
In the Supreme Court of the United States

MAHANAY 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 NATIONAL WOMEN'S LAW CENTER,
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW, AND 30 ADDITIONAL ORGANIZATIONS AS AMICI
CURIAE IN SUPPORT OF RESPONDENTS
[ADDITIONAL AMICI ON INSIDE COVER]**

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WOMEN'S LAW PROJECT

* Denotes amicus curiae represented solely by the National Women's Law Center, Lambda Legal Defense and Education Fund, Inc., and the Lawyers' Committee for Civil Rights Under Law. All other amici curiae are also represented by Ropes & Gray LLP.

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In the Supreme Court of the United States

No. 20-255

MAHANoy AREA SCHOOL DISTRICT, PETITIONER

v.

B. L., A MINOR, BY AND THROUGH HER FATHER, LAWRENCE
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CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI CURIAE¹

The Court’s ruling on whether and to what extent schools have authority to regulate off-campus speech may have serious implications for students belonging to one or more historically marginalized groups—including girls and women; lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) students; students of color; and students with disabilities. On the one hand,

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

these students are especially vulnerable to bullying, harassment, and threats from their peers, which can interfere with their ability to access educational opportunities. If schools cannot regulate such speech simply because it occurs off campus, these students will be left unprotected from harmful educational environments. On the other hand, if schools have broad or unfettered authority to regulate off-campus speech—*i.e.*, to the same extent they may regulate on-campus speech—then students from these groups are more likely to face even greater rates of unwarranted school discipline. This could include discipline for speech on controversial topics or that may be labeled as “defiant” or “disrespectful.” Additionally, disciplinary decisions are susceptible to bias and discrimination based on sex (including sexual orientation and gender identity), race, and/or disability. As such, to further amici’s interest—ensuring that students from these groups can be safe and access equal educational opportunities without victimization by other students and not face disparate discipline for their own speech—amici organizations respectfully urge that the Court permit schools to respond to bullying, harassing, and threatening student speech wherever it occurs, without overextending that authority to reach off-campus speech merely because it may be perceived, in some nebulous way, to disrupt school activities.

The National Women’s Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of the legal rights and opportunities of women and girls and all who are harmed by sex discrimination. Since its founding in 1972, NWLC has focused on issues of importance to women and girls, including education, income security, child care, workplace justice, and reproductive rights and health, with an

emphasis on the needs of low-income women, women of color, and others who face multiple and intersecting forms of discrimination. In advancing the rights of women and girls in education, NWLC has advocated for policies to ensure that schools adequately prevent and respond to sexual harassment and assault. NWLC has participated in a range of cases before this Court to secure the rights of women and girls and others facing discrimination.

Formed in 1973, Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is the nation's oldest and largest nonprofit legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Throughout its history, Lambda Legal has worked to protect students from discrimination and harassment at school on the basis of sexual orientation and gender identity. Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBT people and people living with HIV.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combatting racial discrimination. The Lawyers' Committee's principal mission is to secure equal justice for all through the rule of law. Through its Educational Opportunities Project, James Byrd, Jr. Center to Stop Hate, and Digital Justice Initiative, the Lawyers' Committee works to ensure that all students, regardless of race, receive equal educational opportunities free of racism and discrimination and that

students and people of color are not singled out for their free speech and free expression, including their participation in racial justice protests. The Lawyers' Committee has participated in many cases as counsel of record or amicus curiae to protect the interests of racial and ethnic minorities.

Additional amici include organizations that are also committed to gender, LGBTQ, racial, and disability justice for students.

SUMMARY OF THE ARGUMENT

The off-campus speech² at issue in this case did not involve bullying, harassment, or threats. Nor did it involve political speech or student protest. However, the Court's ruling in this case could implicate both types of speech. Accordingly, amici urge the Court to ensure its ruling: (i) does not prevent schools from responding to off-campus speech that invades a student's rights to be safe and to access equal educational opportunities and (ii) does not impair a student's off-campus speech that is otherwise protected under the First Amendment. Such a ruling will ensure that students from historically marginalized groups who disproportionately face bullying and other harmful speech—such as girls and women, LGBTQ students, students of color, and students with disabilities—are protected, while also ensuring that students from one or more of these groups are not further

² Consistent with the decision below, this brief uses the term “off-campus speech” to mean “speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur.” Pet. App. 31a. Additionally, when using the term “speech,” without more, amici do not mean to take a definitive position as to whether such speech is protected speech, unprotected speech, or unprotected conduct.

subjected to discipline for exercising their free speech rights.

Schools' interests in protecting and preserving students' rights to be safe and to access equal educational opportunities are unchanged and remain paramount regardless of whether student speech occurs off campus. In particular, bullying, harassment, and threats are detrimental to students' physical and mental health and therefore interfere with these rights, especially for students from historically marginalized groups. Consequently, schools may—and, in many instances, must—respond to bullying, harassment, and threats, regardless of whether such speech occurs on or off campus, when such speech invades the rights of other students. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). And schools are best situated to protect these rights.

But schools' interest in addressing speech that may pose a “substantial disruption” of school activities, *Tinker*, 393 U.S. at 514, is significantly diminished off campus and is outweighed by students' First Amendment rights. The default under the Constitution is to preserve everyone's right to free speech—including students—and limits on expression must be appropriately justified and balanced. Because the threat of “disruption” to school activities by off-campus speech is necessarily more speculative and attenuated, the “substantial disruption” standard is insufficiently protective of First Amendment rights when applied to that speech.

Bestowing schools with overly broad authority to regulate off-campus speech risks school overreach. First, data show that students from historically marginalized groups are more likely to receive unwarranted

school discipline for allegedly “disruptive,” “defiant,” or “disrespectful” speech due to racial and other discrimination. Second, such overreach could chill and impair the rights of students to organize and protest school officials, policies, or practices, activities that are likely to occur through the internet and other off-campus communications. Protest almost always, by definition, causes “disruption.” That is its constitutionally protected purpose.

Therefore, regardless of whether this Court holds that *Tinker* or another standard applies to off-campus student speech, the Court should make clear that any restrictions to off-campus student speech only apply to prevent invasions of students’ rights to safety and access to equal educational opportunities, and not to regulate all potential substantial disruptions of school activities.

Here, B.L.’s speech did not invade the rights of other students to be safe and to access equal educational opportunities. Rather, the speech was the type of mildly offensive, profane, and insubordinate speech (typical of some fourteen-year-olds) that the First Amendment protects.

ARGUMENT

The Court should distinguish between student-on-student bullying, harassment, and threats and the allegedly disruptive speech at issue here. The former—wherever it occurs—must fall within a school’s authority to regulate, while the latter loses salience as one moves further away from the schoolhouse gates, thus warranting further protection. Drawing an appropriate line as to when a school may regulate off-campus speech will protect student activism, and the failure to do so would most

significantly impact students from historically marginalized groups because they disproportionately experience both bullying, harassment, and threats and excessive and unwarranted school discipline as compared to their peers.

I. TO PREVENT SIGNIFICANT HARM TO STUDENTS, PARTICULARLY THOSE FROM HISTORICALLY MARGINALIZED GROUPS, SCHOOLS MUST RETAIN AUTHORITY TO ADDRESS OFF-CAMPUS BULLYING, HARASSING, AND THREATENING SPEECH

It is critical that schools be able to respond to student-on-student bullying, harassing, and threatening speech because of the demonstrably negative effects such speech has on students—particularly students from historically marginalized groups. Thus, regardless of how the Court decides this case, it should not strip schools’ authority to regulate off-campus speech altogether.³ Rather, amici respectfully ask the Court to confirm that schools may—and, in many instances, must—respond to off-campus bullying, harassing, and threatening speech when such speech interferes with students’ safety or access to equal educational opportunities.

³ The Third Circuit explicitly noted that “off-campus student speech threatening violence or harassing particular students or teachers * * * would no doubt raise different concerns and require consideration of other lines of First Amendment law.” Pet. App. 34a.

A. The Harms Caused By Bullying, Harassing, And Threatening Speech On Students From Historically Marginalized Groups Are Significant

Bullying, harassment, and threats are a pervasive problem in our nation's schools. Studies examining bullying, a term that can encompass harassment and threats, show that over 50% of students report being bullied at some schools. See *Learning from Student Voice: Bullying*, YouthTruth Student Surv. (YouthTruth), <https://tinyurl.com/5bnu4ezt> (last visited Mar. 28, 2021); U.S. Dep't of Health & Hum. Servs., *What Is Bullying*, stopbullying.gov (July 21, 2020), <https://tinyurl.com/9wpsd3f6>. Bullying is not limited to school grounds: in 2019, 37% of middle and high school students reported being bullied online. See Justin W. Patchin, *Summary of Our Cyberbullying Research (2007-2019)*, Cyberbullying Rsch. Ctr., <https://tinyurl.com/ym7f97yv> (last visited Mar. 28, 2021). Likewise, off-campus, in-person bullying is not uncommon. See, e.g., Alex Newman, *Family Frustrated By 'Systemic' Bullying Of Reading Teen*, Patch (May 11, 2020), <https://tinyurl.com/85frc9fk> (student harassed and heckled by four classmates while walking to and from local ice rink); Leigh Remizowski, *Settlement for bullying victim's parents made public*, CNN (Dec. 28, 2011), <https://tinyurl.com/ukj42r8e> (student died by suicide after enduring verbal abuse on her way home from school).

Regardless of where bullying, harassment, or threats occur, victims can suffer from a deterioration in physical and mental health, including increased anxiety, depression, and post-traumatic stress; self-harm and suicidal thinking; and loss of self-esteem and confidence.

See U.S. Dep't of Educ., Off. for C.R., *Dear Colleague Letter Harassment and Bullying (October 26, 2010): Background, Summary, and Fast Facts* 1 (2010), <https://tinyurl.com/dh4wfr2y>. These impacts are also felt in school, where victims often experience lowered academic achievement and aspirations, feelings of alienation, and increased absenteeism. See *ibid.*

Bullying, harassment, and threats disproportionately impact students from historically marginalized groups, including girls and women, LGBTQ students, students of color, and students with disabilities. When students face bullying, harassment, or threats based on one or more of their identities, they are more likely to report damage to their physical and mental health.

Girls and Women. Approximately 56% of girls in middle and high school have experienced sexual harassment. See Catherine Hill & Holly Kearl, Am. Ass'n of Univ. Women, *Crossing The Line: Sexual Harassment at School* 2 (2011), <https://tinyurl.com/sx69zhwt>. Girls likewise report higher rates of cyberbullying than boys overall. See Justin W. Patchin, *2019 Cyberbullying Data*, Cyberbullying Rsch. Ctr., <https://tinyurl.com/7ye8cuwj> (last visited Mar. 28, 2021). And they are almost 50% more likely than boys to suffer sexual harassment online, including as recipients of unsolicited sexually explicit digital images. See Hill & Kearl 11; Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, Pew Rsch. Ctr. (Sept. 27, 2018), <https://tinyurl.com/yuetfu9t>. Verbal or written sexual harassment often escalates into sexual violence, and this threat makes sexually harassing speech all the more

harmful.⁴ Girls and women are subject to high rates of sexual violence: in a 2017 national survey of more than 1,000 girls ages 14-18, more than one in five (21%) reported being kissed or touched without their consent. See Kayla Patrick & Neena Chaudhry, Nat'l Women's L. Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1, 3 (2017), <https://tinyurl.com/yswxksvj>.

This sex-based bullying and harassment has a clear impact on girls' health and ability to access equal educational opportunities. For example, in *Kowalski v. Berkeley County Schools*, Shay, a high school student, was the subject of a MySpace.com webpage created by a peer called "S.A.S.H" ("Students Against Sluts Herpes"). 652 F.3d 565, 567 (4th Cir. 2011), cert. denied, 565 U.S. 1173 (2012). Approximately two dozen classmates posted pictures and comments ridiculing Shay for allegedly having herpes. *Id.* at 567-568. Shay missed school to avoid her peers. *Id.* at 568. In another example, a ninth-grade girl in Texas dropped to 92 pounds and withdrew from school after a classmate posted an edited picture of her next to a "blobfish" on Instagram and another used a fake online account in her name to ask boys for nude pictures. See Cierra Shipley, *Lorena ISD family speaks out about bullying after little help from district*, KXXV (Dec. 17, 2020), <https://tinyurl.com/3hhzth5p>.

While all students may encounter sexual harassment by their peers, girls are more likely to report that

⁴ The First Amendment does not protect harassment, see, e.g., *United States v. Osinger*, 753 F.3d 939, 944 (9th Cir. 2014) (rejecting First Amendment challenge to conviction for violation of federal cyberstalking law), and, of course, does not protect sexual violence.

harassment led to trouble sleeping, not wanting to attend school, or changing the way they commute. See Hill & Kearl 3. Girls of color and students from lower-income households are more likely to report negative impacts from sexual harassment, such as missing school, skipping extracurricular activities, or finding studying harder. See *id.* at 23. Among girls ages 14-18 who experienced sexual violence, 68% of survivors reported having difficulty concentrating or staying focused at school, 30% were absent from school because they felt unsafe at or on their way to school, and 25% faced exclusionary school discipline, which is often the result of behavior associated with experiencing trauma at an early age. See Patrick & Chaudhry 8.

LGBTQ Students. In a 2019 national survey of LGBTQ students, 69% reported verbal harassment at school based on sexual orientation and 57% based on gender expression. See Joseph G. Kosciw et al., GLSEN, *The 2019 National School Climate Survey*, at xix (2020), <https://tinyurl.com/yhe8waf4>. Over 85% of LGBTQ students reported hearing peers use various pejorative terms relating to sexual orientation or gender identity. See *id.* at xviii-xix. And a 2015 survey of more than 27,000 transgender adults found that 54% who were out or perceived as transgender in elementary or secondary school had been verbally harassed. See Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 4, 11 (2016), <https://tinyurl.com/u5s9yc94>.

As for off-campus harassment, 45% of LGBTQ students said that they experienced harassment or threats within the past year via text message, email, or social media. See Kosciw et al. 30. LGBTQ middle and high

school students consistently report experiencing bullying online at almost double the rate of non-LGBTQ students. See Sameer Hinduja & Justin W. Patchin, Cyberbullying Rsch. Ctr., *Bullying, Cyberbullying, and LGBTQ Students* 3-4 (2020), <https://tinyurl.com/ce4etxj7>.

Bullying and harassment like this have significant, often tragic, consequences. LGBTQ students bullied based on sexual orientation and gender identity are more likely to skip class and have lower grade point averages, lower self-esteem, and higher rates of depression. See Kosciw et al. at xx-xxi. More than one in six (17.1%) LGBTQ students in one survey changed schools because they felt unsafe or uncomfortable at their prior school. See *id.* at xviii. In Missouri, a classmate told a bisexual fourteen-year-old after he got off the school bus to “do everyone a favor and hang himself.” Andra Bryan Stefanoni, *School lawsuit alleging bullying ends with settlement*, Joplin Globe (July 14, 2015), <https://tinyurl.com/yxzzdzp4>. Two days later, the boy hanged himself. See *ibid.* In Tennessee, a sixteen-year-old student died by suicide after classmates outed him as gay by posting screenshots of text messages between him and another boy on Instagram and Snapchat. See Kim Wynne, *Family blames cyberbullying for Coffee Co. teen’s suicide*, WKRN (Sept. 28, 2019), <https://tinyurl.com/2ebp2mxf>.

Students of Color. The U.S. Department of Education’s Office for Civil Rights (OCR) has found that 23% of bullying allegations in schools in the 2015-16 academic year were based on race. See U.S. Dep’t of Educ., Off. for C.R., *2015-16 Civil Rights Data Collection: School Climate and Safety* 5 (2019), <https://tinyurl.com/dtvm>

cskh. Further, while Black students constituted 15% of total student enrollment, they represented 35% of students harassed or bullied because of their race. See *id.* at 6. Asian American students are also frequent targets of bullying and harassment at school. See *Victims of Hate Speech*, Child Trends (Dec. 27, 2018), <https://tinyurl.com/4r9a5k9d> (finding that Black and Asian students are about 50% more likely than white students to be targets of hate speech at school).

A 2020 study showed that children bullied due to race or ethnicity face greater health risks than their peers. See Mariah Xu et al., *Racial and Ethnic Differences in Bullying: Review and Implications for Intervention*, 50 *Aggression & Violent Behav.* 1, 15 (2020). “Bias-based” bullying is associated with depressive symptoms, poor self-esteem, self-harm, suicidal ideation, and substance abuse. See *id.* at 15. The effects of bullying in childhood reverberate throughout the lives of individuals and their peers, families, and communities. See *id.* at 17.

Off campus, students of color are especially susceptible to threats of violence. The news is replete with stories of students threatening to kill their Black and Latinx classmates and other classmates of color via videos and posts on social media. See, e.g., Minyvonne Burke, *Teen arrested for alleged threats targeting black, minority students at a Charlottesville school*, NBC News (Mar. 22, 2019), <https://tinyurl.com/v58axfc4>; Jeffrey Collins & Martha Waggoner, *Parents weren't told of students' racist video, threats*, AP (Aug. 6, 2019), <https://tinyurl.com/3prb6nfp>; Mará Rose Williams, *A threat to kill black students at Fort Osage High School led about 200 to protest*, Kan. City Star (Apr. 26, 2017),

<https://tinyurl.com/2jbxfe7y>. The COVID-19 pandemic has also triggered a new wave of off-campus bullying and harassment directed at Asian American students. See, e.g., Claire Wang, ‘*You have Chinese Virus!*’: 1 in 4 Asian American youths experience racist bullying, report says, NBC News (Sept. 17, 2020), <https://tinyurl.com/d52bh984>.

Students with Disabilities. Students with disabilities are likewise disproportionately impacted by bullying. For example, autistic children are three times more likely to be bullied than their peers. See U.S. Dep’t of Health & Hum. Servs., *Bullying and Children and Youth with Disabilities and Special Health Needs* 1, <https://tinyurl.com/c4njepzm> (last visited Mar. 28, 2021). Approximately 83% of adults who stuttered as children reported being bullied, and 71% reported being bullied at least once a week. See *id.* at 2. Children with attention deficit or hyperactivity disorder, epilepsy, or medical conditions that affect their appearance (such as cerebral palsy, muscular dystrophy, and spina bifida) are also more likely to suffer from bullying. See *id.* at 1.

Such harassment often occurs off campus. In a 2016 survey of around 25,000 high school students near Boston, students with disabilities were almost twice as likely as their non-disabled peers to be victims of bullying online. See Shai Fuxman et al., Ruderman Family Found., *The Ruderman White Paper on Social Media, Cyberbullying, and Mental Health* 2, 6 (2019), <https://tinyurl.com/58j4m3ts>. Cyberbullying victims with disabilities were about 50% more likely to report depression and suicidality than victims without disabilities. See *id.* at 2. Off-campus bullying targeting students with disabilities

occurs in person as well. In *C.R. v. Eugene School District 4J*, for example, a group of seventh-grade boys began following two sixth-grade students with disabilities home from school. See 835 F.3d 1142, 1146 (9th Cir. 2016), cert. denied, 137 S. Ct. 2117 (2017). The boys bullied and sexually harassed the younger students, calling them vulgar fake names, asking them if they watch pornography, and making other sex-related comments, leaving one of the targeted students feeling unsafe. See *ibid.*

* * *

The effects of bullying, harassment, and threats disproportionately fall on students from one or more of these historically marginalized groups and cause disproportionate impacts on their health, well-being, and access to equal educational opportunities that schools must be able to address. And the groups identified here are not exhaustive, as religious students (including religious minorities, such as Muslim, Sikh, and Jewish students) and atheist students, for example, also suffer disproportionately from bullying, harassment, and threats. See, e.g., Dalia Mogahed & Erum Ikramullah, Inst. for Soc. Pol’y & Understanding, *American Muslim Poll 2020: Amid Pandemic and Protest* 23-24 (2020), <https://tinyurl.com/2ct2cjvx> (reporting that children in 51% of Muslim families faced religious-based bullying in school); Sikh Coalition, “*Go Home, Terrorist*”: *A Report on Bullying Against Sikh American School Children* 4 (2014), <https://tinyurl.com/2xw3cckp> (finding that over 50% of Sikh students in the four states surveyed experienced school bullying); Keri Brenner, *Marin Jewish students targeted in online attacks*, *Marin Indep. J.* (Sept.

15, 2020), <https://tinyurl.com/hptuv8fs> (describing an Instagram account, created by an anonymous student, asking followers to contribute to list of Jewish classmates).

B. Schools Are The Appropriate Actors To Address Student-On-Student Off-Campus Bullying, Harassment, And Threats

Schools are not only best suited but often legally required to respond to off-campus student-on-student bullying, harassment, and threats. *First*, this speech generally arises out of relationships that begin and evolve in the educational environment. Bullying and harassment often aim to alter the social hierarchy among the student body, elevating the status of the bully or harasser and diminishing the victim's standing. See Robert Faris et al., *With Friends Like These: Aggression from Amity and Equivalence*, 126 Am. J. Socio. 673, 698-700 (2020). Moreover, off-campus bullying, harassment, and threats tend to migrate onto campus: the vast majority of cyberbullying victims report further in-person bullying at school. See YouthTruth; see also Tracy E. Waasdorp & Catherine P. Bradshaw, *The Overlap Between Cyberbullying and Traditional Bullying*, 56 J. Adolescent Health 483, 486 (2015). Schools have an interest in intervening to stop these harmful behaviors early to protect the learning environment.

Second, as explained above, student-on-student bullying and harassment, whether on campus or off campus, have demonstrably negative (at times, deadly) effects on victims' physical and mental health that inevitably affect their access to equal educational opportunities; schools' power to respond to such speech is inextricably linked to victims' ability to be safe and access equal educational opportunities.

Third, federal and state laws already recognize schools' obligations to address student-on-student bullying and harassment. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, prohibit bullying and harassment based on sex (including sexual orientation and gender identity), race, color, national origin, and disability. See, *e.g.*, *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (Title IX); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408 (5th Cir. 2015) (Title VI); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 995-996 (5th Cir. 2014) (Rehabilitation Act); cf. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (holding that discrimination based on sexual orientation and gender identity is sex discrimination under Title VII). OCR has clarified that schools violate these statutes by failing to address certain forms of student-on-student bullying and harassment. See U.S. Dep't of Educ., Off. for C.R., *Dear Colleague Letter: Harassment and Bullying* 1 (Oct. 26, 2010), <https://tinyurl.com/yp98yfcv>. OCR also clarified that "even when bullying or harassment is not a civil rights violation, schools should still seek to prevent it in order to protect students from the physical and emotional harms that it may cause." *Id.* at 2. Additionally, courts have long recognized that the Constitution's equal protection guarantee imposes obligations on schools to address identity-based bullying and harassment, including in cases that involved a record of off-campus harassment. See, *e.g.*, *DiStiso v. Cook*, 691 F.3d 226, 232, 240-241 (2d Cir. 2012) (including race-based harassment at private birthday

party); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1133, 1137 (9th Cir. 2003) (including sexual orientation-based harassment in parking lot); *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1243, 1250-1251 (10th Cir. 1999) (including sexually harassing phone calls to victim's home).

State laws also impose obligations on schools to protect their students from bullying. All fifty states and the District of Columbia have statutes requiring schools to address such speech on campus. See Pet. Br. 31-34, 32 n.3, 33 n.5. Half of all states require schools to address certain types of bullying that occur off campus, and no state prohibits schools from responding to such off-campus speech. See *ibid.* Schools have created and enforced policies to satisfy these obligations. See *id.* at 33 n.4, 34 n.6. And increasingly, states are applying their anti-discrimination laws equally to online and brick-and-mortar settings. See David Brody & Sean Bickford, Lawyers' Comm. for C.R. Under L., *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce* 2-3 (2020), <https://tinyurl.com/3jhzf82e>.

Lastly, neither parents nor criminal law enforcement can or should exclusively carry the burden of responding to off-campus bullying, harassment, and threats that impair safety or access to equal educational opportunity. Parents may be unwilling or unable to prevent their children from harming other students. See Melissa K. Holt et al., *Parent/Child Concordance about Bullying Involvement and Family Characteristics Related to Bullying and Peer Victimization*, 8 J. Sch. Violence 42, 47, 54 (2009) (finding that only 11% of parents thought their child had bullied others even though 31%

of students admitted doing so). And criminal law enforcement cannot prevent and redress the harms of bullying, harassment, and threats on students' ability to access equal educational opportunities in the same way that schools can. For example, schools can change class, lunch, and bus schedules to keep a harasser or bully away from a victim during the school day and can adjust a victim's schoolwork or grades to avoid academic penalties for bullying, harassment, or threats. Schools can also offer mental health services to address the effects on student victims or provide educational services to harassers and bullies to prevent future incidents. Additionally, people from historically marginalized communities often fear reporting incidents to law enforcement due to concern about retribution or past negative encounters with law enforcement. See, *e.g.*, James et al. 188-189.

* * *

For all these reasons, a strict location-dependent approach that would deprive schools of any authority to regulate off-campus speech is unworkable. Regardless of how the Court resolves this case, schools should be able to respond to student-on-student bullying, harassment, and threats even when they occur away from school.⁵

⁵ As respondents note, First Amendment doctrine permits regulation of threats of violence, harassment, and bullying. Resp. Br. 24-28. Such speech is not protected, regardless of whether *Tinker* applies.

II. SCHOOLS MAY REGULATE OFF-CAMPUS STUDENT SPEECH TO PROTECT THE RIGHTS OF OTHER STUDENTS, BUT NOT TO PREVENT PURPORTED DISRUPTION OF SCHOOL ACTIVITIES

When students speak off campus, their First Amendment interests are no different from when they speak on campus. But the school's interests vary significantly. In both scenarios, the school has a strong interest in protecting its students from bullying, harassment, and threats, which are likely to jeopardize safety and to impair access to equal educational opportunities. But while a school has an interest in maintaining order on campus to execute its pedagogical mission, that interest diminishes when speech occurs outside the school environment. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 423-424 (2007) (Alito, J., concurring) (noting that while a school may have a heightened interest in addressing speech that threatens students' physical safety, such authority cannot sweep in all student speech that merely interferes with a school's educational mission). Consequently, while the First Amendment permits schools to intervene in off-campus student speech to protect students' safety and access to equal educational opportunities, it does not permit schools to regulate off-campus student speech merely to avoid "substantial disruption" of school activities.

This Court has repeatedly recognized that schools' authority to regulate student speech off campus cannot be coextensive with their authority to regulate student speech on campus. In *Bethel School District No. 403 v. Fraser*, the Court held that schools may punish students for vulgar and lewd on-campus speech. 478 U.S. 675, 685 (1986). However, the Court subsequently noted that

“[h]ad [the student in *Fraser*] delivered the same speech in a public forum outside the school context, it would have been protected.” *Morse*, 551 U.S. at 405. Similarly, the Court in *Hazelwood School District v. Kuhlmeier* authorized schools to regulate student speech in school-sponsored expressive activities, see 484 U.S. 260, 271-273 (1988), “even though the government could not censor similar speech outside the school.” *Morse*, 551 U.S. at 405-406 (quoting *Kuhlmeier*, 484 U.S. at 266). In other words, the “special characteristics of the school environment” that justify the regulation of on-campus student speech, *id.* at 408 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)), do not justify the same level of authority off campus. And the extent of schools’ authority to regulate off-campus speech must account for students’ robust First Amendment rights. See *Tinker*, 393 U.S. at 506-507, 511-513.

Under *Tinker*, schools may regulate on-campus student speech either (i) when it causes or is reasonably forecast to cause a substantial disruption of school activities or (ii) when it invades the rights of others. See 393 U.S. at 509, 513. If the Court applies *Tinker* to off-campus speech, it should make clear that only the second prong extends beyond the schoolhouse gates. After all, schools retain a strong interest in protecting students from speech that invades their rights to be safe and to access equal educational opportunities—such as bullying, harassment, and threats—wherever such speech occurs. However, preventing “substantial disruption” of school activities, on its own, should not justify schools’ regulation of off-campus speech. Too broad an authority over off-campus speech would unnecessarily stifle student speech and invite further unwarranted discipline of students from historically marginalized groups.

A. The Demonstrably Harmful Effects Of Bullying, Harassment, And Threats On Students And The Educational Environment Authorize, And In Many Instances Require, Schools To Regulate This Type Of Off-Campus Speech

Under the second prong of *Tinker*, a school's interest in protecting the rights of students exists regardless of whether invasion of those rights occurs off or on campus. As such, the Court should clarify that this prong applies to off-campus bullying, harassment, and threatening student speech.

The second prong of *Tinker*, which allows schools to regulate student speech that "inva[des] * * * the rights of others," 393 U.S. at 513, authorizes schools to protect students' rights to be safe in the school environment and to access equal educational opportunities. As to the former, schools' "heightened obligation to safeguard students whom it compels to attend" justifies reducing students' constitutional rights in other contexts in order to address "behavior that threatens * * * the safety of schoolchildren." *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring). So too here: schools must be able to take action to protect their students from speech that threatens their safety. See *Tinker*, 393 U.S. at 508 (explaining that schools may regulate speech that "colli[des] with the rights of other students to be secure"). As to the right to access equal educational opportunities, this Court has long noted that "education is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It has also recognized "the lasting impact of its deprivation on the life of the child" and "the significant

social costs” when children cannot access an education. *Plyler v. Doe*, 457 U.S. 202, 221 (1982); see *ibid.* (explaining that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all”). Schools must, therefore, have authority to protect students’ access to equal educational opportunities.

As circuit courts have recognized, bullying, harassment, and threats are the quintessential types of speech that invade the rights of other students. See *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 29 (1st Cir. 2020) (bullying); *C.R.*, 835 F.3d at 1152-1153 (sexual harassment); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (violent threat); *Kowalski*, 652 F.3d at 573-574 (sex-based bullying). Such speech does more than merely offend the listener, which is not enough to satisfy this prong of the *Tinker* test. See *Norris*, 969 F.3d at 29 n.18; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.). Rather, as discussed in Section I.A, *supra*, bullying, harassment, and threats may directly interfere with the victims’ right to access equal educational opportunities and their right to be physically, emotionally, and psychologically safe in the school environment. Bullying, harassment, and threats therefore qualify as speech that schools may regulate as invading the rights of other students.

Determining when speech crosses the line from merely offensive to bullying, harassing, threatening or otherwise interfering with the rights of other students is a context-dependent inquiry. Relevant factors include the age of the students involved, see *C.R.*, 835 F.3d at 1153; the frequency of the speech, see *id.* at 1152; the medium of the speech, see *Kowalski*, 652 F.3d at 573;

whether the message was directed at a specific student or group of students, see *Wynar*, 728 F.3d at 1072; and whether the speech was reasonably likely to instill fear in other students for their physical, mental, or emotional safety, see *C.R.*, 835 F.3d at 1152; *Wynar*, 728 F.3d at 1072. The expression of an unpopular viewpoint does not, by itself, invade the rights of students who disagree. See *Tinker*, 393 U.S. at 508-509.

Crucially, unlike merely disruptive speech, schools' strong interest in regulating speech that invades the rights of other students (including bullying, harassment, and threats) exists regardless of whether it occurs in a classroom, over Facebook, or on the walk home from school. Off-campus bullying, harassing, and threatening speech typically affects the victims' health and safety on campus and their access to equal educational opportunities. These interests must override the speaker's right to utter bullying, harassing, or threatening speech off campus.

Circuit courts that have permitted schools to regulate off-campus bullying, harassment, and threats have recognized this logic. Although many have analyzed this issue under the substantial-disruption prong of *Tinker*, they have found "disruption" in part based on the risk of physical or psychological harm to the victims or interference with the victims' access to equal educational opportunities (*e.g.*, having to miss school). See, *e.g.*, *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 710 (9th Cir. 2019) (*per curiam*); *Wynar*, 728 F.3d at 1071; *Kowalski*, 652 F.3d at 574. These decisions only reinforce the importance of allowing schools to regulate off-campus speech to protect students from physical and mental

harm that interferes with their access to equal educational opportunities, not merely to avoid substantial disruption of school activities.

Thus, schools should be permitted to regulate off-campus student speech only that invades the rights of other students. Such speech necessarily includes bullying, harassment, and threats, which interfere with the victims' rights to be safe in the school environment and to access equal educational opportunities.

B. School Oversight Of Off-Campus Speech For “Substantial Disruption” Threatens The Right To Protest, Would Result In Disparate Discipline, And Is Not Justified

Schools have a limited interest in regulating off-campus speech that administrators might consider “substantially disruptive” to their own activities but that does not invade the rights of others (*i.e.*, through bullying, harassment, or threats). Schools' limited interest in preventing the more remote chance of disruption by off-campus speech is outweighed by students' robust First Amendment rights. A student's vulgar outburst in the middle of math class is quite different from a student's vulgar post on social media. And even if off-campus speech actually disrupts school activities (*e.g.*, class discussion interrupted in response to social media posts), the school may address such disruptions without regulating off-campus speech.

Furthermore, the categories of off-campus speech that a school may deem “disruptive” are ill-defined and overbroad. Some schools may consider “disruptive” political speech, coming-out speech, or speech supportive

of historically marginalized groups questioning the status quo. For example, schools have punished or threatened to punish students for allegedly “disruptive” speech promoting the Black Lives Matter movement. See, e.g., Taylor Gordon, *Students Suspended Over ‘Black Lives Matter’ Signs Garner Support from Across the Globe*, Atlanta Black Star (May 20, 2015), <https://tinyurl.com/2e8emdkj> (students carried signs with pro-racial justice phrases while walking down runway at school fashion show); Joe McLean, *Bradford Middle student told to remove Black Lives Matter mask*, News4Jax (Sept. 16, 2020), <https://tinyurl.com/2uutu73w> (student forced to remove face mask reading “I can’t breathe” and “Black Lives Matter”); *“She told me to take it off,” Deer Creek student dress coded for “Black Lives Matter” shirt*, KFOR (May 3, 2017), <https://tinyurl.com/fs9xbpry> (principal threatened to discipline students who wore black shirts to support Black Lives Matter). Schools have also punished students expressing pro-LGBTQ messages for engaging in purportedly “sexual” and “disruptive” speech. See, e.g., *Hatcher ex rel. Hatcher v. Fusco*, 570 F. App’x 874, 875-876 (11th Cir. 2014) (per curiam) (student remained silent in class for pro-LGBTQ Day of Silence); *Young v. Giles Cnty. Bd. of Educ.*, 181 F. Supp. 3d 459, 461-462 (M.D. Tenn. 2015) (student wore t-shirt reading “Some People Are Gay, Get Over It”). Additionally, schools may deem religiously motivated speech to be too “disruptive” in some instances. See, e.g., Mike Carter, *Student punished for preaching sues Everett school district*, Seattle Times (Nov. 20, 2014), <https://tinyurl.com/777kvdkn> (student handed out religious pamphlet at school and preached at school bonfire event).

Allowing schools to regulate off-campus speech merely because it is “disruptive” risks excessively restricting students’ First Amendment rights by leaving limited fora in which they are able to express themselves freely.⁶ Because an assessment of what is disruptive to the school environment often relies on the reaction of others, it also risks giving classmates an impermissible “heckler’s veto” over the opinions a student may express. See *Reno v. ACLU*, 521 U.S. 844, 880 (1997); cf. *Tinker*, 393 U.S. at 508 (recognizing that schools must permit students to express unpopular views even if the speech “may start an argument or cause a disturbance”).

Schools have similarly invoked the risk of “disruption” to justify regulating off-campus student speech that is merely vulgar, insubordinate, or mildly offensive. See, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 43-44 (2d Cir. 2008) (finding foreseeable risk of substantial disruption where student protested postponement of student event on an independent blog). One school in Minnesota gave a detention to a student who posted on social media about an adult school monitor that she hated “a Kathy

⁶ Petitioner and certain amici curiae supporting petitioner seek to limit the reach of *Tinker*’s substantial-disruption prong by arguing that *Tinker* should only apply to certain off-campus speech, such as speech that the student directs at the school environment, Pet. Br. 27, or speech that bears a sufficient nexus to the school, Nat’l Educ. Ass’n Amicus Br. 18. These arguments implicitly concede the problems with extending the substantial-disruption prong to off-campus speech, but neither limitation suffices to protect students’ First Amendment rights. Much of students’ off-campus speech will likely be “directed at” the school environment in some way because such speech may involve their classmates. And because students’ lives often revolve around their schools, much of their off-campus speech arguably would satisfy a “nexus” test. As such, both proposed limitations fail to effectively limit *Tinker*.

person at school because [Kathy] was mean to” her. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F. Supp.2d 1128, 1133 (D. Minn. 2012) (alteration in original). Even though some may consider this type of speech to lack value, students should be able to question authority away from campus without fear that their schools will punish them for it. See *United States v. Stevens*, 559 U.S. 460, 479 (2010) (“Most of what we say to one another lacks * * * serious value[], but it is still sheltered from government regulation.”).

Finally, and importantly, permitting schools to regulate off-campus student speech based solely on its potential for substantial disruption would likely exacerbate the disparate impact that school discipline has on students of color, LGBTQ students, and students with disabilities, with compounded impacts on girls of color.⁷

In the 2013-14 academic year, Black students represented 15.5% of public school students but 39% of students who were suspended. See U.S. Gov’t Accountability Off., GAO-18-258, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* 12-13 (2018), <https://tinyurl.com/py9fwnnv>. Although approximately 17.4 million more white students than Black students attended public schools that year, nearly 176,000 more Black students than white stu-

⁷ In their amicus brief, Advancement Project and Juvenile Law Center similarly explain that giving schools broad authority over off-campus student speech would exacerbate the disparate discipline faced by students of color, students with disabilities, and LGBTQ students, which results in decreased student engagement, lower academic performance, and higher rates of school pushout. See Advancement Project & Juv. L. Ctr. Amicus Br. Section II.

dents were suspended. See *id.* at 13. In the 2015-16 academic year, Black secondary school students lost 103 days of instruction due to suspension per 100 students enrolled, more than four times the rate of their white classmates. See Daniel J. Losen & Paul Martinez, Ctr. for C.R. Remedies, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* at vi (2020), <https://tinyurl.com/4eysphh3>. The disparity is even starker for Black girls, who are five times more likely to be suspended than their white peers and miss seven times as much instruction. See *ibid.*; Kayla Patrick et al., Nat'l Women's L. Ctr., “. . . And They Cared”: *How to Create Better, Safer Learning Environments for Girls of Color 2* (2020), <https://tinyurl.com/2pvc9jfh>.

Students with disabilities and LGBTQ students also experience disproportionate rates of school discipline. In the 2017-18 academic year, students with disabilities lost 41 days of instruction due to suspension per 100 students enrolled compared to only 19 days of instruction per 100 students enrolled for students without disabilities. See Daniel J. Losen et al., Ctr. for C.R. Remedies, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies 25* (2021), <https://tinyurl.com/4sa8hzk7>. Black students with disabilities miss three times as many days of classroom instruction due to suspension than white students with disabilities. See Daniel J. Losen, Ctr. for C.R. Remedies, *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities 2* (2018), <https://tinyurl.com/3hra9vu7>. A survey of the 2012-13 academic year found that 40% of LGBTQ students experienced school discipline, includ-

ing 45% of transgender students. See GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth* at x (2016), <https://tinyurl.com/ktk6r2>. This statistic rose to 47% for Black LGBTQ students and 48% for LGBTQ students with disabilities. See *ibid.*

Schools' disparate discipline of students belonging to one or more historically marginalized groups is often tied to biases based on race, sex (including sexual orientation and gender identity), and disability, as well as stereotypes about who are "good" or "bad" students. Several studies show that Black students receive harsher punishments than white students for committing the same or similar conduct offenses. See, e.g., Shoshana N. Jarvis & Jason A. Okonofua, *School Deferred: When Bias Affects School Leaders*, 11 Soc. Psych. & Personality Sci. 492, 495-496 (2020); Jayanti Owens & Sara S. McLanahan, *Unpacking the Drivers of Racial Disparities in School Suspension and Expulsion*, 98 Soc. Forces 1548, 1570 (2020). Students of color, especially girls of color, are also more likely to be disciplined for minor subjective offenses that are susceptible to biases, such as being "defiant," "loud," "disobedient," or "disrespectful." See Patrick et al. 9; Don Dailey, *School Discipline and Race in Alabama*, Pub. Affs. Rsch. Council of Ala. (July 1, 2020), <https://tinyurl.com/yxd93as3>. And teachers are more likely to observe Black students closely for misbehavior than white students—even in cases involving preschool children. See Walter S. Gilliam et al., Yale Child Study Ctr., *Do Early Educators' Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?* 7 (2016), <https://tinyurl.com/2ytx7zuf>.

A program implemented by a school district in Alabama demonstrates how broad authority to regulate off-campus speech would exacerbate disparate discipline of students from historically marginalized groups. The district hired a former FBI agent to review social media for student posts that violated its code of conduct. See Sharada Jambulapati, *Story from the Field: Children of Color Pushed Out of Alabama Schools over Social Media Posts*, S. Poverty L. Ctr. (July 9, 2015), <https://tinyurl.com/6nm9ab5v>. Of the fourteen students expelled based on social media posts during the 2013-14 school year, twelve were Black, even though only 40% of the district's students were Black. See *ibid.* When Black students tried to explain their posts at disciplinary hearings, school officials dismissed their explanations based on biased stereotypes about the Black community. See *ibid.* For example, officials suspended a Black student who posted a photo on Instagram wearing a sweatshirt with an image of her deceased father on the assumption that the sweatshirt was gang attire. See *ibid.*

The Court should be cautious about granting school administrators authority to regulate off-campus speech for something as nebulous as “substantial disruption.” The majority of school discipline incidents likely will never go before any sort of review panel or legal process, so the rule the Court adopts must be clear and circumspect.

Accordingly, the Court should not permit schools to regulate off-campus speech only because it allegedly causes or indirectly risks a substantial disruption: schools have a reduced interest in regulating off-campus speech as compared to on-campus speech where the im-

pact is more direct. This limited interest is far outweighed by the needs to protect students' First Amendment rights and to prevent excessive and unwarranted discipline of students from historically marginalized groups.

III. THE FIRST AMENDMENT PROTECTS B.L.'S OFF-CAMPUS SPEECH BECAUSE IT DID NOT BULLY, HARASS, OR THREATEN OTHERS

Petitioner violated B.L.'s First Amendment rights when it punished her for her Snapchat posts (Snaps). There is no question that the Snaps qualify as off-campus speech: B.L. posted them away from school grounds in her personal time and did not use school resources in creating them. J.A. 24-25. Moreover, B.L.'s Snaps did not invade the rights of other students. She did not direct the Snaps at specific students (or anyone); the Snaps were not part of a recurring pattern of targeted speech; the Snaps were not likely to instill fear in other students; and the Snaps disappeared in short order. J.A. 20-21, 23, 26. The Snaps were far from the type of harassing, bullying, or threatening speech that schools may regulate off campus.

Instead, B.L.'s Snaps were—at worst—the type of mildly offensive, profane, and insubordinate speech that must remain outside the scope of schools' regulatory authority off campus. The First Amendment protects B.L.'s right to engage in such speech.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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