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

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harasses others or otherwise foreseeably disrupts the school environment. If sc hools cannot appropriately discipline harassing and di sruptive students, they will be unable to guarantee safe learning environments or proper and equit able 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 distri cts. 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 fr equently 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.

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

schools to promptly investigate complaints, furnish

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 pro-

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 pres ident 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 con-

in order to help inculcate the unique values that ex-

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

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 st ronger 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 disc ipline" 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 compl y with the obligations in-

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 sch

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

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.

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 fi ve 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 disreganeal134 T5fmd50 -1tis ewrs12ss0dfir"e(
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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.

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[10] It is unclear whether the speech in some of these exam-

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

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 stud ents 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

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[14] Torrey Trust, The 3 Biggest Remote Teaching Concerns We Need to Solve Now, EdSurge (Apr. 2, 2020), https://tinyurl.com/y6azcjof; see also