherwise reasonably likely to materially disrupt on-campus life. Compounding the confusion are state laws—including provisions in jurisdictions within the Third Circuit—that *require* schools to address off-campus bullying.

To make matters worse, in assessing the extent to which school officials may properly respond to

harassing or disruptive student speech that is initiated off campus, the Third Circuit failed to consider the type of school activity at issue—here, extracurricular sports—or the nature of the discipline, here, losing a privilege rather than access to the classroom. As a practical matter, schools must have the flexibility to address disruptive behavior differently in different circumstances, including with respect to extracurricular activities that can play a vital role in a student’s overall educational experience.

The Third Circuit’s anachronistic line between on-campus and off-campus speech is especially unjustified in the age of social media, when students can interact with each other online from any location and at any time. Indeed, the very purpose of social media is to provide an intimate communication experience for people who are physically distant. *See, e.g.*, Facebook Company Info, <https://tinyurl.com/vlx9wc5> (describing Facebook’s mission as “[g]iv[ing] people the power to build community and bring the world closer together”). The unworkability of the Third Circuit’s distinction is even more evident as schools respond to the COVID-19 pandemic by shifting more in-class teaching to online platforms.

This Court’s review is necessary to resolve the circuit split created by the Third Circuit’s misguided decision. The Court should grant the petition and reaffirm that the nation’s public schools retain the authority to discipline students, as warranted, for off-campus student speech that threatens to interfere improperly with school operations.

ARGUMENT**I. This Court's Review Is Warranted In Light Of The Uncertainty The Third Circuit's Decision Creates For School Discipline.****A. The Third Circuit's decision creates a clear circuit split as to whether and to what extent administrators at public schools may regulate off-campus student speech.**

For decades, schools have relied on this Court's opinion in *Tinker*, and its progeny, as a guide to whether and to what extent they may regulate student speech within the bounds of the First Amendment. *Tinker* recognizes that students have free speech rights, but permits school administrators to intervene when that speech "would materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). Since then, every circuit that has addressed the question has recognized some right by schools to discipline students for off-campus speech that meets *Tinker's* test for being likely to cause a material and substantial disruption. *See* Pet. 11-15.

The Third Circuit's split with that unanimous authority throws that settled understanding into doubt. Under the Third Circuit's new test, behavior that schools considered subject to disciplinary action because of its predictable and harmful consequences for other students and the school community now may be

off-limits in a potentially untouchable category of “off-campus” speech.

Take, for example, several recent situations involving racist statements on social media confronting NSBA members’ school districts. One Georgia school was rocked by racial tension after students posted a TikTok video parodying a cooking show where they made a “recipe for n-----s” by adding “ingredients” like “black,” “don’t have a dad,” and “rob people (specifically whites).”² The video, posted the same month as George Floyd’s death, originated off campus—but that did not matter to the students’ fellow classmates who watched it in dismay and discussed the video at school. At another school, a student photoshopped a picture of two black students running from a robed Ku Klux Klan member.³ The student posted the picture on social media from off campus—but again that was presumably irrelevant to the students who felt targeted by the message, whether they were included in the photo or not. On another occasion, students in an Alabama high school posted a video of themselves drinking and making vulgar, racist comments like “f--- Jews” and “f--- n-----s.”⁴ All of these communications

² See Ashleigh Atwell, *Georgia High School Students Expelled After Posting Video Detailing a Racist Recipe for Black People*, Atlanta Black Star (Apr. 19, 2020), <https://tinyurl.com/y2wn29w4>.

³ See Brian Blair, *Racist Social Media Photo Draws Protest*, The Republic (Mar. 11, 2020), <https://tinyurl.com/y88c6rwb>.

⁴ See Trisha Powell Crain, *Alabama High School Students Filmed Using Racist Slurs*, AL.com (Mar. 4, 2019), <https://tinyurl.com/yxl86293>; see also Martin Slagter, *Saline Students*

materially disrupted academic operations at the school even though they originated off campus.

Because these events took place outside the Third Circuit’s jurisdiction, school administrators were able to appropriately address the ensuing disruption to help protect individuals affected and forestall wider effects on the broader school community. But not so if they had occurred in Pennsylvania, New Jersey, Delaware, or the U.S. Virgin Islands. Instead, the school administrators in these jurisdictions likely would have been forced to sit on their hands, losing a critical opportunity to convey the importance of combatting racism and preserving safe academic environments for students of color—and indeed, all students.

When school administrators are unable to discipline students for disruptive speech, they lose an important tool to maintain a safe and supportive school environment. *See Tinker*, 393 U.S. at 508 (recognizing that schools could discipline students for speech that infringed on “the rights of other students to be secure and to be let alone”). Without that tool, schools are more susceptible to claims that the learning environment is hostile or unsafe. In one elite high school, families blamed school administrators for failing to address racist and sexual bullying by students at school and on social media, and thus causing “a toxic, intolerant, racially insensitive environment,” in

Sue School District for Punishment From Racist Snapchat Group, Mlive (Feb. 11, 2020), <https://tinyurl.com/y3xp3g2n> (school disciplined students who posted “WHITE POWER” and “THE SOUTH WILL RISE AGAIN” on social media from their homes on a non-school day).

which some students dropped out and at least one student committed suicide.⁵

The Third Circuit’s decision to hamstring the authority of public schools to discipline students for off-campus speech with on-campus effects is particularly anomalous given that many states *require* schools to address certain student speech—like bullying—regardless of whether it occurs off campus or after school hours. “Today, all fifty states have passed some law pertaining to bullying,” and “[m]ost states address cyberbullying specifically.”⁶ Many of these state laws are based on the generally-accepted principle that the *Tinker* framework allows schools to address speech that occurs off-campus when it substantially disrupts the school learning environment. And all three states in the Third Circuit require schools to adopt policies that address cyberbullying and to create reporting mechanisms to ensure that bullying is addressed. *See* 24 P.S. § 13-1303.1-A; N.J.S.A. §§ 18A:37-16–17; 14 Del. Code §§ 4164, 9304. In 2010, New Jersey passed the New Jersey Anti-Bullying Bill of Rights Act, which, among other things, requires

⁵ Krista Johnson, *A Reputation to Uphold: LAMP Grads, Families Claim Toxic, Racially Insensitive Environment at Nationally Renowned School*, *Montgomery Advertiser* (June 19, 2020), <https://tinyurl.com/y2s33axq>.

⁶ Makenzie Keene, *Bullies Behind Bars: How Changes to Statewide Cyberbullying Policy May Do More Harm Than Good*, 51 *Tex. Tech L. Rev.* 333, 346 (2019); *see also* Cyberbullying Research Center, *Bullying Laws Across America*, <https://tinyurl.com/ybjo82ad>. “Cyberbullying” is “the electronic posting of mean-spirited messages about a person (such as a student)[.]” *Cyberbullying*, Merriam-Webster Online Dictionary (2020), <https://tinyurl.com/vkndzyc>.

schools to promptly investigate complaints, furnish support for victims, and provide consequences for the students who bully. N.J.S.A. § 18A:37-15. In particular, the school's policy must "include provisions for appropriate responses to harassment, intimidation, or bullying ... that occurs off school grounds." *Id.* § 18A:37-15.3; *see also id.* § 18A:37-14 (defining bullying to include behavior "that takes place ... off school grounds"). Under state law, a school administrator who fails to address bullying when made aware of it, including when the activity occurs off campus, may be subject to sanctions. *Id.* § 18A:37-16. In Delaware, schools must adopt policies to address cyberbullying and students may not defend themselves from disciplinary action by claiming that the speech occurred off campus or outside of school hours, provided there was a "sufficient school nexus." 14 Del. Code § 4164(b), (f)(1). As noted above, Pennsylvania has enacted cyberbullying legislation as well.

After the Third Circuit's decision, schools in these jurisdictions must now try to walk a fine line. If they elect not to discipline a student for harmful behavior, they risk running afoul of state cyberbullying laws. If they instead decide to discipline the student, that student can claim a First Amendment violation, sue, and potentially subject the school and its officials to protracted litigation. This Court's review is essential to draw a clearer line for schools, and to ensure that school officials continue to have the authority to properly address disruptive off-campus student speech, thereby safeguarding children's learning environments and complying with applicable state law.

B. The Third Circuit’s categorical rule overlooks the distinction between core academic programs and extracurricular activities, frustrating school officials’ ability to impose context-appropriate discipline.

The Third Circuit’s categorical distinction between on-campus and off-campus speech also does not take into account the type of school activity involved—here, extracurricular sports—or the nature of the discipline imposed, here, losing an extracurricular privilege rather than access to academic programming. As several circuits have recognized, these contextual factors affect the relationship between student and school far more than the happenstance of the geographic location of the student’s speech that is at issue. School officials must have proper leeway to discipline students in the context of extracurricular activities, and should have greater freedom to withdraw discretionary privileges than to limit core access to the classroom. The Third Circuit’s decision casts aside these sensible distinctions, creating even more confusion about whether and when school officials can impose context-appropriate discipline.

Extracurricular activities occupy a crucial role in the mission of public schools. Through them, schools build character and camaraderie, and provide opportunities for students to learn teamwork, leadership, sportsmanship, and perseverance—a broader and more diffuse set of values than those directly implicated by classroom learning. To instill these values, teachers and coaches must be able to suitably discipline students who undermine rules and

expectations. How effective is a coach who cannot discipline the team captain for demeaning the teammates she is supposed to lead? What lessons will students learn if the president of Model U.N. hurls racist insults at other student ambassadors without consequence? Amici and their members can attest, based on their real-world experience, that the location of these infractions outside the schoolhouse gate often makes no difference regarding the extent of disruption and injury they can cause on campus.

By choosing to participate in extracurriculars, students agree to abide by specified standards of conduct, including speech, as a condition of taking part in these enriching activities. As this Court has explained, when students “choos[e] to ‘go out for the team,’ they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.... Somewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); see also *Lowery v. Euverard*, 497 F.3d 584, 597 (6th Cir. 2007) (“It is well-established that ... student athletes are subject to more restrictions than the student body at large.”). The same can be said for student participants in other extracurricular activities. *E.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 46, 53 (2d Cir. 2008) (imposing specific standards of conduct on participants in extracurricular student government).

When students fail to live up to these standards, schools must be able to impose appropriate discipline

in order to help inculcate the unique values that extracurricular activities are designed to teach. Where exactly the speech occurred—especially if it originated online—is far less relevant than the message it sends to the rest of the student participants and the broader school community.

There is no shortage of examples underscoring these basic propositions. In *Doninger*, the Junior Class Secretary of a public high school wrote an online blog from home, crudely criticizing school administrators and urging readers to lodge complaints “to piss [them] off.” 527 F.3d at 43, 46. The school disqualified the student from running for Senior Class Secretary because she “failed to display the civility and good citizenship expected of class officers.” *Id.* at 46. The Second Circuit upheld this discipline, emphasizing that the student’s behavior “undermin[ed] ... the values that student government, as an extracurricular activity, is designed to promote.” *Id.* at 52.

Likewise, in *Lowery*, several high school football players were removed from the team after expressing hatred for their coach in a petition to have him fired. 497 F.3d at 596. In upholding the school’s actions, the Sixth Circuit highlighted “the differing natures of the classroom and playing field.” *Id.* at 589. In the classroom, students are encouraged to “express and evaluate competing viewpoints,” but on the field, “[e]xecution of the coach’s will is paramount.” *Id.* (quoting *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995)). “Requiring coaches to tolerate attacks on their authority would effectively strip them of their ability to lead. It would also do a great disservice to other players who wish to play on

a team free from strife and disunity[.]” *Id.* at 599; *see also Wildman v. Marshalltown*, 249 F.3d 768, 771 (8th Cir. 2001) (high school basketball coach could punish insubordination because of school’s “interest in affording [all] teammates an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team”).

The Third Circuit’s decision overlooks the distinction between the extracurricular and more purely academic contexts. Extracurricular teachers and coaches should be able to regulate student speech that is antithetical to the values they are charged with instilling. The Third Circuit’s rule casts doubt on their authority to do so, forcing schools and school personnel to risk lawsuits and money judgments if they step over the court’s arbitrary line. If it stands, the decision below threatens to undermine the very purpose of extracurricular activities: to teach students character, teamwork, sportsmanship, and leadership—not just on but also off the field, the debate floor, and the school’s delimited grounds.

The decision below also fails to account for the nature and extent of the discipline imposed. It ignores the difference between penalties that touch on a student’s core educational right—like academic suspension or expulsion—and discipline that merely withdraws a privilege, like separation, perhaps only temporary, from a sports team. The Third Circuit’s one-size-fits-all rule contrasts with the approach this Court adopted in *Tinker*, which considers whether the school’s discipline is a “reasonable regulation of

speech-connected activities” under the particular “circumstances.” 393 U.S. at 513; *see also id.* 507-08 (indicating that broad regulation of “pure speech,” like forbidding all student discussion of controversial political issues, requires stronger justification than more modest regulations, like limiting certain types of student clothing).

Several circuits have recognized what amici and their members know to be true: It makes good sense in this context to weigh a student’s speech interests against the nature of the deprivation imposed. When the Junior Class Secretary failed to show the “good citizenship” expected of student leaders in *Doninger*, 527 F.3d at 45, the Second Circuit found it “of no small significance that the discipline” chosen—disqualification from running for Senior Class Secretary—“related to [her] extracurricular role as a student government leader,” *id.* at 52. The court properly appreciated that “participation in voluntary, extracurricular activities is a ‘privilege’ that can be rescinded when students fail to comply with the obligations inherent in the activities themselves.” *Id.*

The Sixth Circuit similarly emphasized the nature of the discipline imposed in *Lowery*. While the football players were removed from the team for defying the coach’s authority, their “ability to attend class” was not implicated. 497 F.3d at 599. Indeed, the players were “free to continue their campaign to have [the coach] fired,” even though they could not “continue to play football for him while actively working to undermine his authority.” *Id.* at 600 (emphasis omitted). The Eighth Circuit likewise recognized the importance of the deprivation in *Wildman*. 249 F.3d

at 772. There, the school conditioned a basketball player's continued membership on the team on her apologizing to her teammates for circulating a disrespectful letter. The modest condition was central to the court's reasoning: "the school sanction only required an apology. The school did not interfere with Wildman's regular education. A difference exists between being in the classroom, which was not affected here, and playing on an athletic team when the requirement is that the player only apologize." *Id.*

As these cases illustrate, when a school's penalty does not touch on a student's core educational right, school officials should have more flexibility in addressing student speech. Schools and coaches should not fear lawsuits and monetary liability every time they instruct a player to apologize to her teammates for harmful speech without first calculating the precise location of the offending statement. *Cf. Morse v. Frederick*, 551 U.S. 393, 427 (2007) (Breyer, J., concurring in part) ("Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence."); *id.* at 409-10 ("School [administrators] have a difficult job," in which they often "ha[ve] to decide to act—or not act—on the spot."). "[N]othing in the First Amendment requires [school officials] to check their common sense at the school house door." *Layshock ex rel. Layshock v.*

Hermitage Sch. Dist., 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, J., concurring).⁷

As the case law adhering to *Tinker* emphasizes, “[t]he contour[s] of First Amendment protection given to speech depends upon the context.” *Lowery*, 497 F.3d at 587. Other circuits have rightly been “reluctant to try and craft a one-size fits all approach” to the issues of student speech. *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013). In attempting to bring “up-front clarity to students and school officials,” Pet. App. 33a, by imposing a blanket rule for all contexts in which off-campus student speech might be implicated, the Third Circuit has created even more confusion by blurring the longstanding and practical distinctions between extracurricular privileges and core academic activity.

C. The line between on- and off-campus speech is arbitrary and anachronistic in the social media age, when students can disrupt the school community from anywhere with the touch of a button.

Social media has fundamentally changed the way that students experience the world and communicate

⁷ The harm extends beyond extracurriculars. By failing to give any consideration to a school’s degree or “mode of discipline,” Pet. App. 20a, the Third Circuit did not clarify whether school officials can consider off-campus speech when conferring other privileges, such as college recommendation letters or admission to the National Honor Society. See Nat’l Honor Soc’y, *How to Become a Member*, <https://tinyurl.com/y5b4fdje> (last visited Oct. 1, 2020) (membership is based on four pillars: scholarship, service, leadership, and character).

with their peers both on and off campus. In 2018, 97% of thirteen- to seventeen-year-olds used at least one social media platform.⁸ Ninety-five percent of them had access to a smartphone, and almost half of them reported being online “almost constantly.” *Id.* The numbers have only increased since then—and at an even faster clip since COVID-19 substantially curtailed in-person gatherings.⁹

Most circuits have acknowledged that the omnipresent nature of social media renders the physical boundary demarcating the schoolhouse gates in many respects obsolete. “Students now have the ability to disseminate instantaneously and communicate widely *from any location* via the Internet. These communications, which may reference events occurring, or to occur, at school, or be about members of the school community, can likewise be *accessed anywhere, by anyone, at any time.*” *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) (en banc) (emphases added). This reality makes “any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.” *Doe v. Valencia Coll.*, 903 F.3d 1220, 1231 (11th Cir. 2018) (quoting *Bell*, 799 F.3d at 395-96); *see also Kowalski v. Berkeley*

⁸ Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center (May 31, 2018), <https://tinyurl.com/uzcepg3>.

⁹ Peter Suci, *Screen Time and Social Media Use Among Teens Continues to Rise*, *Forbes* (May 21, 2020), <https://tinyurl.com/yxo4xr3e>.

Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011); *Doninger*, 527 F.3d at 48-49.

Rather than heeding the consensus among its sister circuits, the Third Circuit instead followed “[t]he consensus in the analog era,” drawing an artificial line between speech that originates on campus and speech that does not. Pet. App. 32a. This approach is unworkable in today’s public schools. It ignores the realities of social media, which can be deployed anywhere, and which can perpetuate harmful student speech, regardless of where it is first expressed. It also disregards the intent of the speaker, who, whether posting content on or off campus, may take aim at other students or school officials with the goal of disrupting the school community.

Social media amplify the effects of harmful student speech. Again, examples abound. In *Kowalski*, a student, while off campus, created a social media group to ridicule her classmate and invited 100 of her online “friends” to join. 652 F.3d at 567. Within hours, a classmate asked Kowalski to deactivate the group after the victim’s father discovered it. *Id.* at 568. But Kowalski was unable to shut it down. In a short time, more than two dozen of her classmates had joined the group, contributing their own harmful comments and photographs. *Id.* at 567-68. The widespread disruption and damage of her speech was irreversible.

Similarly, in *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School District*, two students created a blog where they posted racist and sexually degrading comments about their high school peers. 696 F.3d 771, 773 (8th Cir. 2012). The students used a foreign domain name

so that the blog could not be found through a Google search, and they told only five or six friends about it. *Id.* But before long, the entire student body knew about the blog, and local media arrived on campus to cover the story. *Id.* at 774. Speech can spread “like wildfire” on social media, *Layshock*, 650 F.3d at 208; a single online statement can create much broader and more lasting harm to the school community than the same comment expressed in-person inside the school. *See, e.g., R.L. ex rel. Lordan v. Cent. York Sch. Dist.*, 183 F. Supp. 3d 625, 639 (M.D. Pa. 2016) (noting that a social media post made off campus was “even more disruptive to [the] school” than a written bomb threat found on-campus).

The Third Circuit’s ruling not only ignores these realities of social media, but it also disregards that student speakers can cause adverse effects just as easily from outside the school as from inside. Students, while off campus, can disrupt the school community through social media posts that target other students and school officials. If the off-campus location of the speech is enough to defeat any form of discipline by school officials, the implications are significant and concerning. “With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building, but would be left powerless to discipline the student.” *Layshock*, 650 F.3d at 221 (Jordan, J., concurring).

Examples permeate the everyday experiences of amici and their members. Consider the elementary school student who logged into several other students' social media accounts after acquiring their login and password information, and then posed as those students while sending harassing messages to their teacher. The student intended to bully the other students by turning the teacher against them. Even though the speech was aimed directly at the teacher and attempted to undermine other students' reputations, the school, if located in the Third Circuit, might not be able to address the incident simply because the messages originated off campus. If teachers cannot appropriately discipline elementary schoolers for engaging in such intentionally disruptive speech—perhaps their first acts of cyberbullying—how can we expect them to “inculcate the habits and manners of civility”? *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

More egregious examples occur every day in high schools across the country. Currently, school officials in Michigan are facing a lawsuit after imposing a 10-day suspension on a student for intentionally targeting a biology teacher through social media. The student, while off campus, created an Instagram account under a username that corresponded to the name of his teacher. He then posted a photograph featuring a dangerously placed hypodermic needle, with a caption reading: “Watch out guys, I am concerned for everyone’s safety.” Complaint at 5, *Kutchinski v. Freeland Comm’y Sch. Dist.*, No. 19-13810 (E.D. Mich. filed Dec. 30, 2019). The student shared the password with his friends, who added their own inappropriate posts targeting the teacher. In response to the student’s

suspension, his father filed a lawsuit against the school district, superintendent, and principal, emphasizing that the “speech occurred completely off-campus.” *Id.* at 19.¹⁰

“It goes without saying that a teacher ... is the cornerstone of education. Without teaching, there can be little, if any, learning. Without learning, there can be little, if any, education.” *Bell*, 799 F.3d at 399. And “threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to teach; it impedes, if not destroys, the ability ... to educate.” *Id.* at 399-400. If school officials cannot address verbal attacks on teachers simply because they were initiated off campus—no matter the detrimental effect of the speech on the learning environment—schools will be undercut in their ability to fulfill their most basic functions. Put simply, if the Third Circuit’s opinion is left uncorrected, it threatens to “disrupt[], if not destroy[], the very mission for which schools exist—to educate.” *Id.* at 400.

¹⁰ It is unclear whether the speech in some of these examples would qualify as unprotected fraud, defamation, or invasion of privacy. See generally *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion) (false statements are not perforce unprotected); *id.* at 730-36 (Breyer, J., concurring in the judgment) (applying intermediate scrutiny to a regulation of false statements, and distinguishing it from prohibitions on fraud, defamation, and invasion of privacy). In the Third Circuit, however, the origination of the speech off campus might well be dispositive.

D. This Court’s guidance is especially needed as schools shift to remote learning in the wake of the COVID-19 pandemic.

The misguided nature of the Third Circuit’s analysis is brought into even sharper relief now that many schools have responded to the COVID-19 pandemic by moving classroom activity online. “With the onset of the global pandemic caused by COVID-19, nearly all K-12 students in the United States have experienced an unprecedented interruption in their formal schooling.”¹¹ Many schools are “transitioning to online learning,” *id.*, using new communication platforms, including social media, to teach remotely.¹²

These platforms allow teachers to preserve a semblance of the traditional classroom experience, but they also provide new opportunities for disruptive student speech, away from campus. One student, for instance, reported being attacked in a “Google Chat” session with her class, during which a classmate “compared her to a fat ape’s picture and commented on her hair, saying it looked ‘ghetto.’”¹³ More generally, students may be harassed during video

¹¹ Brian Fitzpatrick, et al., *Virtual Charter Schools and Online Learning During COVID-19*, Brookings (June 2, 2020), <https://tinyurl.com/y3gk2msd>.

¹² See, e.g., Bill Pearson, *Edgecomb Educators Use Social Media in Distance Learning*, Boothbay Register (Apr. 14, 2020), <https://tinyurl.com/y69rd4kp>.

¹³ Christopher B. Dolan, *There Are Ways to Deal With Cyberbullying in School*, S.F. Examiner (Aug. 20, 2020), <https://tinyurl.com/y4uurfak>.

conferencing, “by logging into the Zoom room before the teacher arrives and being harassed by classmates, or by having classmates take photos or screenshots of their face during a Zoom meeting and use it in a harmful way.”¹⁴

Bullying is a critical issue; by some counts, it affects more than 20% of students between the ages of 12 to 18.¹⁵ Of those students, 22% reported being bullied outside of school, and 15% reported being bullied online or by text. *Id.* Cyberbullying in particular, including cyberbullying that originates off campus, is only likely to increase as students spend more time learning and interacting online.¹⁶

But under the Third Circuit’s bright-line rule, it is unclear that teachers can discipline students who disrupt the online classroom. The ongoing shift from the conventional in-person classroom to remote

¹⁴ Torrey Trust, *The 3 Biggest Remote Teaching Concerns We Need to Solve Now*, EdSurge (Apr. 2, 2020), <https://tinyurl.com/y6azcjof>; see also Beatriz Oliveros, *Remote Learning and the Potential for Cyberbullying: What Houston Parents Should Know*, KPRC2 (Aug. 28, 2020), <https://tinyurl.com/yyueul8x> (“Kids have been seen to actively, and in real time, group bully another student on a zoom chat or sending horrible private messages to each other.”).

¹⁵ Inst. of Educ. Scis., *Indicator 10: Bullying at School and Electronic Bullying*, National Center for Education Statistics (Apr. 2019), <https://tinyurl.com/y5lr3xuf>.

¹⁶ See Sarah Darmanjian, *Organizations Say Rise in Cyberbullying Likely During COVID-19 Isolation*, News10 (Apr. 8, 2020), <https://tinyurl.com/y2gwb2x9>; Kendall Morris, *Experts Say Virtual Learning Could Lead to an Increase in Cyberbullying*, WCNC (July 19, 2020), <https://tinyurl.com/y4wen9ou>.

learning has substantially obscured any clear line that may once have existed between on-campus and off-campus student speech and serves only to underscore the unworkability of the Third Circuit's approach.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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