No. 20-255

In the
Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
Petitioner,

v.

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

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

BRIEF OF THE STATES OF LOUISIANA, ARKANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, TEXAS & UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL*
Solicitor General
BEN WALLACE
Assistant Solicitor General
Louisiana Dept. of Justice
1885 N. Third Street
Baton Rouge, LA 70804
(225) 205-8009
MurrillE@ag.louisiana.gov
**Counsel of Record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*[1]

States have an immeasurable interest in directing their limited educational resources where they belong: the classroom.

The States of Louisiana, Arkansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Texas, and Utah ("*Amici* States"), share an interest in protecting their students from speech suppression, the exact type of government overreach the Founders feared as much as any other. They also worry that their schools increasingly are forced to serve as the never-off-duty speech police of their students. This untenable position results in schools either unconstitutionally chilling their students' speech or facing an uproar, often in the form of a lawsuit, for failing to regulate it. The First Amendment will always lose if that is the calculus.

To be clear, *Amici* States embrace their duty to foster nurturing learning environments for their pupils. They seek to promote critical thinking and independent thought, pillars of intellectual growth from pre-school through high school and all educational points thereafter. *Amici* States believe a ruling in the Respondents' favor promotes rather than threatens these ideals.

---

[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than amici has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although this case presents an admittedly delicate constitutional question, it does not raise many of the issues discussed by the Petitioner and the *amici* that support it. This is a case about non-threatening, non-harassing, off-campus student speech. This Court should not be tempted to turn this case into a textbook example of bad facts making bad law.

For public schools systems, under-policing off-campus student speech rather than over-policing it is undoubtedly the better rule. As it stands today, *Amici* States are often placed in a no-win situation. If a student says something offensive off campus, schools are expected to punish the student. But once the disciplinary hammer drops, undesirable collateral consequences follow. The punishment chills student speech in a way that is antithetical to core American educational values and the United States Constitution. If the rule is that schools can police off-campus student speech 24/7, then school systems also open themselves up to lawsuits—for either not doing enough or, conversely, violating student rights.

Standards to regulate off-campus student speech proposed by Petitioner and the United States are too broad to offer meaningful guidance to schools and their students. A clear rule like the Third Circuit's would strike the appropriate balance between protecting students' First Amendment rights and providing notice to students and their schools regarding schools' authority to discipline off-campus student speech.

Amici States would benefit, not suffer, from a ruling in Respondents' favor. Consistent with the First Amendment, it would allow public school students to speak freely off-campus without fearing on-campus retribution from the public schools they are compelled to attend. Schools then can focus on educating students without risking an inaction-inspired uproar when they choose to respect, rather than undermine, students' First Amendment rights.

ARGUMENT

I. APPLYING *TINKER* TO OFF-CAMPUS SPEECH PUTS STATES BETWEEN A ROCK AND A HARD PLACE.

If schools are given wide latitude to police off-campus speech then don't do it, they expose themselves to liability for failing to protect students from offensive speech. See Amicus Br. of Nat'l Sch. Bds. Ass'n *et al.* 24-25. But if they *do* discipline students for potentially problematic speech made anytime or anywhere, they also risk being sued, Exhibit A being this case. This consequence inevitably follows from a broad standard that puts schools in a lose-lose situation.

A ruling in Respondents' favor, by contrast, would drive a wedge between this proverbial rock and hard place. If *Tinker* does *not* apply to off-campus student speech that is neither threatening nor harassing, the practical result will be a lowering of the expectation that schools serve as 24/7 speech police. By no means would such a ruling constitute a get-out-of-jail-free card for misbehaving students. Indeed, parents—the ultimate speech police—have

the primary responsibility of supervising their children off-campus. And far from "forc[ing] schools to ignore student speech," Pet. Br. 3, schools—unburdened from the responsibility of overseeing their students' every off-campus word—will have the *freedom* not to intervene without fear of being sued for their inaction. *Amici* States believe such a world is preferable to the status quo under which their schools are damned if they do and damned if they don't.

Proposals by Petitioner and the United States would perpetuate the current quagmire. Whether off-campus student speech is "directed at the school" should be irrelevant when the speech is non-threatening and non-harassing. *See* Pet. Br. 5. The same is true for such speech that "intentionally targets" anyone in the school community. *See* Amicus Br. of the U.S. 24. Although the United States emphasizes the weaknesses of a "multifactor test" in this setting, *id.* at 23, it then proposes one of its own, which would require courts to first decide whether speech is "school speech" that falls into a certain category and then, if so, whether it should be protected under the "specific circumstance[s]" of the case. *Id.* at 24-25. The problem with these standards is that they capture too much student speech that should be protected. They also fail to provide schools and their students with sufficient notice about what is off-limits when it comes to school discipline for off-campus speech.

Tinker sensibly permits schools to address disruptive student speech uttered in the school setting. But as this Court explained in *Tinker*—a case involving *on*-campus political speech that was decided long before the advent of social media or

even the Internet—students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). It therefore stands to reason that when students *exit* those doors they are even *less* subject to the threat of discipline for otherwise constitutionally protected speech.

Petitioner and the United States hypothesize that the Third Circuit's ruling would lead to "arbitrary" results. Pet Br. 43-46; Amicus Br. of U.S. 7, 15. But there is nothing "arbitrary" about treating off-campus speech different from on-campus speech. As this Court stated in *Tinker*, "special characteristics of the schools environment" warrant the disparate treatment. *Tinker*, 393 U.S. at 506. If anything, arbitrary results flow from a rule that allows schools to discipline off-campus speech that *might* disrupt the school environment. See *id.* at 513 (suggesting that schools can regulate speech that "*would* materially and substantially disrupt the work and discipline of the school") (emphasis added). At the very least, any rule governing off-campus student speech should require *actual* substantial disruption to warrant discipline.

Petitioner and the United States also criticize the Third Circuit's ruling based on hypothetical difficulties future courts may have when determining whether certain speech is "off-campus." See Pet. Br. 12; Amicus Br. of U.S. 15. But *Amici States* contend that it will be *easier* in most cases to determine whether speech was "off-campus" than to determine whether it "intentionally targeted" or was "directed at " the school community.

While bright-line rules are naturally over- and under-inclusive, the value of up-front clarity in the context of this case outweighs potential future difficulties that may arise at the margins. Permitting public schools to discipline potentially offensive off-campus student speech constitutes a vague and boundless license to chill protected speech. Moreover, it sends precisely the wrong message to students, who will have no way of knowing whether something they say might subject them to their school's disciplinary reach.

Applying *Tinker* equally to on-campus and off-campus speech pressures schools to over-police rather than under-police their students' speech, which puts *Amici States* in a difficult spot. Additionally, if the speech at issue in this case is *not* protected by the First Amendment, *Amici States* worry what off-campus student speech *is* protected. The slope is slippery. Although history bears this out, *Amici* States are particularly troubled by several recent examples of schools disciplining their students' non-threatening, non-harassing, off-campus speech.

M.L., for example, was kicked off her high school's cheer team for "liking" and sharing Tweets that included curse words and sexual references. *Longoria Next Friend of M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 261-62 (5th Cir. 2019). She published the Tweets on her personal Twitter, and they had nothing to do with school. *Id.* Although she actually went to the trouble of suing to vindicate her rights, her efforts were fruitless, in part because it was not "clearly established" that disciplining a student for non-threatening, non-harassing, off-campus speech violated the First

Amendment. *Id.* at 270. That result is surprising given *Tinker*'s fundamental premise that students retain their First Amendment rights for non-disruptive speech *on campus*. This Court should affirm that such speech *is* constitutionally protected and falls outside of the public school system's regulatory authority.

Unlike M.L.'s case, many instances in which schools discipline their students for off-campus speech do not result in litigation. Bethany Koval, an Israeli Jew, was reprimanded by her schools' administrators for publishing an expletive-riddled Tweet criticizing her home country. https://tinyurl.com/2cjxen8s. Austin Carroll was *expelled* for publishing a poetic Tweet about the versatility of the F-word. https://tinyurl.com/4rwft8vu. Like Respondent B.L., Austin, Bethany, and M.L. were disciplined by their schools for purely off-campus speech that was neither threatening nor harassing. Countless others received the government's chilling message: speak at your own risk. The First Amendment should have protected them.

Amici States seek security for their schools and their students. And they cannot provide it without this Court's help since this case involves the proper scope of the First Amendment, which would supersede any potential state legislative fixes to the problems presented by this case. *Amici States*' schools—and their budgets—would benefit from the existence of a clear rule that *embraces* First Amendment principles and frees them from the responsibility of policing the vast majority of their students' off-campus speech. Their students would benefit from being encouraged, rather than

discouraged, from learning the art of agreeably disagreeing with one another.

"To live and participate in a pluralistic society like the United States, students should be taught how to 'endure the speech of false ideas or offensive content and then to counter it.'" Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 409 (2019) (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)). As this Court stated more than sixty years ago in *Brown v. Board of Education*, primary education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." 347 U.S. 483, 493 (1954). Although this pronouncement in *Brown* aged well, *Tinker* has not—at least to the extent it has been applied to off-campus student speech. *Amici* States therefore urge this Court to rule in the Respondents' favor.

II. THIS CASE IS ABOUT OFF-CAMPUS STUDENT SPEECH THAT IS NEITHER THREATENING NOR HARASSING.

Amici States agree with the States that filed an *amicus* brief in support of neither party that the Court should be wary of issuing a ruling in this case that casts doubt on the enforceability of state anti-bullying laws. *See* Amicus Br. of Massachusetts, the District of Columbia, and Other States 3. *Amici* States also agree with the United States—which filed a brief in support of Petitioner—that schools probably can discipline most threatening and at least some harassing off-campus student speech without violating the First Amendment. *See* Amicus

Br. of U.S. 19-20. Importantly, neither the facts of this case nor the holding of the Third Circuit implicate bullying, threatening, or harassing off-campus student speech.

The Third Circuit could not have been clearer: It was "reserving for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others." Pet. App. 25a. Later on in its opinion, the court *re-affirmed* the limited nature of the case before it: "Nor are we confronted here with off-campus student speech threatening violence or harassing particular students or teachers." *Id.* at 34a. The court was careful to note that a "future case . . . involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law." *Id.*

Amici States agree. This Court should avoid falling into the trap of sanctioning a broad rule untethered to the facts of this case. The Court need look no further than *Tinker* to see how a wide-ranging rule can become untamable: a case that should have been a shield for student speech is now a sword that stifles free expression.

As this Court has done countless times before, it should reserve the more difficult First Amendment questions raised by violent and harassing speech "for another day." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (leaving "for another day consideration of other possible theories of harm not presented here"); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 n.5 (2018) (leaving "for another day" a question not outcome-determinative to the case); *BG Grp., PLC v. Republic*

of Argentina, 572 U.S. 25, 39 (2014) (same); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (same); *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602, 621 n.5 (1989) (same).

Far from representing an abdication of judicial *duty*, reserving these tough questions for a later case would in fact reflect constitutionally appropriate judicial restraint. *See Pereira*, 138 S. Ct. at 2113 n.5 (explaining that leaving an unpresented question "for another day" is an "exercise of judicial restraint"). The alternative—creating a rule inapplicable to the facts before it—would "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted).

CONCLUSION

This Court should affirm the Third Circuit and hold that schools cannot discipline off-campus student speech that is neither threatening nor harassing without violating the First Amendment.

Respectfully submitted,

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL*
Solicitor General
**Counsel of Record*
BEN WALLACE
Assistant Solicitor General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, LA 70804
(225) 205-8009
MurrillE@ag.louisiana.gov

Counsel for Louisiana

Additional counsel listed on following page

March 31, 2021

Additional Counsel

LESLIE RUTLEDGE
ATTORNEY GENERAL OF ARKANSAS

DANIEL CAMERON
ATTORNEY GENERAL OF KENTUCKY

LYNN FITCH
ATTORNEY GENERAL OF MISSISSIPPI

ERIC SCHMITT
ATTORNEY GENERAL OF MISSOURI

AUSTIN KNUDSEN
ATTORNEY GENERAL OF MONTANA

DOUG PETERSON
ATTORNEY GENERAL OF NEBRASKA

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

SEAN REYES
ATTORNEY GENERAL OF UTAH