No. 20-255

In the
Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,
Petitioners,

V.

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

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

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BRIEF OF *AMICUS CURIAE* LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus Life Legal Defense Foundation (Life Legal) is a California not-for-profit public interest and educational organization. The mission of Life Legal is to give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms.

For over 30 years, Life Legal has defended the free speech rights of those anti-abortion advocates who seek to educate and persuade using signs, leaflets, and one-on-one communication. Some advocates focus their educational outreach on high school students, as those young people approach the age demographic that obtains the most abortions in the United States.

While engaged in peaceful, orderly free speech activity on the sidewalks adjacent to high schools, Life Legal's clients frequently encounter hostile school administrators who eagerly brand their speech "disruptive" precisely because students are interested, will pause to take a leaflet, and may continue their discussions about the content later at school. These clients find that, more often than not when they are challenged or face hostility, it's not from students, but from school personnel who

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[1] This brief was wholly authored by counsel for amicus Life Legal Defense Foundation. No party or counsel for any party made any financial contribution toward the preparation or submission of the brief. Counsel of record for the parties Have provided written consent to the filing of this brief.

overreact to "outsiders" giving information to "their" students.

For this reason, Life Legal is concerned about any precedent-setting case where the parameters of "disruption" of school activities, by students or non-students, is at issue.

SUMMARY OF THE ARGUMENT

This case has drifted from its moorings. Petitioner Mahanoy Area School District (MASD) responded to Respondent B.L.'s use of profanity directed at an extracurricular athletic activity by suspending her from participation in that activity. When sued, MASD defended its decision on those grounds. A divided panel of the Third Circuit turned the case into something much bigger by issuing an unnecessary and unnecessarily broad ruling on a question of constitutional law.

While the Third Circuit's decision unfortunately leaves behind it a trail of uncertainty, the consequences are not as dire as MASD and their amici predict. Rather than deciding an abstract constitutional issue that even MASD's amici hedge with many qualifications and conditions, this Court should dismiss the writ as improvidently granted.

ARGUMENT

I. THIS COURT SHOULD NOT DECIDE A QUESTION THAT WAS NOT LITIGATED BELOW.

The sole question presented in the petition is "[w]hether this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus."

However, that was not how the case was presented below. At the first hearing in the district court, a hearing on B.L.'s motion for a preliminary injunction, counsel for Mahanoy Area School District (MASD) stated "[T]his is not a *Tinker* case." Memorandum, ECF No. 12, 3:17-cv-1734, (M.D.Pa. Oct. 5, 2017) at 9.

MASD never claimed that B.L.'s speech disrupted the work or discipline of the school itself. Its defense to B.L.'s lawsuit was targeted at four facts: 1) B.L., a minor student, had used profanity; 2) the profanity was communicated to, directed at, and received by individuals involved in the extracurricular activity of cheerleading; 3) the discipline imposed on B.L. was based on rules she had agreed to, applicable specifically to extracurricular activity; and 4) the punishment imposed involved solely her participation in that activity.

MASD's original defense of its actions was squarely based not on a claim of disruption of the school, but on the use of profanity in the context an extracurricular athletic activity. The district relied on *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), not *Tinker*. Mem. of Opp. to Pltf.'s Mot. for Prel. Inj., ECF No. 9-1, 3:17-cv-1734 (M.D.Pa. Oct. 1, 2017) at 1 ("*Tinker* does not apply for several reasons. First, it does not apply to school-related profanity. Second, it does not apply to removals from extracurricular activities.")

The facts adduced below clearly would not support an attempt by MASD to justify its action on the basis of an actual or threatened disruption of the school. As the district court noted, "Coach Luchetta-Rump [who suspended B.L. from the team] testified, at both the preliminary injunction hearing and at her deposition, that she punished B.L. for profanely referencing cheerleading, not because of any possibility of disruption. (*See* Doc. 40-13 at 47:2-11; 53:10-24; 62:8-11). She would have punished B.L.—under the same Rules—if B.L.'s Snap read: 'Cheerleading is f***ing awesome.' (*Id.* at 47:7-11)." Pet. App. 74a (cleaned up).[2]

The district court acknowledged but was ultimately dismissive of MASD's argument that schools should have greater latitude in dealing with the speech and conduct of students in relation to extracurricular activity, particularly athletic

[2] Based on this record, it seems safe to assume that, had B.L. expressed her displeasure with math using similar profane language, she would not have been disciplined even if the Snaps had come to the attention of her math teacher.

activities: "But there is nothing unique about athletics that would justify a broader application of *Tinker* or *Fraser* to a student athlete's off-the-field profanity. . . . The interest that a school or coach has in running a team does not extend to off-the-field speech that, although unliked, is unlikely to create disorder on the field. . . . Coaches cannot punish students for what they say off the field if that speech fails to satisfy the *Tinker* or *Kuhlmeier* standards." Pet. App. 70a, 71a, 74a.

On appeal, MASD again stressed the significance of the particular content of B.L.'s speech (profanity by and to minors) and the context of participation in an extracurricular athletic activity, which had its own rules and expectations to which B.L. had agreed as a condition of participation. It again stressed that the sanction imposed on B.L. affected solely her participation in that extracurricular activity. Brief for Appellant, Case No. 19-1842, Doc. 003113278124, at 10.

A divided panel of the Third Circuit ignored these unique factors and rushed to decide a broad question not before it: whether, under *Tinker*, school officials can ever regulate off-campus student speech that substantially disrupts school work or invades the rights of others.[3] In the Third Circuit's view, *this* question was the "threshold question," not the question of whether agreement to an extracurricular code of conduct is a valid waiver

[3] This Court has already decided that *other* civil authorities may regulate or restrict disruptive expression off campus "in the immediate environs" of schools. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ordinance prohibiting making noise on sidewalks adjacent to schools).

of students' First Amendment rights, as the school district originally argued, or indeed whether *Tinker*'s "substantial disruption" is the proper standard in the context of school officials regulating voluntary extracurricular activities, on or off campus.

The dissenting judge strongly disagreed with the majority's approach of "promulgating a new constitutional rule based on facts that do not require us to entertain hard questions such as these." Pet. App. 48a. Beyond the unnecessary nature of the new rule, the admitted absence of evidence of any disruption in the facts of the case before it produced a decision lacking "guidance on how its new rule is to be applied." *Id*. at 44a.

Many of MASD's amici, although disagreeing with the Third Circuit's ruling that *Tinker* does not allow schools to discipline student for off-campus speech, could only endorse a qualified "yes" to the question as presented in the petition for certiorari. Brief of National Association of Pupil Services Administrators, *et al*., at 4 ("Schools need to be able to discipline students for off-campus speech, particularly online speech, that impacts the school community, at least some of the time and under some circumstances"); Brief of First Amendment and Education Law Scholars at 9 (First Amendment permits regulation of student online speech "only in a narrow, well-defined category of circumstances"); Brief of the United States at 21 ("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"); Brief of Cyberbullying Research Center, *et al.*, at 18 ("Amici will leave it to the parties and other stakeholders to argue what rules should apply to off-campus speech generally. But there must be a clear and unmistakable pronouncement that school officials may take reasonable measures to curtail peer bullying").

Finally, the question decided by the Third Circuit, and now placed before this Court, may not in fact resolve this case. If this Court rules that *Tinker* allows school regulation of off-campus speech, on remand MASD would still have to show substantial disruption at the school. But MASD concedes it cannot make that showing – unless the extracurricular context matters. Conversely, if this Court decides that *Tinker* alone does *not* allow school regulation of disruptive off-campus speech, that holding will not resolve the question of whether regulation of student participation in extracurricular activities is bounded by *Tinker*'s "substantial disruption" standard or some other standard yet to be enunciated.[4]

The Court should dismiss the writ as improvidently granted. Leaving the Third Circuit's decision undisturbed entails less danger than

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[4] Cf. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (*Tinker* standard of disruption need not be met in order to restrict or punish profane, vulgar, and offensive speech); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (school may regulate speech perceived to bear school's imprimatur); and *Morse v. Frederick*, 551 U.S. 393 (2007) (school may prohibit or penalize speech promoting illegal drug use).

would this Court deciding the question inaptly presented, based on facts where this Court's decision will leave the central issue litigated below, and possibly the outcome of the case, unresolved. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) (dismissing writ as improvidently granted where "deciding this case would require us to resolve a constitutional question that may be entirely hypothetical").

II. THE THIRD CIRCUIT'S OPINION, IF LEFT UNDISTURBED, NEED NOT LEAD TO A PARADE OF HORRIBLES.

MASD and its amici predict a tidal wave of unchecked threats, harassment, bullying, and general chaos if the Third Circuit's decision is not overturned. Such fears are overblown.

A. Threats Are Not Protected Speech Either On or Off Campus.

MASD and its amici decry the Third Circuit ruling as leaving school officials helpless to protect teachers, administrators, and students from threats and even physical harm. This is a straw man.

The Brief of the United States (at 15-16) claims that the Third Circuit's decision "could undermine school's efforts to respond to threats to the safety of students and staff," citing cases of students whose speech or writings led school staff to fear that the student would commit violent acts

against students or teachers. However, in these situations, expulsion or suspension is not imposed to *punish* the student for *speech*, but to protect others from the actions of a student who appears to present a physical danger to others. Presumably, the school would take the same prophylactic measures (investigation possibly followed by expulsion or suspension) even if the student had never openly expressed those thoughts, but instead, e.g., exhibited a fascination with school shootings, started to dress and wear his hair like a well-known school shooter; began carrying a large gym bag rather than a book bag; withdrew from friends; and frequently remained after school, testing which doors were locked. *Cf.* Brief of National Education Association at 9 ("A report by the U.S. Secret Service analyzing 41 incidents of school violence at K-12 schools found that *all attackers exhibited concerning behaviors*, and most communicated some intent to attack") (emphasis added).

Conversely, a school would not impose a punishment such as after-school detention or loss of senior off-campus lunch privileges in response to what it perceived as a genuine threat of violence expressed by a student. Cases of threatened school violence simply play no part in a discussion of the limits of *Tinker* vis-à-vis First Amendment rights.[5]

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[5] In *Morse v. Frederick*, 551 U.S. 393 (2007), Justice Alito suggested that *Tinker*'s "substantial disruption" standard does play a role in preventing school violence, but specifically in the context of *speech* that *may cause* violence. *See* 551 U.S. at 425: "But due to the special features of the school environment, school officials must have greater authority to intervene before speech *leads to* violence. And, in most

Indeed, the Brief of the United States says as much: "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." Brief of the United States at 15. Exactly.

As to MASD's hypothetical student "shout[ing] at classmates from a megaphone on the sidewalk" right off campus (Pet. Br at 5), this Court has already decided that civil authorities may regulate or restrict disruptive conduct off campus "in the immediate environs" of schools. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding ordinance prohibiting making "any noise or diversion which disturbs or tends to disturb the peace or good order" of schools while on adjacent sidewalks). Students and non-students alike are subject to these laws.[6]

Finally, the Third Circuit's decision did not foreclose school officials from imposing disciplinary

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cases, *Tinker*'s 'substantial disruption' standard permits school officials to step in before actual violence erupts." (Alito, J., concurring; emphasis added.) However, in the cases cited by amici United States and NEA, the student speech did not cause or "lead to" the violence. Rather, the speech, in conjunction with other indicia, served as a warning that the student was contemplating violence.

[6] MASD oddly treats *Grayned* and *Tinker* as if mutually exclusive, such that a ruling that *school authorities* may not penalize students for off campus speech would operate to shield students from municipal enforcement of generally applicable statutes. Pet. Br. at 4 (warning of "speaker-based discrimination" favoring students if decision is upheld). There is no legal basis for this assumption.

measures to deal with off-campus threats and harassment. Pet. App. 34a-35a. While the court "disagree[d] with the *Tinker*-based theoretical approach that many of our sister circuits have taken" with respect to threatening or harassing speech by students, the court took "no position on the bottom-line power to discipline speech in that category." *Id*. at 35a.

B. School Discipline Is Not the Only Tool for Dealing with Speech that Disrupts the Functioning of Schools or Impinges on the Rights of Others.

The unspoken assumption underlying the dire predictions of MASD and many of its amici about the Third Circuit's decision is that school discipline is the only method of dealing with problems such as bullying, sexual harassment, stalking, and other expression-related means by which students disrupt schools and violate the rights of others. But such is clearly not the case.

Much of the more extreme conduct cited by MASD and its amici can also be the subject of criminal and/or civil liability. Laws against stalking, assault, and cyberbullying can be brought to bear. Civil actions for defamation and temporary protective orders could also play a role in curbing disruptive off-campus speech. Moreover, just as the rising phenomenon of cyberbullying led to the passage of laws against it, so too might new laws be passed to address new forms of disruptive and harmful expression. And of course, parents have an

important role in student discipline. No rule prevents a school from calling parents into the mix.

CONCLUSION

"For adjudication of constitutional issues, concrete legal issues, presented in actual cases, not abstractions, are requisite." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation and internal quotation marks omitted). The petition in this case presented an abstract question about whether schools can discipline students for off-campus speech that causes a substantial disruption. The writ should be dismissed as improvidently granted.

Respectfully submitted,

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