No. 20-255

IN THE
SUPREME COURT OF THE UNITED STATES

Spring 2021

MAHANOY AREA SCHOOL DISTRICT,

Petitioner,

v.

B.L., **a Minor**, **By and Through Her Father**,
LAWRENCE LEVY, **and Her Mother**, **BETTY LOU LEVY**

Respondent,

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

BRIEF FOR PETITIONER

#103
Counsel for Petitioner

Oral Arguments Requested

TABLE OF CONTENTS

QUESTION PRESENTED

Whether *Tinker v. Des Moines*, which holds that schools can regulate speech when the speech presents a material and substantial disruption to school, extends to off-campus speech when a student posts a message discussing school-sponsored extracurricular activities to an audience of social media "friends," many of whom are students at the same school.

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court of Appeals Cases

State Court Cases

Constitutional and Statutory Authorities

Secondary Authorities

OPINIONS BELOW

The decision of the United States District Court for the Middle District of Pennsylvania can be found at R. 98. The decision of the Third Circuit Court of Appeals appears at 964 F.3d 170 (3rd Cir. 2020).

STATEMENT OF JURISDICTION

Pursuant to Rule 2(a)(1) of the Dean Fred F. Herzog Moot Court Competition, the Jurisdictional Statement has been waived.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Adjudication of this case involves interpretation of the First Amendment to the United States Constitution, applied to the states through 42 U.S.C § 1983.

STATEMENT OF THE CASE

I. Statement of Facts

The Mahanoy Area School District ("MASD") is a "political subdivision of the Commonwealth of Pennsylvania located in Schuylkill County." R. 67. B.L., ("Respondent") was a student at Mahanoy Area High School ("MAHS"), part of MASD, who participated in the school's cheerleading program. R. 66-67.

MAHS offers a cheerleading program to its students, consisting of both a junior varsity and varsity team. R. 31. The cheerleaders will cheer at the high school's football, basketball, and wrestling events. R. 31. In addition, the cheer teams will practice about twice a week during the school year and holds a summer camp when school is not in session. R. 67. Both the varsity and junior varsity teams are coached by Nicole Luchetta-Rump ("Ms. Luchetta-Rump") and April Gnall ("Ms. Gnall"). R. 67.

When Ms. Luchetta-Rump and Ms. Gnall took over coaching the cheer teams, they adopted a set of rules ("Cheerleading Rules") that were already in place. R. 68. They also made minor changes. R. 68. All MAHS cheerleaders are expected to abide by the Cheerleading Rules. R. 68. The rules provide, in part, "Please have respect for your school, coaches, teachers, other cheerleaders, and teams… Good sportsmanship will be enforced, this includes foul language and inappropriate gestures" ("Respect Provision"). R. 68-69. The Cheerleading Rules further provide that "[t]here will be no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet" ("Negative Information Provision"). R. 69. The Cheerleading Rules are explained to team members when they try out for the team. R. 68.

During the 2016-2017 school year, Respondent's freshman year of high school, she was a member of the MAHS junior varsity cheerleading team. R 67. As a part of her participation,

Respondent received a copy of the Cheerleading Rules, and she and her mother signed a document acknowledging that they received them. R. 68. Respondent believes the Cheerleading Rules to be reasonable, and never raised a complaint about the provisions contained therein. R. 70-71.

Respondent, after having spent freshman year on the junior varsity team, tried out for the 2017-2018 school year's cheerleading team. R. 71. After receiving low scores, Respondent was again placed on the junior varsity team. R. 71. Respondent was upset by this placement, especially because an incoming freshman had been placed on the varsity squad. R. 71. Respondent then texted Ms. Luchetta-Rump and asked about whether cheerleaders were required to spend one year on junior varsity before being placed on the varsity team. R. 71. When Ms. Luchetta-Rump responded that there was no such requirement, Respondent replied by saying "That's stupid." R. 71.

Coupled with the frustration of being placed on the junior varsity cheer team, Respondent was also not handed her preferred position on a private softball club. R. 37. Respondent channeled this frustration into a Snap on Saturday, May 27, 2017. R. 72. The Snap depicted Respondent and another student, middle fingers in the air, accompanied by the caption "fuck school fuck softball fuck cheer fuck everything." R. 72. The Snap, taken at a convenience store in Mahanoy City, was shared with approximately 250 of Respondent's Snapchat friends, many of whom were MASD students. R. 73. Respondent followed up this Snap with a second post, this time with no picture and the caption "Love how me and [redacted] get told we need a year of jv before we make varsity but that[] doesn't matter to anyone else?" R. 72.

By Monday, the Snap had become a point of discussion among the student body. R. 100. "Students were visibly upset and voiced their concerns to [Ms. Luchetta-Rump] repeatedly for several days." R. 100.

Ms. Gnall was made aware of the Snaps by her daughter, who was also an MAHS cheerleader. R. 73. Ms. Gnall and Ms. Luchetta-Rump jointly decided to suspend Respondent from cheer for the school year over the contents of the Snap. R. 73. In suspending Respondent, Ms. Gnall and Ms. Luchetta-Rump explained that the Snap was disrespectful to the coaches, the other cheerleaders, and MAHS. R. 13. The Snaps, in conjunction with the texts Respondent sent to Ms. Luchetta-Rump, were in violation of both the Respect Provision and the Negative Information Provision. R. 13, 60. Although internal strife within the cheerleading program was not uncommon, Ms. Gnall and Ms. Luchetta-Rump thought it important to discipline Respondent in order to "avoid chaos" and maintain a "team-like environment." R. 74. Respondent's punishment was the second time that the Cheerleading Rules had been enforced against a student. R. 74.

Respondent's father attempted to get MAHS, and subsequently the MASD's board to reverse its decision. R. 100. MAHS administration deferred to Ms. Luchetta-Rump and Ms. Gnall. R. 43, 44. MASD's board decided not to get involved in the minutia of extracurricular activities. R. 74. Superintendent Green wrote to Respondent's father on Facebook, informing him that the "board decided to support the cheer coaches and their decision to remove your daughter from the team." R. 45.

II. Procedural History

On September 25, 2017, Respondent filed a three-count complaint in the United States District Court for the Middle District of Pennsylvania against the MASD. The complaint alleges

a free speech violation under the First Amendment (Count I), a First Amendment constitutional challenge to the Cheerleading Rules (Count II), and a Fourteenth Amendment Due Process Clause challenge to the Cheerleading Rules (Count III). R. 2, 12, 14. On October 5, 2017, the district court granted Respondent a preliminary injunction, which allowed her to rejoin the junior varsity cheerleading team. R. 97. On November 17, 2017, MASD responded to the Complaint, denying that Respondent has been deprived of any constitutional rights. Following discovery, both parties filed separate motions for summary judgment, and Respondent filed a motion to disqualify one of MASD's experts. R. 29, 66, 97.

On March 21, 2019, the district court granted Respondent's motion for summary judgment, denied MASD's motion for summary judgement, and denied as moot Respondent's motion to exclude expert testimony. The court held that "Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards." R. 117.

On April 12, 2019, MASD appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit affirmed, writing, "We hold today that *Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or, -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *B.L. v. Mahanoy Area School Dist.*, 964 F.3d 170, 189 (3rd Cir. 2020). In a concurring opinion, Justice Ambro writes "…ours is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech" *Id.* at 196 (Ambro, J. concurring). "We promulgate a new constitutional rule based on facts that do not require to entertain hard questions such as these" *Id.* at 197.

On February 10, 2021, this Court granted certiorari and directed the parties to address the following issue: "Whether *Tinker v. Des Moines Independent Community School District*, which

holds that public officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." R. 121.

SUMMARY OF THE ARGUMENT

The Third Circuit erred in holding that this Court's holding in *Tinker* never applies to student speech that occurs off-campus. First, *Tinker* should apply to off-campus speech. *Tinker* allowed for speech to be regulated by public schools when it either creates a substantial disruption in school activities or if the speech impinges on the rights of other students. This Court in *Tinker* did not create an exception for off-campus speech and did not specifically exclude off-campus speech from regulation. Instead, it created the *Tinker* test, which should be applied equally to both on-campus and off-campus speech when that speech is reasonably foreseeable to come onto campus. Second, there is a circuit split on the issue of whether *Tinker* applies to off-campus speech. There are currently four Circuit Courts of Appeal that hold that *Tinker* has some applicability to off-campus speech. The Second Circuit has held that off-campus speech can create a foreseeable risk of harm to an on-campus community. The Fourth Circuit developed a "nexus" test to determine whether the speech has a sufficient nexus to school. The Fifth Circuit has also held that there are moments of off-campus speech that can reach school regulation. The Eighth and Ninth Circuit developed a reasonable foreseeability test. Even the Pennsylvania Supreme Court held that *Tinker* applies to off-campus speech. Only the Third Circuit has held that *Tinker* never applies to off-campus speech, and this Court needs to resolve the split in a way that balances the interests of students in free speech and the government in maintaining a safe learning environment. Third, as a matter of policy, schools need to be able to regulate off campus speech so they can adequately address cyberbullying. Failing to reverse the Third Circuit will allow cyberbullies to work with impunity, and it is the responsibility of schools to regulate speech like cyberbullying that can come on campus and create harm, as well as result in strained student relationships, poor mental health, and self-harm and suicide.

ARGUMENT

THE DECISION OF THE THIRD CIRCUIT SHOULD BE REVERSED BECAUSE SCHOOLS SHOULD BE ABLE TO REGULATE OFF-CAMPUS SPEECH, AND THE THIRD CIRCUIT IS ALONE IN HOLDING THAT THEY CANNOT.

A. This Court's Holding in *Tinker v. Des Moines* Applies to Off-Campus Speech When the Speech Has A Reasonable Foreseeability of Coming On-Campus.

In cases like this, where the school district's interests are being weighed against the First Amendment rights of the student, it is important that courts strike a balance between the two. The landmark case of *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) dealt with this very issue. In *Tinker*, at issue was three students who wore black armbands to protest the Vietnam War, in defiance of a school policy that had explicitly banned them. *Tinker*, 393 U.S. at 504. The students were all sent home and suspended for wearing the armbands. *Id*. This Court, in holding that was a violation of the students' free speech rights, notably said that "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The *Tinker* court then noted that the school may be able to regulate speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. (citing *Burnside v. Byars*, supra, 363 F.2d 744, 749 (5th Cir. 1966)).

"*Tinker* provides that school administrators may prohibit student expression that will 'materially and substantially disrupt the work and discipline of the school.'" *Doninger v. Niehoff*, 527 F.3d 41, 50 (2nd Cir. 2008) (citing *Tinker*, 393 U.S. at 513). Further, courts "have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school" *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of Weedsport Cent. School Dist.*, 494 F.3d 34, 39 (2nd Cir. 2007). "In such circumstances, its off-campus character does not necessarily insulate the student from school discipline." *Doninger*, 527 F.3d at 50. Further,

schools do not need to wait for a substantial disruption to occur at school before acting. *Barr v. Lafon*, 538 F.3d 554, 565 (6th Cir. 2008) (citing *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007)).

Under this framework, it was reasonably foreseeable that the speech would be brought onto campus. Though produced off-campus and without campus resources, Respondent invoked MAHS when she posted herself using a vulgar sign and making vulgar comments about a school-sponsored event. R. 72. ("[Respondent] posted a 'Snap,'… showing her… holding up [her] middle finger[]… accompanied by the text…'fuck cheerleading'"). Respondent then disseminated this Snap to everyone on her friends list, many of whom were MASD students, and some of whom were cheer teammates of Respondent's at MAHS. R. 73. Respondent then posted a second Snap with the caption "Love how me and [redacted] get told we need a year of jv before we make varsity but that[] doesn't matter to anyone else?" R. 72. This Snap is a clear reference to the conversation she had with Ms. Luchetta-Rump. R. 71. Respondent knew or should have known that her speech would have made it on campus when she made it. Further, it was reasonably foreseeable that the speech would come on campus because the Snap was shared with members of the cheer team Respondent was complaining about. A cheer team that, in the past, has had issues with "squabbling." R. 75. The Snap was reasonably foreseeable to have come onto campus.

There is also evidence in the record that the speech was brought onto campus, not that it was just foreseeable. Several students, some of whom were not cheerleaders, approached Ms. Luchetta-Rump about the Snap, and to express their disappointment in it. R. 75. For days, students were visibly upset, and voiced their concerns. R. 75. When the injunction was granted, several cheerleaders expressed their displeasure that Respondent was allowed to return to the

team. R. 76. The record supports that not only was the speech reasonably foreseeable to come onto campus, but there is also direct evidence to support that it had, and that the impact it had spanned several days.

Having established that Respondent's speech can fall under the *Tinker* test, Respondent's speech must be evaluated under it. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. "The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). "A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988). "where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem." *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 577 (4th Cir. 2011).

In this case, the school has an interest in regulating the speech, and it is outweighed by the student's interest in free speech. Respondent's viewpoint was not only an unpopular viewpoint. Instead, it was speech that found its way onto campus, upsetting students, both those on the cheer team and others. R. 75. Respondent agrees that it is the place of MASD to teach students the consequence of their own crude and profane communications on social media. R. 76. The school would not be able to convey its "lessons of civil mature conduct," *Fraser*, 478 U.S at 683, if it allowed Respondent to openly disparage MASD, MAHS, and its cheer team.

Moreover, Respondent agreed to follow the Cheerleading Rules, which were meant to "teach high school students to follow the rules of society." R. 68, 76. Respondent admits that the profane gesture and vulgar caption were violations of the Cheerleading Rules. R. 26-27. The speech also violated the MAHS Student Handbook, which Respondent got a copy of, that states "Participation on an athletic team or cheerleading squad in the [MASD] is a privilege and the participants must earn the right to represent Mahanoy Schools by conducting themselves in such a way that the image of [MASD] would not be tarnished in any manner." R. 70. The speech, in violating both the Cheerleading Rules and Student Handbook, allows the school to act. Since the speech was brought on campus, the school had the ability to act, and did so in a reasonable way that did not deprive Respondent of any right.

The landmark *Tinker*, accompanied by the cases that followed, allow MASD to act on speech created off campus that has a reasonable foreseeability of coming on campus. Once the speech is moved on campus, then MASD has a compelling interest in preventing material disruptions to the school. In this case, the speech was brought on campus when students, both those in cheer and out of it, started complaining to faculty about its con. The MASD had the right, at that point, to restrict the speech, and did so in a reasonable way. *Tinker* allows for off-campus speech to be regulated, and in this case it should be.

B. This Court Should Follow the Reasoning of the Majority of the Circuit Courts of Appeal and the Pennsylvania Supreme Court in Restricting Student's Off-Campus Speech.

There is currently a circuit split on the issue of whether a student's off-campus speech can be regulated by their school. Currently, four Circuit Courts of Appeal directly hold that off-campus speech is subject to regulation, and two more have suggested they would hold that way. In addition, the Pennsylvania Supreme Court has also held that schools can regulate off-campus

speech. Only the Third Circuit has expressly held that *Tinker* does not apply to off-campus speech. *B.L. v. Mahanoy Area School Dist.*, 964 F.3d 170, 189 (3rd Cir. 2020).

The Third Circuit stands alone in its narrow view of *Tinker*. The Third Circuit in this case wrote "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *B.L. by Levy*, 964 F.3d at 189. This holding, the court notes, builds on their holding in *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F.3d 915 (3rd Cir. 2011). In that case, the facts concerned a student who made a Myspace page that made fun of her principal. *Id*. at 920. The student was later suspended for that conduct. *Id.* at 920. The Court held that the school could not punish the student for that speech. *Id.* at 932 ("Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.") The concurrence noted "[a]pplying *Tinker* to off-campus speech would create a precedent with ominous implications." *Id.* 650 F.3d at 939 (Smith, J. concurring). The Third Circuit held similarly in *Layshock ex rel. Layshock v. Hermitage School Dist.*, 650 F.3d 205, a case concerning the Myspace page of a student. The Court held "that, under these circumstances, the First Amendment prohibits the school from reaching beyond the schoolyard to impose what might otherwise be appropriate discipline. *Id.* at 207.

The Third Circuit, in these decisions, has strayed from the holdings on similar issues from the sister circuits. The Third Circuit recognizes as much, saying "[u]ltimately, however, we find their approaches unsatisfying in three respects." *B.L. by Levy*, 964 F.3d at 187. The court then continues by explaining how it feels that the holdings of the other circuits have made bad law, encompassed too much speech, and failed to provide clarity and predictability. *Id.* at 188.

However, the Third Circuit erroneously narrows the scope of *Tinker*, 393 U.S. 503, and this Court should resolve the circuit split by holding that *Tinker* can encompass off-campus speech.

In a string of decisions, the Second Circuit has held that *Tinker* does extend to off-campus speech. The first case was *Wisniewski ex rel. Wisniewski*, 494 F.3d at 34. In that case, at issue was the creation and distribution of an IM icon that showed a pistol firing at a skull, with a blood pattern behind it. *Id.* at 35. Below the image was the words "Kill Mr. VanderMolen," referencing a teacher who worked at the school. *Id.* The court, in holding that the purely off-campus speech was not protected, wrote "[w]e have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school." *Id.* at 39. Next, the court decided *Doninger* 642 F.3d at 334. At issue in that case as a blog post submitted by a student in response to the school cancelling "Jamfest," an event that was planned by the student council. *Id.* at 339-340. In response to the student's blog post, the school refused to let the student hold a position within the student council. *Id.* at 342. The Court held that "It is therefore not the case that, in this Circuit, *Thomas* clearly established that off-campus speech-related conduct may never be the basis for discipline by school officials. Indeed, this Court expressly held that it could." *Id.* at 347 (citing *Thomas v. Board of Education, Granville Central School Dist.*, 607 F.2d 1043 (2nd Cir. 1979)).

The Fourth Circuit has also held that *Tinker* can be extended to off-campus speech. In *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), a student had posted on Myspace a blog post that was full of comments bullying other students. *Id*. at 568. The school subsequently suspended Kowalski for violating its policy on "harassment, bullying, and intimidation" *Id.* at 569. In upholding the school's discipline, the court wrote "We need not resolve, however, whether this was in-school speech… because the School District was

authorized by *Tinker* to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it "interfer[ed] ... with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone." *Id*. at 573. The court further noted that "Other courts have similarly concluded that school administrators' authority to regulate student speech extends, in the appropriate circumstances, to speech that does not originate at the school itself, so long as the speech eventually makes its way to the school in a meaningful way." *Id*. at 574. The court limited the reach of the school, requiring a "nexus" between the speech and the school. *Id.* at 573.

Similarly, the Fifth Circuit has held that off-campus speech is within the reach of the school. First, in *Porter v. Ascension Parish School*, 393 F.3d 608, 621 (5th Cir. 2004), the court held that it would be reasonable for a school administrator to find that off-campus speech could be brought on-campus under *Tinker*. In *Bell v. Itawamba County School Bd.*, 799 F.3d 379 (5th Cir. 2015), the court dealt with a rap song that was produced off-campus by a student. The student was later suspended for violating the school's harassment policy. *Id.* at 385. The court held that "based on our court's precedent and guided by that of our sister circuits, *Tinker* applies to off-campus speech in certain situations." *Id.* at 394.

The Eighth Circuit took a different approach in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School Dist.*, 696 F.3d 771 (8th Cir. 2012). In that case, the court was dealing with a website created by students that had a blog containing racist comments, sexually explicit comments, and comments on women who attended their school, identified by name. *Id.* at 773. The school then suspended the students. *Id.* at 771. The Court found in favor of the school, saying "*Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting." *Id*. at 777.

The Ninth Circuit Court of Appeals dealt with *Tinker* and off-campus speech in *Wynar v. Douglas City School Dist.*, 728 F.3d 1062 (9th Cir. 2013). In that case, a student was sending instant messages threatening violence, including shooting specific classmates. *Id.* at 1065. The court held that "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." *Id.* at 1069. The court further noted that "Under *Tinker*, schools may restrict speech that 'might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities' or that collides 'with the rights of other students to be secure and to be let alone.'" *Id.* at 1070 (citing *Tinker*, 393 U.S. at 514).

In addition to the shared holdings of the circuits, the Pennsylvania Supreme Court also found it necessary to apply *Tinker*, 393 U.S. 509, to off-campus speech. In *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 569 Pa. 638, 644 (2002), the court handled an issue of a student website that contained several derogatory comments about teachers and school administrators. The court held that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id.* at 668.

This Court should follow the holdings of the several circuits the Pennsylvania Supreme Court in resolving the circuit split on whether *Tinker* applies to off-campus speech. By resolving the circuit split, this Court will be able to balance the interests of the school in preventing disruptions to the school's mission with the interests of students' First Amendment rights. This court should hold that *Tinker* allows schools to regulate speech when there is a reasonable belief that the speech will "would substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 509. This would bring all the circuits in line

with this Court's holding in *Tinker*, as well as create a clear balancing test that ensures fairness to both the school districts and the students. The lower court noted that "obscure lines between permissible and impermissible speech have a chilling effect on speech."
Levy, 964 F.3d at 185. It would benefit the courts, the schools, and the students if this Court clearly delineates the line between protected speech and unprotected speech in the school setting.

C. Schools Need to be Able to Regulate Off-Campus Speech to Effectively Police Bullying.

According to the Centers for Disease Control, "bullying [is] any unwanted aggressive behavior(s) by another youth or group of youths, who are not siblings or current dating partners, that involves an observed or perceived power imbalance, and is repeated multiple times or is highly likely to be repeated." *Preventing Bullying*, Centers for Disease Control and Prevention, https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html (October 21, 2020). About one in five students is bullied in high school. *Id*. About 15% reported being cyberbullied. *Id.* Cyberbullying "is the intentional infliction of harm by the use of one or more media of electronic technologies." Carol Greta, *Cyberbullying: Doing Something about It, Lawfully*, Iowa Department of Education, https://www.educateiowa.gov/sites/files/ed/documents /cyberbullying.pdf (March 27, 2013). "Cyberbullying can occur through SMS, Text, and apps, or online in social media, forums, or gaming where people can view, participate in, or share content." *What is Cyberbullying*, United States Department of Health and Human Services, https://www.stopbullying.gov/cyberbullying/what-is-it (July 21, 2020). "The most common places where cyberbullying occurs are… Social Media, such as Facebook, Instagram, *Snapchat*, and Tik Tok." *Id* (emphasis added).

Unfortunately, cyberbullying, like traditional bullying, has disastrous consequences for school-age children. Bullying can cause physical pain and emotional distress, but it also

"increases the risk for depression, anxiety, sleep difficulties, lower academic achievement, and dropping out of school." *Preventing Bullying*, Centers for Disease Control and Prevention, https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html (October 21, 2020). In the worst cases, it can result in self-harm and suicide. *Id*. For an example of the worst-case scenario for victims of bullying, take the story of Tyler Clementi. Tyler was eighteen years old when he asked his roommate for privacy so he could go out on a date. Tyler Clementi's Story, Tyler Clementi Foundation, https://tylerclementi.org/tylers-story-tcf (March 15, 2021). His roommate then set up a secret camera that was pointed at Tyler's bed, and streamed the camera feed to the internet, where he shared it with other students. *Id.* Tyler became "a topic of ridicule in his new social environment." *Id.* Days later, at eighteen years old, Tyler died by suicide. *Id.*

Cyberbullying creates a special risk of harm for students, because "digital devices offer an ability to immediately and continuously communicate 24 hours a day, so it can be difficult for children experiencing cyberbullying to find relief." *What is Cyberbullying*, United States Department of Health and Human Services, https://www.stopbullying.gov/cyberbullying/what-is-it (July 21, 2020). Thus, it must be within the realm of school's authority to discipline students for off-campus speech, including that which occurs on the internet. "It is in the best interests of all parties for the courts to adopt a test that schools can use to curtail student cyberbullying, even when such acts occur off-campus." Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 2009 Barry L. Rev. 103 (2009).

Through its case law, the courts have established a foundation of when schools can reach off-campus speech. *Tinker* established that schools could regulate speech where there is a

material and substantial interference. *Tinker*, 393 U.S. at 503. Fraser then allowed schools to reach offensive, lewd, and indecent speech. *Fraser*, 478 U.S. at 675. *Hazelwood School District* allowed speech that bears the imprimatur of the school or speech where the school has a reasonable pedological interest to be regulated. *Hazelwood School Dist.*, 484 U.S. at 260. However, the question of *Tinker* in the internet age has not been directly answered, and for the protection of students across America, it must be resolved in favor of school districts, allowing them to reasonably regulate cyberbullying.

One approach, which is admittedly conservative, is to adopt a "true threat" analysis to online speech. Allison Belnap, *Tinker at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public-School Regulation of Off-Campus Student Speech*, 2011 BYU L. Rev. 501, 525 (2011). "Indeed, the true threat standard can be used effectively not only for student-on-teacher or student-on-administrator cyberbullying, but also for student-on-student cyberbullying." *Id.* at 530. Under this approach, the school could use the subjective view of the students but would also be required to view the context of the comments and the reception of the audience for which they were offered. *Id*. If the school could bear the evidentiary standard, then it is able to regulate the speech. *Id.* at 531. This approach relies heavily on criminal statutes working to police the worst speech that may be offered online. *Id.* at 531-532. ("much speech that can be categorized as cyberbullying is punishable through criminal or civil statutes that constitutionally regulate harassment, defamation, slander, stalking, and so on.").

This approach is problematic for a number of reasons. First, it fails to protect the students from speech that does not rise to a high level of a true threat. Second, it fails to protect the interests of students who aren't victim to physical bullying, but only relentlessly cyberbullied. Cyberbullying is unique, where the speech at issue is permanent in most cases, unless removed

by the creator. see *What is Cyberbullying*, United States Department of Health and Human Services, https://www.stopbullying.gov/cyberbullying/what-is-it (July 21, 2020) ("Most information communicated electronically is permanent and public, if not reported and removed.") Due to the permanent nature of the internet, a simple "true threat" analysis is not enough to combat cyberbullying.

A second approach would be for this Court to adopt a *Tinker* analysis for off-campus cyberbullying. "If courts adopt a Tinker analysis to determine whether schools can discipline students for off-campus cyberbullying, the school still needs to satisfy one of the prongs to avoid violating the free speech rights of the cyberbully." Zande, *supra*. at 133. The schools would be able to regulate if it causes a disruption within the school. *Id* at 134. The schools, however, need not wait until an actual disruption occurs, given the disastrous consequences that can accompany hesitancy for the cyberbullying victim and the school community at-large. *Id*. Under this prong, the school could have a reasonable foreseeability of a disruption if the student shows "insecurity at the school, fearfulness, or depression." *Id.* "Because the school will be able to reasonably forecast disruption under Tinker, and show a nexus between the speech and school, if required, they will not violate the First Amendment rights of the cyberbully by stopping his or her speech." *Id*.

Under this approach, the school would be even stronger in situations that fall under the second prong of *Tinker*. Schools have the ability to regulate speech when it interferes with the rights of other students. Zande, *supra*. at 135. "If the school can show that these effects interfere with the rights of students to feel safe at school or perform academically, then it should be able to discipline a cyberbully for off-campus acts under the second prong of the Tinker test." *Id.* at 136. Notably, while there may be more cyberbullying that could be regulated under the second

prong of the test, "schools would be advised to justify curtailment first under the disruption prong if they are so able." *Id.* at 136.

This approach would cover a wider array of speech than the "true threat" approach. It would balance the interests of students, who should not surrender their free speech rights, with the interests of the school, who wants to weed out cyberbullying and ensure that it is able to provide students with a safe environment in which they are allowed to exercise their rights to an education.

As a matter of policy, this Court cannot hold that *Tinker* never applies to off-campus speech, as the court below did. *B.L. by Levy*, 964 F.3d at 189. This Court cannot hand the bullies of the country the constitutional protection to cyberbully their peers off-campus without any consequence other than that speech that may be subject to criminal charge. Instead, this Court needs to rule that *Tinker* does apply in an internet age, and that the schools should be able to protect students from the harm posed by cyberbullying. In doing so, it would be protecting children from cyberbullying, and preventing students from exploring self-harm and suicide in an effort to escape the type of speech the Third Circuit thought was not subject to school regulation. This Court has the ability to bring *Tinker* into the internet age and protect an entire generation of young people from online harassment and abuse, and it should do so here.

CONCLUSION

WHEREFORE, Petitioner Mahanoy Area School District asks this Court to reverse the decision of the Third Circuit and remand for further proceeding.

Respectfully Submitted,
/s/ #103
#103
Counsel for Petitioner