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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the First Amendment categorically prohibits public-school officials from disciplining students for speech that occurs off campus.

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INTEREST OF THE UNITED STATES

This case concerns the authority of public schools to discipline students for speech that occurs off campus. The federal government operates hundreds of primary and secondary schools on military installations and Indian reservations. And several federal governmental entities, including components within the Departments of Education, Justice, and Health and Human Services, devote significant resources to addressing, preventing, and enforcing prohibitions on bullying and harassment of students. The United States thus has a substantial interest in the outcome of this case. The government also has a substantial interest in the correct interpretation and application of the federal Constitution.

STATEMENT

Respondent, a high-school student, was removed from the cheerleading team because of two messages she had posted on social media. Respondent sued the school district, petitioner here, under 42 U.S.C. 1983, alleging that the removal violated her constitutional freedom of speech. The district court granted summary judgment to respondent. Pet. App. 49a-76a, 77a-79a. The court of appeals affirmed. *Id.* at 1a-48a.

1. a. As a sophomore, respondent was placed on her high school's junior-varsity cheerleading team for a second straight season, even as a freshman made the varsity team. Pet. App. 4a-5a. Frustrated, respondent posted two messages to her personal account on Snapchat, a social media application. *Id.* at 5a. The first said "Fuck school fuck softball fuck cheer fuck everything," and it was accompanied by a photo of her and a friend raising their middle fingers. J.A. 20; see Pet. App. 5a. The second said "Love how me and [another student] get told we need a year of jv before we make varsity but that's doesn't matter to anyone else? 🙃." J.A. 21; see Pet. App. 5a. Approximately 250 people, including fellow students and cheerleaders, had permission to view the posts. Pet. App. 5a.

Several of those students, some of them "visibly upset," showed copies of the messages to the cheerleading coaches, who determined that the messages violated team and school rules. Pet. App. 52a (citation omitted); see *id.* at 5a-6a. Specifically, the cheerleading rules required team members to "have respect for [the] school, coaches, teachers, other cheerleaders and teams," prohibited "foul language and inappropriate gestures," and forbade the posting of "any negative information regarding cheerleading, cheerleaders, or coaches placed

on the internet." J.A. 17-18; see Pet. App. 6a. Respondent had signed a document acknowledging that she would be bound by those rules. See Pet. App. 51a. School rules also stated that student athletes, including cheerleaders, must "conduct[] themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." C.A. App. 486; see Pet. App. 6a. Having determined that respondent's posts violated those team and school rules, the coaches suspended respondent from the cheerleading team for the year. Pet. App. 6a. The coaches "would not have suspended" respondent "if her [messages] had not referenced cheerleading." *Id.* at 52a (citation omitted).

Respondent brought this suit under 42 U.S.C. 1983, alleging as relevant here that her suspension violated the First Amendment, made applicable to the States by the Fourteenth Amendment. See Pet. App. 6a. The district court granted a temporary restraining order and then a preliminary injunction reinstating respondent to the cheerleading team. See *id.* at 53a.

b. Following discovery, the district court granted summary judgment to respondent. Pet. App. 49a-76a.

The district court first determined that petitioner "ha[d] not produced sufficient evidence that [respondent had] waived her speech rights" as a condition of joining the cheerleading team. Pet. App. 60a. The court explained that "conditioning extracurricular participation on a waiver of a constitutional right is coercive." *Id.* at 61a. The court also rejected the suggestion that "mere exclusion from an extracurricular activity reduces or fails to raise constitutional concerns." *Id.* at 66a. Instead, the court reasoned that "the fact that this case involves cheerleading is only appropriately considered in determining whether [respondent's] speech was

protected," *id.* at 67a, and that "players do not completely waive their rights when they join a team," *id.* at 68a (citation omitted).

The district court next reviewed this Court's precedents concerning student speech, including *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which this Court held that students had a First Amendment right to wear black armbands at school to signify their opposition to the Vietnam War. *Id.* at 513. The district court stated that *Tinker* "sets the baseline for what student speech is protected: anything that does not, or in the view of reasonable school officials, will not cause material and substantial disruption at school." Pet. App. 55a. The court also stated that subsequent cases had set forth "exceptions to this broad dictate." *Ibid.* As relevant here, the court said that under *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), "a school may categorically prohibit lewd, vulgar, or profane language." Pet. App. 57a-58a (citation omitted).

The district court determined, however, that neither of those cases supported petitioner here. In the court's view, "that [respondent's] speech occurred off-campus [wa]s all but fatal" to petitioner's reliance on *Fraser*, Pet. App. 68a, which the Third Circuit had previously held "cannot be extended to justify a school's punishment for use of profane language outside the school, during non-school hours," *ibid.* (citation and ellipsis omitted). And though the court acknowledged that "whether *Tinker* applies to speech uttered beyond the schoolhouse gate is an open question," *id.* at 75a, it found that petitioner had "not shown that [respondent's] speech created any substantial disorder or likelihood thereof," *id.* at 73a.

2. The court of appeals affirmed. Pet. App. 1a-48a.

a. The court of appeals observed that respondent's messages "took place 'off campus' " because she created them "away from campus, over the weekend, and without school resources, and she shared [them] on a social media platform unaffiliated with the school." Pet. App. 15a. The court further explained that under its prior precedent, "*Fraser* does not apply to off-campus speech." *Id.* at 16a. The court stated that it would "undermin[e] the values" its prior precedent "sought to protect" to make an exception when, as here, the speech or punishment involves an extracurricular activity.

The court of appeals then held that *Tinker* categorically does not apply to off-campus student speech, Pet. App. 31a, and that the First Amendment prohibits public schools from disciplining students for their speech unless "the speech occurs in a context owned, controlled, or sponsored by the school," *id.* at 33a. The court stated that "*Tinker*'s focus on disruption makes sense when a student stands in the school context, amid the 'captive audience' of his peers," but "makes little sense where the student stands outside that context" because "any effect on the school environment will depend on others' choices and reactions." *Id.* at 32a (citation omitted). The court explained that its categorical rule "offers the distinct advantage of offering up-front clarity to students and school officials." *Id.* at 33a. The court stated, however, that its otherwise categorical rule might contain an exception for "off-campus student speech threatening violence or harassing particular students or teachers." *Id.* at 34a.

The court of appeals also determined that respondent did not "waive her First Amendment rights as a condition of joining the team," Pet. App. 38a, because her

social-media posts were "not covered by any of the [team and school] rules on which [petitioner] relies," *id.* at 41a. The court acknowledged, however, that "[a]ll rights, including free speech rights, can be waived," and that "there are a wide range of extracurricular activities and student roles that may make conditions on speech more or less connected to the needs of the program" and thus permissible under the First Amendment. *Id.* at 38a-39a.

b. Judge Ambro concurred in the judgment. Pet. App. 42a-48a. In his view, the district court correctly found that respondent's messages had caused "no 'substantial disruptions,'" *id.* at 45a, and so he would have affirmed the judgment under *Tinker*'s "substantial disruption" test, see *id.* at 45a n.1, 48a (citation omitted).

SUMMARY OF ARGUMENT

A. The First Amendment does not categorically prohibit public schools from disciplining students for speech that occurs off campus. Although this Court has made clear in the context of on-campus speech that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986). This Court has held, for example, that schools may prohibit vulgar speech and speech that encourages illegal drug use, and may control speech that appears in school-sponsored publications. And *Tinker* suggests that schools also may discipline students for speech that materially and substantially disrupts school activities. 393 U.S. at 513.

The principles of the Court's "school speech" cases are not categorically inapplicable to student speech uttered off campus and outside of school hours. This Court's school-speech cases have focused on the *consequence* of students' speech on other students and school activities, not the precise time or location at which the speech occurs. The court of appeals' ruling that school officials are categorically prohibited from disciplining students for their off-campus speech thus has no basis in this Court's precedents, and would lead to arbitrary results. That categorical rule also could substantially undermine efforts by schools to address harassment and bullying, much of which might take place off campus but which nevertheless could deprive victims of equal educational opportunities.

B. The question remains which off-campus student speech may be treated as "school speech" potentially subject to discipline by public-school officials. In general, the broad range of speech engaged in by students when off campus is beyond the proper purview of school officials. And there is good reason to be wary of any rule that would permit an overbroad opportunity for the discipline of such speech. Lower courts accordingly have attempted to craft various rules to establish the requisite connection between off-campus speech and school. No universal formulation is possible, but specific categories of off-campus student speech that may properly be regarded as school speech include speech that (1) threatens the school community, (2) intentionally targets specific individuals or groups in the school community, or (3) intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or programs themselves.

In the particular context of an extracurricular athletic program, for example, maintaining team cohesion and respect for the coach's authority are essential to and inherent in the proper functioning of a team. Accordingly, students who choose to join such teams reasonably should expect that if they engage in off-campus speech that intentionally targets their teammates or teams regarding matters essential to or inherent in the program, their speech might properly be considered school speech that coaches and team administrators could potentially discipline.

To be clear, the question of which off-campus student speech may be treated as school speech is a different question from whether any particular regulation of such speech would violate the First Amendment. To answer that latter question, courts generally apply this Court's school-speech precedents, including *Tinker*. In this case, more specific principles distilled from those precedents can appropriately be identified for application to extracurricular programs.

C. Because the court of appeals incorrectly held that school officials are categorically prohibited from disciplining students for their off-campus speech, it did not apply any of the principles set forth here. Accordingly, this Court should vacate the judgment below and remand so the lower courts can undertake that analysis in the first instance.

ARGUMENT

A. The First Amendment Does Not Categorically Prohibit Public-School Officials From Disciplining Students For Speech That Occurs Off Campus

1. This Court has made clear in the context of on-campus speech that although students do not "shed

their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 682 (1986); accord *Morse* v. *Frederick*, 551 U.S. 393, 404-405 (2007); *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988). Instead, the First Amendment "must be 'applied in light of the special characteristics of the school environment.'" *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

Among those special characteristics is "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979); see *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Because the task of educating the Nation's children vests public schools with responsibility to teach students, a school may prohibit student speech that "would undermine the school's basic educational mission." *Fraser*, 478 U.S. at 685; see *Kuhlmeier*, 484 U.S. at 266 ("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.") (quoting *Fraser*, 478 U.S. at 685).

For that reason, a number of constitutional rights apply differently in the school setting. See, *e.g.*, *New Jersey* v. *T. L. O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."); *Board of Education of Independent*

School District No. 92 v. *Earls*, 536 U.S. 822, 830-831 (2002) (same); *Vernonia School District 47J* v. *Acton*, 515 U.S. 646, 651 (1995) (same); *Goss* v. *Lopez*, 419 U.S. 565, 584 (1975) (disciplinary suspension ordinarily requires only "rudimentary procedures"). The First Amendment is no exception.

In *Fraser*, for example, the Court held that the First Amendment did not preclude a school from punishing a student for making a sexually suggestive speech at a school assembly. 478 U.S. at 679-680. The Court explained that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech * * * would undermine the school's basic educational mission." *Id.* at 685. Thus, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-686.

In *Kuhlmeier*, this Court held that a school has substantial latitude in regulating student speech when it is sponsored by the school, such as in a school-published newspaper. 484 U.S. at 273. The Court explained that in light of public-school officials' traditional responsibility for overseeing "the education of our Nation's youth," the officials may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Ibid.* Only when such restrictions "ha[ve] no valid educational purpose [would] the First Amendment [be] so 'directly and sharply implicated' as to require judicial intervention to protect students' constitutional rights." *Ibid.* (brackets and citations omitted).

And in *Morse*, this Court upheld against a First Amendment challenge the suspension of a student who unfurled a banner reading "BONG HiTS 4 JESUS" across the street from the school "during school hours, at a school-sanctioned activity." 551 U.S. at 397, 401 (citations omitted). The Court explained that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." *Id.* at 407 (citation omitted). Accordingly, the Court held "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Id.* at 397.

As those cases demonstrate, public schools may discipline students for speech that otherwise would enjoy First Amendment protection if uttered by adults outside the school context. See *Kuhlmeier*, 484 U.S. at 266. There are, of course, limits on schools' ability to discipline students for such speech. In *Tinker*, for example, this Court held that a school could not prohibit students from wearing armbands in school to protest the Vietnam War. 393 U.S. at 504. After observing that the school had prohibited the armbands "to avoid the controversy which might result from the expression" (out of a belief that "'the schools are no place for demonstrations'"), this Court explained that "to justify prohibition of a particular expression of opinion, [a school] 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." *Id.* at 509 & n.3, 510.

It was in that context—where the asserted governmental interest was merely to prevent controversy—that the Court stated that a student "may express his opinions, even on controversial subjects like the conflict

in Vietnam, if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Tinker*, 393 U.S. at 513 (brackets and citation omitted). Significantly, the *Tinker* Court made clear that schools may discipline student speech for reasons *other than* avoiding controversy—including if the speech would "materially and substantially disrupt the work and discipline of the school." *Ibid.*; see *id.* at 509. And as discussed above, the Court's subsequent decisions in *Fraser*, *Kuhlmeier*, and *Morse* establish that other such legitimate reasons include shielding students from profanity, controlling the message conveyed in school-sponsored speech, and deterring illegal drug use, respectively. Unlike the prohibition of armbands in *Tinker*, those restrictions "extend[] well beyond an abstract desire to avoid controversy." *Morse*, 551 U.S. at 409. They instead are geared toward furthering "the 'fundamental values' of public school education," *Fraser*, 478 U.S. at 685-686, enforcing standards in school activities that "are reasonably related to legitimate pedagogical concerns," *Kuhlmeier*, 484 U.S. at 273, and preventing danger to the health and wellbeing of students, *Morse*, 551 U.S. at 407-408.

2. Contrary to the court of appeals' holding, those principles are not categorically inapplicable to off-campus student speech. To be sure, as this Court recognized in *Morse*, "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents." 551 U.S. at 401. But the court of appeals erred in converting that uncertainty into a categorical rule that student speech occurring off campus

does not qualify as "school speech" potentially subject to discipline by public-school officials.

a. This Court's precedents do not support the lower court's categorical rule. Nothing in *Tinker*, for example, suggests that school officials are powerless to discipline students for materially and substantially disruptive speech if they happen to utter it on their way to school, a moment before they set foot on school grounds. *Tinker* made clear that its concern was with the prospect of disruptive consequences of speech on the school environment. The "schoolhouse gate" to which the opinion refers was intended to be metaphorical, not literal; after all, nobody would contest that schools may discipline students for substantially disruptive speech at a school-sponsored event that happens to take place off school property. See Br. in Opp. 10 (stating that schools may discipline student speech "at a school-sponsored event"); cf. *Morse*, 551 U.S. at 401-402 (upholding discipline for displaying a banner across the street from the school). *Tinker* itself stated that "conduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." 393 U.S. at 513 (emphasis added). That rationale can apply as well to certain off-campus conduct or speech by the student that would have a substantial and material disruptive or invasive effect.

This Court effectively held as much in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), which involved a criminal ordinance prohibiting noisy picketing within 150 feet of school property. See *id.* at 107. The Court

found the ordinance constitutional because such picketing could "disrupt or [be] incompatible with normal school activities." *Id.* at 120. The defendant in *Grayned* did not even attend the school. See *id.* at 105. If a State may criminally punish a nonstudent for off-campus speech based on its disruptive effect on school activities, *a fortiori* the school itself must be able to discipline its own students for engaging in off-campus speech if it would have a similarly disruptive effect.

Indeed, the principle that schools are not categorically prohibited from addressing speech by a student who is located off campus is not limited to disruptive speech under *Tinker*. For example, *Kuhlmeier* presumably would permit a school to exercise editorial control over student postings on a website sponsored by the school, even if the student generated that speech outside of school and uploaded it to web servers located entirely off campus. Accordingly, the court of appeals' focus on the question whether *Tinker* applies to speech by students who are not on campus, see, *e.g.*, Pet. App. 31a, was incomplete. The appropriate question is whether and under what circumstances off-campus student speech may, consistent with the First Amendment, be treated as "school speech" and therefore potentially subject to discipline by public-school officials. Cf. *Kowalski* v. *Berkeley County Schools*, 652 F.3d 565, 573 (4th Cir. 2011), cert. denied, 565 U.S. 1173 (2012). Whether a school may discipline a student for school speech (whether occurring off campus or on) is a separate question requiring application of this Court's school-speech precedents (including of course *Tinker*). Cf. *Morse*, 551 U.S. at 400-401 (bifurcating the inquiry in a similar fashion).

The court of appeals was mistaken to defend its categorical rule as "offering up-front clarity to students and school officials." Pet. App. 33a. For one thing, the categorical rule would mean that schools' ability to discipline students because of the substantial adverse effect of their speech on other individuals in the school or the school's operation would turn on arbitrary distinctions, such as whether the student drafted the particular message using a school-owned computer or her own, or whether she posted it a minute before the school bell rang or a minute after. For another, the current pandemic has underscored that the line between "on" and "off" campus is increasingly blurry. As Judge Ambro observed, the court of appeals' holding likely "will sow further confusion," *id.* at 48a, rather than "draw a clear and administrable line," *id.* at 45a.

b. Moreover, the court of appeals' categorical holding could undermine schools' efforts to respond to threats to the safety of students and staff. When school administrators are alerted to messages by a student that, for instance, suggest plans for violence, they cannot be said to have violated the First Amendment when they take reasonable steps to avert that potential harm. See, *e.g.*, *McNeil* v. *Sherwood School District 88J*, 918 F.3d 700, 703-704 (9th Cir. 2019) (per curiam) (upholding one-year expulsion of a student with "access to firearms" who created "a hit list of students" who "'must die'"); *Wynar* v. *Douglas County School District*, 728 F.3d 1062, 1070 (9th Cir. 2013) (upholding temporary expulsion of a student "with confirmed access to weapons" who posted social-media "messages that could be interpreted as a plan to attack the school" and that were "brought to the school's attention by fellow students"); *Wisniewski* v. *Board of Education*, 494 F.3d 34, 36 (2d

Cir. 2007) (upholding suspension of student who circulated an instant-messenger icon depicting "a pistol firing a bullet at a person's head, above which were dots representing splattered blood," and below which were the words "'Kill Mr. VanderMolen,'" an English teacher at the school), cert. denied, 552 U.S. 1296 (2008).

As the Ninth Circuit has observed, school officials who learn of such messages "face[] a dilemma every school dreads": do nothing and risk the safety of the school community, or take action and risk a lawsuit. *Wynar*, 728 F.3d at 1070; see *Boim* v. *Fulton County School District*, 494 F.3d 978, 984 (11th Cir. 2007) ("We can only imagine what would have happened if the school officials, after learning of Rachel's writing, did nothing about it and the next day Rachel did in fact come to school with a gun and shoot and kill her math teacher."). The court of appeals' categorical rule here could force schools into that dilemma whenever they learn of off-campus student speech that contains similar threats of violence or other threats to safety.

That categorical rule also could undermine schools' efforts to combat harassment, bullying, and other similar harms. Several provisions of federal law—such as Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373; Titles IV and VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 246, 252; Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, 87 Stat. 394; and Title II of the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 337—may require public schools and schools receiving federal financial assistance to take action to address harassing speech in the school context directed at students or school employees on the basis of race, sex, disability, or other protected

characteristics, depending on the factual circumstances.

For example, school districts may under certain circumstances be held liable for damages if they are "deliberately indifferent to [student-on-student] sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis* v. *Monroe County Board of Education*, 526 U.S. 629, 650 (1999); see *Estate of Lance* v. *Lewisville Independent School District*, 743 F.3d 982, 995-996 (5th Cir. 2014) (applying *Davis* to disability harassment claim under Section 504 of the Rehabilitation Act); *Zeno* v. *Pine Plains Central School District*, 702 F.3d 655, 664-667 (2d Cir. 2012) (applying *Davis* to racial harassment under Title VI).

Similarly, the Department of Education has explained that harassment and bullying of a student with a disability on any basis can rise to the level of denying a free appropriate public education under the Individuals with Disabilities Education Act, Pub. L. No. 108-446, 118 Stat. 2647, and Section 504 of the Rehabilitation Act. See Letter from Melody Musgrove, Director, Office of Special Education Programs, & Michael K. Yudin, Acting Assistant Secretary, Office of Special Education & Rehabilitation Services, United States Department of Education, to Colleague (Aug. 20, 2013), sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf; Letter from Catherine E. Lhamon, Assistant Secretary, Office for Civil Rights, United States Department of Education, to Colleague (Oct. 21, 2014), www2.ed.gov/about/offices/list/ocr/letters/ colleague-bullying-201410.pdf.

Off-campus speech—including speech communicated via email, text message, social media, and the like—that is harassing or bullying can contribute to depriving victims of the educational opportunities to which they are entitled. Under those circumstances, schools officials attempting to satisfy their obligations under federal law to address those harms should not be placed in the difficult position of having to blind themselves to instances of the harassing or bullying conduct that occurred online. Cf. *Tinker*, 393 U.S. at 513 (observing that student speech or conduct, "in class or out of it," that involves "invasion of the rights of others" is "not immunized by the constitutional guarantee of freedom of speech"); *Feminist Majority Foundation* v. *Hurley*, 911 F.3d 674, 688-689 (4th Cir. 2018) ("[W]e cannot conclude that [the school] could turn a blind eye to the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.").

Even aside from those statutory requirements, schools have valid educational reasons to protect students from bullying and harassment by other students. As the Fourth Circuit has observed, "student-on-student bullying is a 'major concern' in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide." *Kowalski*, 652 F.3d at 572. "Just as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment," including by "punish[ing] harassment and bullying in order to provide a safe school environment conducive to learning." *Ibid.* (citation omitted) (citing

Morse, *supra*). A categorical rule holding that schools may not discipline a student for harassing or bullying speech that deprives another student of educational opportunities simply because it occurs off campus—including on email, text, or social-media platforms—would hinder efforts to address that harmful behavior.

The court of appeals' only response to those substantial concerns was to leave for another day the problem of "off-campus student speech threatening violence or harassing particular students or teachers," Pet. App. 34a, suggesting that discipline of students for such speech might be subject to the stricter First Amendment scrutiny applicable outside the school context, see *id.* at 36a. But the court offered no principled basis for why such speech having direct and substantial adverse consequences for students or school personnel should be immune from the discipline that would be called for if the same speech had occurred on campus.

B. Off-Campus Student Speech That Threatens The School Community Or Intentionally Targets Certain Individuals, Groups, Or Discrete School Functions May Qualify As School Speech Potentially Subject To Discipline By School Officials

1. Although the First Amendment permits public-school officials to discipline students for certain off-campus speech, the question remains which off-campus student speech may be treated as "school speech" that is potentially subject to discipline by public-school officials. Obviously there are broad ranges of off-campus student speech that would not be a proper subject of discipline by school officials. For example, as *Morse* observed, had the student in *Fraser* "delivered the same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 405. And if a

student delivers a fiery religious sermon or a controversial political speech over the weekend, it almost certainly would be protected under the First Amendment no matter how disruptive its lingering effects might prove to be when the student returns to school. Cf. *id.* at 406 n.2; *id.* at 422 (Alito, J., concurring); *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citation omitted); *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). More generally, the vast array of day-to-day off-campus communication by students is beyond the legitimate reach of school discipline—in other words, should be regarded as protected without even having to consider the application of *Tinker* or another of this Court's school-speech cases to determine whether the communication could properly be subject to discipline.

Conversely, some narrow categories of student speech that occurs off campus nevertheless are properly regarded as "school speech" potentially subject to discipline by school officials. One example is speech that can create a threatening environment, or that can deprive other students of educational opportunities to which they are entitled, such as bullying and harassment. Another example is speech that would undermine the essential functioning of the educational curriculum (such as posting the answers to an exam) or breach school security (such as instructions for hacking into the school's computer system).

This Court has not yet had the opportunity to address the circumstances under which off-campus student speech may be considered "school speech." Cf. *Morse*, 551 U.S. at 400-401. And there are reasons to be

wary of any rule that would grant school officials disciplinary authority over a broad range of off-campus student speech as school speech. Cf. *id.* at 423 (Alito, J., concurring). There may be a risk, for example, that such authority could be exercised disproportionately against students of color or other identified student populations. Some studies have suggested, for instance, that schools sometimes disproportionately discipline black students for speech deemed to be disrespectful or defiant. See, *e.g.*, Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 The Urban Rev. 317, 334-335 (2002) (study of discipline in a middle school suggesting that "black students are more likely to be referred to the office for more subjective reasons," including "disrespect") (emphasis omitted); Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 School Psych. Rev. 85, 101 (2011) (same). A recent GAO report on discipline disparities for black students, boys, and students with disabilities has made similar findings. See U.S. Gov't Accountability Office, GAO-18-258, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* 12 (Mar. 2018), gao.gov/assets/700/690828.pdf. Other limitations on school officials' authority, such as due-process protections or viewpoint-neutrality requirements, may do little to curb such abuses.

The government thus respectfully disagrees with petitioner that due-process principles or *Tinker* itself provides a sufficient "backstop" to preserve a large sphere of off-campus student communication free from the potential for school discipline. Pet. Br. 4; see *id.* at 26-30.

Just as school officials need assurance that they can, for example, react to threats to school safety without running afoul of the First Amendment, see p. 16, *supra*, so too do students need assurance that they do not risk potential discipline for whatever they write or say off campus simply because they happen to be enrolled in the school. There is, in short, no basis for treating the immense amount of off-campus speech by students as school speech that would potentially be subject to discipline, even if it is about the school or might have some effect on other students or the school environment.

Some lower courts have adopted multifactor totality-of-the-circumstances tests to determine when off-campus student speech qualifies as school speech. See, *e.g.*, *McNeil*, 918 F.3d at 707 (setting forth a "flexible and fact-specific" test "based on the totality of the circumstances"); *Bell* v. *Itawamba County School Board*, 799 F.3d 379, 398 (5th Cir. 2015) (en banc) (setting forth seven nonexclusive factors to determine whether off-campus student speech may be treated as school speech), cert. denied, 136 S. Ct. 1166 (2016). The Ninth Circuit in *McNeil*, for example, identified three nonexclusive "relevant considerations": "(1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." 918 F.3d at 707 (citations omitted). One problem with such tests, however, is that they tend to conflate the inquiries into whether off-campus speech counts as "school speech" to begin with and whether, if so, that speech may be subject to discipline consistent with the First Amendment. For example, *McNeil*'s consideration of the "harm to the school"

seems more appropriate to answering the question whether discipline is warranted than the antecedent inquiry whether the speech counts as school speech in the first place. Another problem with multifactor tests is they generally leave both school officials and students with little guidance about how the various factors might apply or be weighted in particular circumstances.

Other lower courts have held that off-campus student speech may qualify as school speech if it is "targeted at [the school]" and "could reasonably be expected to reach the school." *S.J.W.* v. *Lee's Summit R-7 School District*, 696 F.3d 771, 778 (8th Cir. 2012) (citation omitted); see *Kowalski*, 652 F.3d at 573; see also Pet. Br. 13 (off-campus speech must be "directed at campus") (capitalization and emphasis omitted). If not further cabined, however, that test has the potential to be overbroad. Students spend much of their lives in school, or at school activities, or doing schoolwork at home; one might therefore naturally expect much of their speech to "target" the school environment in some fashion. Social-media messages griping about homework or exams undoubtedly are commonplace. And when it comes to online activity—especially salient during the current pandemic—many of students' contacts and social-media "friends" are likely to be fellow students, so anything they post online reasonably could be expected to "reach" the school.

2. As the discussion above illustrates, it is difficult to formulate a single universal rule that captures the discrete types of off-campus student speech that school officials might properly regard as school speech that can be disciplined when warranted—for example, to protect students and school personnel from threats and harassment, or to prevent substantial disruption of the

school's functions and programs, or to protect other students' rights from invasion, or to protect the school from danger—without being overbroad. That said, the "targeting" inquiry does capture a central element of workable standards that can meaningfully narrow the universe of off-campus student speech that school officials may treat as school speech. But it should not be sufficient for off-campus student speech merely to target the school or the school environment in some nebulous way, or to spark controversy or strong disagreements in the student body.

Instead, based on the types of cases that lower courts typically have confronted, and keeping in mind the interests and duties of school officials to educate students while protecting them from harm, a few discrete categories of off-campus student speech can be identified as "school speech" potentially subject to discipline by school officials: namely, off-campus student speech that (1) threatens or reasonably can be regarded as threatening to the school community, (2) intentionally targets specific individuals or groups in the school community (such as identifiable students and teachers), or (3) intentionally targets specific school functions or programs regarding matters essential to or inherent in the functions or programs themselves (such that the speech has the potential to substantially undermine the function or program). Under those focused categories, off-campus student speech that threatens violence to a student, a teacher, or the school would qualify as school speech, as would speech that harasses or bullies another individual. But day-to-day communication in the off-campus world that is not so targeted in a manner that

potentially could give rise to the sorts of harms described above should be well beyond the school's purview to discipline.

The inquiry in the particular categories described above necessarily will be circumstance-specific. One such specific circumstance, relevant to this case, is when the student's off-campus speech targets an extracurricular athletic program in which the student participates. Such speech might properly be regarded as school speech that is potentially subject to discipline by school officials if, for instance, it intentionally targets a feature that is essential to or inherent in the athletic program itself. Cf. *Doninger* v. *Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008) (upholding the disqualification of a student from running for class secretary based on off-campus speech demonstrating a lack of "good citizenship," in part because "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") (citation omitted).

For example, a social-media post lambasting the football coach's play-calling might qualify as school speech if written by a member of the football team, because such a message has intentionally targeted the coach and his competence, which could in certain circumstances substantially undermine respect for the coach's authority and team cohesion, both of which are essential components of a well-functioning football team and its educational mission. The coach might thus be justified in disciplining the player for such a post—for example, by benching him—if the speech sufficiently disrupted the team's activities. Likewise, a post suggesting that women are ill-suited to mathematics might

be deemed school speech and potentially subject to discipline if posted by a mathlete on a school math team. Or, as in *Doninger*, a student who posts vulgar, incendiary, and false information about the cancellation of a school event might be prohibited from running for student government on the ground that class representatives "should teach good citizenship" if they are to "represent fellow students." 527 F.3d at 52.

In all of those cases, the off-campus student speech would be of the type that intentionally targets individuals or targets activities regarding matters that are "inherent in the activities themselves." *Doninger*, 527 F.3d at 52. Importantly, such speech generally would not qualify as school speech if posted by someone not on the football team, or not a mathlete, or not running for student government, respectively. Outside criticism of a football team is not only common but expected, and cannot reasonably be regarded as comparable to the undermining of the distinct imperative of team cohesion or respect for the coach's authority among members of the team itself. Likewise, sexist remarks made off-campus by a non-mathlete not rising to the level of depriving other students of educational opportunities does not comparably undermine the math team's unity, and one not running for student government is under no special obligation to demonstrate "good citizenship" when off campus.

As noted, in the context of an athletic program, team cohesion and respect for the coach's authority are particularly important for the proper functioning and educational mission of the team. The Sixth Circuit has explained that "[a]lthough team chemistry is impossible to quantitatively measure, it is instrumental in determining a team's success." *Lowery* v. *Euverard*, 497 F.3d

584, 595 (2007), cert. denied, 555 U.S. 825 (2008). And "[m]utual respect for the coach is an important ingredient of team chemistry." *Ibid.* Those observations are consistent with academic research positing a "significant moderate to large relationship between cohesion and performance in sport." Albert V. Carron et al., *Cohesion and Performance in Sport: A Meta Analysis*, 24 J. Sport & Exercise Psych. 168, 176 (2002). "[T]rust in leadership allows the team members to suspend their questions, doubts, and personal motives and instead throw themselves into working toward team goals." Kurt T. Dirks, *Trust in Leadership and Team Performance: Evidence from NCAA Basketball*, 85 J. Applied Psych. 1004, 1009 (2000). Trust may be especially important in a sport like cheerleading, in which team members might have to catch and spot one another. Cf. Kristen L. Kucera & Robert C. Cantu, National Center for Catastrophic Sport Injury Research, *Thirty-Seventh Annual Report* 28 (Tbl. 4a) (Sept. 27, 2020), nccsir.unc.edu/reports (Report No. 2020-03) (showing that women's cheerleading appears to yield the largest number of traumatic catastrophic injuries of any high school sport save football).

It is thus reasonable to expect students who wish to join a team to understand that their off-campus speech might be treated as school speech potentially subject to discipline by school officials if that speech intentionally targets the team in a way that could undermine the program itself, for example by substantially undermining team cohesion or respect for the authority of the coach among the team. Cf. *Agency for International Development* v. *Alliance for Open Society International, Inc.*, 570 U.S. 205, 215 (2013). It is one thing for members of a team to be forced to endure, say, sustained and

profane criticism when it comes from members of the general student body—but quite another when it comes from a fellow teammate.

That is not to suggest that administrators of extracurricular programs have unfettered discretion to discipline student participants for their off-campus speech in ways that other school administrators do not. Such programs are an important and perhaps essential part of a student's educational experience, and generally are subject to the same statutory nondiscrimination requirements that apply to all other school and classroom activities. See 20 U.S.C. 1687 (explaining that the nondiscrimination provisions of Title IX apply to "all of the operations of" a school); 29 U.S.C. 794(b) (similar, under the Rehabilitation Act); 42 U.S.C. 2000d-4a (similar, under Title VI); cf. *Green* v. *County School Board*, 391 U.S. 430, 435 (1968). Nor may schools engage in retaliatory behavior against protected conduct by those who participate in sports or preclude the reporting of inappropriate behavior by a coach or teammates. Cf. *Seamons* v. *Snow*, 206 F.3d 1021, 1027 (10th Cir. 2000). Rather, the analysis above is simply a circumstance-specific application of the principle that when a student's off-campus speech intentionally targets a discrete school program in a manner that could substantially undermine the essential features of that program, the student should expect that speech to qualify as school speech potentially subject to discipline.

3. Determining whether certain off-campus student speech may be treated as "school speech" within the proper purview of school officials is a different issue from whether discipline of a student based on such speech would violate the First Amendment. Cf. *Morse*, 551 U.S. at 400-401 (first determining whether the

speech at issue was "school speech" before determining whether the regulation of that speech was constitutional). Just because off-campus student speech qualifies as school speech does not necessarily mean that any particular discipline for that speech would comport with the Constitution. For example, off-campus speech by student-athletes demanding that their coach resign or be fired might properly be deemed school speech (because it intentionally targets the coach on a topic that undermines respect for his authority among the team), but disciplining the students for that speech nevertheless might be unconstitutional, as for instance if the coach had affirmatively solicited their views on whether he should resign. Cf. *Pinard* v. *Clatskanie School District 6J*, 467 F.3d 755 (9th Cir. 2006) (involving a similar situation).

To determine whether particular discipline of school speech is constitutional, courts generally have applied this Court's four school-speech precedents. Cf. Pet. App. 55a-58a. Notably, as this Court has recognized, each of those four decisions adopted a different rule tailored to the circumstances of the case: substantial disruption in *Tinker*, vulgarity in *Fraser*, school-sponsored speech in *Kuhlmeier*, and promotion of illegal drugs in *Morse*. See *Morse*, 551 U.S. at 406 ("[T]he rule of *Tinker* is not the only basis for restricting student speech."); *id.* at 405 ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") (citation omitted). Here, for example, petitioner has suggested that if respondent's Snapchat posts qualify as school speech, her suspension from the cheerleading team was justified because the posts were substantially disruptive under *Tinker*. See Pet. Br. 30-31, 46. Other cases might

present situations more amenable to arguments under other precedents; for example, a football player who posted messages encouraging the use of illegal anabolic steroids in violation of team rules potentially could be disciplined under *Morse*.

Some principles distilled from this Court's school-speech precedents likewise are relevant to assessing whether school speech targeted at extracurricular athletic programs may be subject to discipline consistent with the First Amendment. Restrictions applied to school speech in that context should be reasonable and tied to safeguarding, or preventing the substantial undermining of, an essential or inherent feature of the program, in service of both the success of the program and the safety of its participants. It is relevant as well whether a student who objects to such conditions can forgo participation in that particular program. Cf. *Alliance for Open Society*, 570 U.S. at 214; *Vernonia*, 515 U.S. at 657 (recognizing that "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges" even beyond those intrusions "imposed on students generally"); *Lowery*, 497 F.3d at 597 ("[T]here is a difference between the way a school relates to the student body at large, and to students who voluntarily 'go out' for athletic teams.").

These considerations can be regarded as an application of the *Tinker* standard to student speech that is substantially disruptive in the particular context of an extracurricular sports program. These considerations also suggest that the First Amendment would afford greater, though still qualified, latitude for discipline imposed on the ground that the student's speech substantially undermines or disrupts the program in light of its

special demands on those students who choose to participate, when the discipline is limited to the program and does not extend beyond removal from that program. Cf. *Doninger*, 527 F.3d at 52; *Lowery*, 497 F.3d at 597. Of course, if the participant's speech rises to the level of threats or harassment that would justify discipline of any student in the school, the participant would not be immune from such discipline merely by virtue of the speech or conduct's having occurred in the context of the program.

C. This Court Should Vacate The Judgment Below

The court of appeals incorrectly held that off-campus student speech is categorically immune from discipline by public-school officials under this Court's "school speech" jurisprudence, and so it did not engage in any of the analysis set forth above. The United States takes no position on whether respondent's particular posts would fall within a category of off-campus student speech that may properly be regarded as school speech, or whether, if so, they were substantially disruptive under *Tinker* or otherwise actionable under specific principles this Court might articulate that would be applicable here. Those questions are best addressed in the first instance by the courts below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (explaining that this Court is "a court of review, not of first view"). Accordingly, this Court should vacate the judgment below and remand for further proceedings.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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