No. 20-255

In The Supreme Court of the United States

**MAHANOY AREA SCHOOL DISTRICT,**
*Petitioner,*

v.

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

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

# AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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## QUESTION PRESENTED

1. Whether *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which construes the First Amendment as imposing *limits* on public school authority to restrict student speech *on school premises*, in fact somehow *authorizes* a public school to assert disciplinary control over student expression that is *neither* on campus *nor* part of a school activity.

2. Whether a minor's broadcast of a crude expletive to other minors is protected First Amendment speech?

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## INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before this Court as counsel for parties, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *Morse v. Frederick,* 551 U.S. 393 (2007), addressing a variety of issues.

ACLJ attorneys have represented public school students facing the restriction or denial of their free speech rights. The imbalance of age and authority between student and teacher or administrator make the mere assertion of free speech rights daunting for most public school children. Moreover, public schools, like colleges and universities, face a constant temptation to impose a suffocating blanket of political correctness, institutional image protection, or both, upon the educational atmosphere. Given these circumstances, the vigorous defense of free speech rights in the public schools is a matter of considerable importance.

That said, the First Amendment is not a licence to broadcast foul language to minors. The ACLJ therefore files this brief, not in support of the disgruntled cheerleader's particular vulgar and immature outburst, which the First Amendment does not protect, but rather

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[1] The parties in this case have consented to the filing of this amicus brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

in defense of the larger constitutional principles at stake.

## SUMMARY OF ARGUMENT

This Court should reject petitioner school district's assertion of general authority over student speech that is not on school grounds or part of any activity (such as sports, field trips, or online learning) over which the school has supervisory authority. *Tinker* construes *limits* on school authority to restrict student speech; it does not *empower* schools to restrain speech, much less any speech that has an adverse impact on school operations. There are ample other authorities, from parents to law enforcement, available to address minors' misbehavior. Moreover, a rule that only targeted *students* for off-campus bad acts that disrupt school operations would be arbitrarily underinclusive, as non-students can inflict identical harms. Only in the narrow context of a team sport might it make sense for a school to take broader issues of character and team morale into account.

In any event, the student's free speech claim here must fail. There is no First Amendment right for a minor to broadcast obscene language and gestures to other minors.

## ARGUMENT

Both sides of this case have the constitutional law wrong. This Court should reject the petitioner school district's assertion of police power to superintend the

private lives of students and others in the name of remedying anything that adversely affects a school. This Court should also reject the respondent student's claim of a free speech right to blast foul language out to other minors.

## I. *Tinker* Protects Student Speech; It Does Not Authorize Schools to Police Off-Campus Speech that Is Not Part of Any School Program.

This Court should reject the petitioner school district's assertion of plenary authority to supervise the lives of students (and others) as to anything that may adversely affect school operations.

### A. The First Amendment does not affirmatively authorize a school to police verbal misbehavior outside a school context.

As discussed *infra* § II, the First Amendment does not protect a minor's broadcasting of profanity to other minors, and B.L.'s free speech claim must fail for that reason.[2] But petitioner Mahanoy Area School District makes a far more aggressive argument, an argument

[2] After B.L. used Snapchat to send a message with foul language and an obscene gesture, she sent a second "snap" with neither of these elements, but also evincing disrespect for the coaches' decision not to select her for varsity cheer. Pet. App. 5a. It is unclear whether or how much the second snap factored into the school district's subsequent discipline of B.L. *Compare id.* at 5a (focus on first snap alone) *with* Pet. at 6 (referencing both snaps).

this Court must reject. When launching her obscenities, B.L. was *not* on school grounds, *not* part of a school trip or after-school activity, and *not* part of a virtual school program. Nor did she inject her Snapchat tantrum into the school environment by showing it to other students in any of these contexts. Hence, the government-run school had no general[3] authority to police B.L.'s expression in the first place. The school district's attempt to leverage *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), into a grant of power to superintend nonschool behavior must fail.

*Tinker* famously declared that students do not "shed their constitutional rights . . . at the schoolhouse gate." 393 US. at 506. The obvious premise for that statement is that students *do* keep their rights *outside* the schoolhouse gate.

> Students . . . out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students . . . may not be confined to the expression of those sentiments that are officially approved.

*Id.* at 511.

The school district treats *Tinker* as if it were an authorization of school power. It is not. *Tinker* construed the First Amendment, which is a *limit* on governmental authority. To be sure, *Tinker* recognized boundaries on

[3] The specific context of team sports is discussed *infra* § I(D).

the *scope* of that limitation. But those boundaries do not represent affirmative conferrals of government power.

That a school may *in a school context* restrict expressive behavior which would "impinge upon the rights of other students," *Tinker*, 393 US. at 509, does not mean it may police misconduct by or against other students generally much less police "disruptive" behavior by non-student "members of the public, " Pet. Br. at 4 . A neighbor, by playing loud music all evening, may hinder a student's ability to do homework[4] or even to get rest necessary for a school exam. A fellow student may distract a classmate at home with endless text messages, over the student's objection. An envious peer may deliberately report a theatrically talented student's misbehavior to that student's parents to get the student actor grounded and so miss tryouts for a school play. Poor parenting, or the disruption arising from live-in guests, may severely hamper a child's in-school performance. All of these may produce "substantial disruption" of the school environment, at least as to the affected students. But *Tinker*, as an interpretation of First Amendment limits on school authority, does not positively bestow disciplinary authority on schools to police their students' lives in nonschool contexts. "School officials do not possess absolute authority over their students," *id.* at 511, even *in* school. *A fortiori*, they do not enjoy such power *outside* the school context.

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[4] That a school has authority to assign homework, Pet. Br. at 20, does not mean it has the authority to regulate the student's home environment or behavior.

### B. The school district's proposed limits on its authority are feeble and problematic.

The school district here argues that the school authority it seeks to exercise is limited: "no off-campus speech is within schools' ambit unless students direct their speech at the school community." Pet. Br. at 4. This is not a serious limit. First, the school district has already acknowledged that it wants the power to regulate not just students, but "even members of the public" whose speech allegedly "impairs school functions." Pet. Br. at 4. And second, "direct[ing] speech at the school community" is a hopelessly vague and overbroad standard that amounts in practice to a restriction on speech the school finds sufficiently undesirable. Hammering out the contours of such a "directed at" test would far more likely "spawn years of litigation," Pet. Br. at 12, than the straightforward question whether the activity in question is under school supervision.[5]

Were schools to enjoy such general police power over *anything, anywhere*, that "substantially disrupts school activities or interferes with other students'

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[5] The school district betrays the immense breadth of its claimed power when it uncritically describes a historical basis for schools "disciplin[ing] offenses committed out of school hours and off school grounds, which *have a tendency to influence* the conduct of other pupils while in the school room, [or] to set at naught the proper discipline of the school." Pet. Br at 14 (emphasis added; internal quotation marks and citation omitted). The school district only acknowledges a subsequent limitation, from *Tinker*, over its authority to address student *speech*. Pet. Br. at 17. Yet negative (and positive) influences come from far more than just speech.

rights," Pet. Br. at 10, school authority would be enormous. Schools could supplement or supplant parents[6] in disciplining students and even non-students, Pet. Br. at 4 ("even members of the public") for a host of off-campus misconduct, and even for conduct that is not necessarily wrongful but which has a disruptive impact on school operations. In addition to the examples mentioned above, schools could punish students for reporting teacher misconduct to their families, on the theory that the report even (or perhaps especially) if 100% accurate provoked protests or annoying parent inquiries. Clever or amateur student satires of teachers or administrators posted online might, like any satire, adversely impact the target's work.[7] Schools could stifle the off-campus expressive activities of students whose notoriety as public advocates "substantially interferes" with student focus in the classroom, so long as they invoked a viewpoint neutral rationale. Schools could retaliate against any off-campus efforts to organize protests, strikes, etc., for whatever cause, in view of its adverse impact on school operations a result the school

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[6] Remarkably, the school district explicitly invokes *in loco parentis* authority over "off-campus speech." Pet. Br. at 10. *See also id.* at 13 ("coterminous authority with parents").

[7] The school district cites in its support a case "uph[olding] a school's suspension of high schoolers who convinced the local newspaper to run a poem parodying the school's rules," because the poem found its way into the homes of many classmates. Pet. Br. at 15. *But see* Pet. Br. at 17 (admitting that *Tinker* "heightened the showing that school must make").

expressly embraces, Pet. Br. at 29, 46.[8] And again, the school asserts similar authority to deal with "members of the public" as well. Pet. Br. at 4.

Contrary to the school district's arguments, schools are not like a "military base" and students are not like soldiers. *Compare* Pet. Br. at 25-26. Nor are students employees of the school whom the school can fire for bad character. *Compare* Pet. Br. at 23, 26. *See Tinker*, 393 U.S. at 511-12 (forcefully rejecting Spartan military model for education). *But see infra* § I(D).

### C. The school district's assertion of general power over student lives is unnecessary and poorly tailored to its concerns.

To be sure, many of the concerns the school district identifies are valid and important. The remedy, however, is not to give the public schools general police power over anything that adversely affects school operations. Such a power would be overbroad and would ignore the availability of existing alternative means of addressing student and non-student misconduct.

The school district objects to confining its authority under a "territorial approach," Pet. Br. at 4-5, 12, 35, 46. But *Tinker*'s "schoolhouse gate" is not a *physical* line but rather a *jurisdictional* line the school context sweeps more broadly than mere property boundaries. Not only in-class activities, but also online schooling, extracurricular clubs, school sports, and field trips all

[8] A school's ability to take action against any walkout or boycott that disrupts school activities does not require a concomitant power to suppress or punish related speech.

fall within a school's purview and may be regulated consistent with *Tinker*'s interpretation of the First Amendment *because in all of those contexts the school is the supervising authority*. *See* 393 U.S. at 512-13 ("in the cafeteria, or on the playing field, or on the campus during the authorized hours").[9] Likewise, a student may invite school discipline by injecting outside matter into the school environs. Thus, a student who shows a classmate a disruptive or offensive message on a cell phone[10] does not escape school authority just because the message may have been generated off-campus or by nonschool actors, any more than passing a note during class is exempt because the note was composed at home over the weekend. Moreover, off-campus misconduct can provide crucial context for the imposition of discipline for in-school conduct, as when off-campus bullying colors a student's treatment of a classmate on school grounds or in online instruction.

Importantly, *schools are not the only resource for addressing student misconduct*. "The child is not the mere creature of the State." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). To the contrary, the "primary

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[9] Conversely, the mere fact that an event occurs on school grounds does not make it something subject to school superintendence (aside from neutral user regulations). *See* Pet. Br. at 44 (use of playground on weekends, third-party meeting held in school room). Public schools may certainly regulate the time, place, and manner of after-school use of school facilities, but schools may not censor the speech of such users. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[10] *E.g., J.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 645, 807 A.2d 847, 852 (Pa. 2002) ("J.S. . . . showed [threatening and offensive website he had created] to another student at school").

role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).[11] Aside from parents, other adults coaches on nonschool sports teams, scout leaders, religious leaders, and others will be available as well to tamp down on the misbehavior of minors. And of course, should the misconduct rise to the level of criminal or civil violations, such as cyberbullying,[12] invasion of privacy, revenge porn, or stalking, *see, e.g.*, Pet. Br. at 22 ("crank calls," bullying, and harassment), there are ample law enforcement remedies already in place or capable of enactment. Furthermore, schools need not retain students whose speech suggests they represent a genuine physical threat to other students.[13]

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[11] This case ought never to have been filed. The proper remedy for dealing with respondent B.L.'s "absurd and immature antic," *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting), would have been for school officials to advise her parents, who could have addressed the matter as they saw fit. Once B.L.'s parents learned of her tirade, they could have themselves grounded her from the cheer squad and made her apologize. That they chose instead to sue the school and make this a federal case, despite the mild discipline the school imposed, is a sorry reflection on our contemporary culture.

[12] *See* Cyberbullying Research Center, "Bullying Laws Across America," *available at* https://cyberbullying.org/bullying-laws.

[13] *E.g., Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (school suspended student who discussed shooting fellow students); *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) (school suspended student who had sent messages to another student talking about shooting various classmates).

Moreover, the school district's focus on *student* misbehavior is bizarrely narrow, illustrating exactly why schools are not the proper authority to address broader problems. The school district cites a litany of egregious hypothetical misdeeds by students, Pet. Br. at 36-37, 39, 42-44. But claiming that *school* "authority to address pernicious off-campus speech is *essential* to safeguarding the wellbeing of the Nation's more than 50 million public schoolchildren," Pet. Br. at 37 (emphasis added), makes little sense. Schools do not enjoy police authority over the universe of non-students. It is therefore irrational to act as if schools, and only schools, can address the misconduct the school district identifies. This would mean that the *same misdeed*, with the *same pernicious impact* on school operations, can be remedied or not depending on whether or not the perpetrator is a *current student*. A *former* student, a student at a *different* public or private school (or home school), and non-students generally are certainly capable of bullying, harassment, encouraging students to kill themselves, targeting black students with racist photos, or spreading revenge porn, to use the school district's parade of (genuine) horribles, Pet. Br. at 36-37. By placing the onus of enforcement on school officials, the school district's approach would miss all of these other malefactors. Standard law enforcement, by contrast, faces no such arbitrary limit. Likewise, while students might post online instructions how to evade drug testing or metal detectors, how to cheat on tests, or how to hack the school computer system, Pet. Br. at 39, former students and other persons not currently enrolled at that particular school can do the same. In

fact, a simple online search will yield existing third-party websites containing this very information, plus instructions on how to prank teachers.

The question is not whether a particular minor's behavior should be punished, but instead whether *government schools* must be the ones to tackle the problem.[14] B.L.'s crude, juvenile use of Snapchat on her own time and outside of school activities is a perfect example of the kind of misbehavior that should be addressed by nonschool authorities, ideally parents.

### D. A different rule might obtain in the specific context of team sports, where cohesion and morale are particularly important.

In the lower court the school district argued that the *specific context of team sports* justified the school's discipline of B.L.'s speech. Pet. App. 23a n.10. Under this much narrower contention, team members are treated analogously to employees, as to whom an employer can insist upon team cohesion and properly consider extramural messaging that may undermine the morale and chemistry of the work environment. This argument has considerable force and does not entail

[14] The school district, Pet. Br. at 18, invokes *Grayned v. City of Rockford*, 408 U.S. 104 (1972), in support of school authority to regulate off-campus speech. The citation is doubly inapt. First, *Grayned* involved disruptive *noise*, not messages. Of course government may address excessive noise that disrupts any place, not just schools. Second, *Grayned* did not involve *school* discipline of the protester, but local government law enforcement – precisely the appropriate authority for such police power matters.

giving the school supervisory authority over students' private lives in general. Rather, the school could only properly consider communications (or misconduct) by *team members* (not other students, even if they voice the same gripes). Moreover, discipline could only address disrespectfulness or other misconduct that undermines team morale and chemistry, and the discipline would need to be limited to the team context (e.g., suspension from team events). As the Third Circuit noted,

> Here, B.L. does not dispute that her speech would undermine team morale and chemistry: She openly criticized the program and questioned her coaches' decisionmaking, causing a number of teammates and fellow students to be "visibly upset" and to approach the coaches with their "concerns," J.A. 7 (citations omitted). She did so, moreover, in the context of a sport in which team members rely on each other for not only emotional and moral support, but also physical safety.

Pet. App. 23a n.10. The school district, however, does not appear to pursue this quite limited assertion of supervisory authority before this Court. Instead, the school district argues for much more far-reaching, unjustifiable powers over student speech.

* * *

This Court should reject the petitioner school district's assertion of general power to impose discipline for speech conducted off-campus, outside of any curricular or extracurricular school activity, not on a

field trip, and not otherwise subject to school superintendence. To that extent, the decision below was correct.

## II. The Student's First Amendment Claim Here Nevertheless Fails Because the First Amendment Does Not Protect a Minor's Broadcast of an Expletive to Other Minors.

The Third Circuit was correct to hold that *Tinker* does not empower government-run schools to discipline a minor's misuse of social media just because that minor is a student who addresses a school activity. Nevertheless, B.L.'s First Amendment challenge[15] fails for a different, independent reason: her speech is not protected by the First Amendment.

The student's vulgar rant,[16] had it happened within the school's proper jurisdiction, would clearly *not* enjoy First Amendment protection.

> The First Amendment guarantees wide freedom in matters of *adult* public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. *See Cohen v. California*, 403 U.S. 15 (1971). It does not follow,

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[15] B.L. brought three counts in her complaint. Pet. App. 6a; Cplt. ¶¶ 66-68. The first invokes the First Amendment against the discipline the school imposed. The second and third counts challenge the school's cheer policy, invoking the First Amendment and the Due Process Clause, respectively.

[16] This section addresses only B.L.'s first snap. *See supra* note 2.

> however, that simply because the use of an offensive form of expression may not be prohibited to *adults* making what the speaker considers *a political point*, the same latitude must be permitted to *children in a public school*. . . . [T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.

*Bethel School Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (emphasis added; internal quotation marks and citation omitted). Hence, had B.L. uttered or electronically transmitted her vulgarities in the classroom (including online instruction), on school grounds, in the chat box of a school's virtual class, or at a school activity (such as a cheerleading event), whether on or off campus, the school's imposition of sanctions for using foul language and an obscene gesture would trigger no First Amendment concerns.

In fact, even outside the school context, B.L.'s utterance is not protected. As this Court explained in *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942),

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no

> essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 [(1940)].

*Chaplinsky*, 315 U.S. at 571-72 (footnotes omitted). B.L.'s expletive here was simply a crude insult of the sort that aims to incite a hostile reaction. The whole point of using foul language instead of "I'm sick of" or "The heck with" would seem to be to offend.[17] While *Cohen v. California* immunized an adult's profane printed political expression on a jacket against criminal prosecution, the *Fraser* case clarified that this ruling does not necessarily apply to students addressing other students, as here. 478 U.S. at 682.[18] "Indeed, the

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[17] "The term . . . is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2303 (2019) (Alito, J., concurring); *id.* at 2307 (Breyer, J., concurring in part and dissenting in part) ("scientific evidence suggests that certain highly vulgar words have a physiological and emotional impact that makes them different in kind from most other words").

[18] As the federal government has previously noted, the constitutional rights of students do not always enjoy the same

(continued...)

fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive . . . to others." *Bethel School District*, 478 U.S. at 683 (internal quotation marks and citation omitted).

Even for adults, at the most such "references to excretory and sexual material surely lie at the periphery of First Amendment concern," *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 522 (2009) (internal quotation marks and citation omitted). *See also Young v. American Mini Theatres*, 427 U.S. 50, 70 (1976) ("society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate"); *Iancu v. Brunetti*, 139 S. Ct. 2294, 2303 (2019) (Alito, J., concurring) ("vulgar terms . . . play no real part in the expression of ideas").

Moreover, this Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), held that indecent speech including precisely the expletive B.L. employed may be punished when broadcast to minors. As this Court emphasized, context matters. As in *Pacifica*, the speech at issue here is "accessible to children," *id.* at 749 in fact was directed at them, being "visible to about 250 'friends,' many of whom were [fellow] students," Pet. App. 5a. Further, the message was transmitted through social media, which have "a uniquely pervasive

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[18] (...continued)
sweep as those of adults. School drug testing, limits on vulgar speech, and procedural due process requirements, for example, can be valid against students when they would be struck down as to adults. *See* Br. for United States, *Morse v. Frederick*, No. 06-278, at 9 n.1 (U.S. Jan. 16, 2007) (listing cases).

presence," *Pacifica*, 438 U.S. at 748, and arguably dominate the lives of today's minors.[19]

> This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children . . . even though the material in question [may be] entitled to First Amendment protection with respect to adults. And . . . all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico*, 457 U.S. 853 . . . (1982). These cases recognize the *obvious concern* on the part of parents, and school authorities acting *in loco parentis*, *to protect children especially in a captive audience from exposure to sexually explicit, indecent, or lewd speech*.

*Bethel School Dist.*, 478 U.S. at 684 (emphasis added; citations omitted); *see also id.* at 684-84 (explicitly connecting this line of cases with the indecent words in *Pacifica*).

While *Morse v. Frederick*, 551 U.S. 393 (2007), opined that the student's suggestive "metaphor" in *Bethel* "would have been protected" had it been delivered

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[19] *See, e.g.,* Pew Research Center, "Teens, Social Media & Technology 2018" (May 31, 2018) ("Fully 95% of teens have access to a smartphone, and 45% say they are online 'almost constantly'").

"in a public forum *outside the school context*," *id.* at 405 (emphasis added), this dicta is wholly consistent with the proposition, *supra* § I, that government schools have no general power to reach out into students' private lives. Unlike the present case, *Bethel* involved no crude words or obscene gestures. As the author of the majority opinion in *Morse* recently observed, laws targeting "vulgarity and profanity" aim at terms "that offend because of their *mode* of expression," not "the *ideas* they convey." *Iancu*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part and dissenting in part) (emphasis added). *Morse* did not purport to overrule *Pacifica* as to such words, and the subsequent *Fox TV* ruling is inconsistent with any such reading of *Morse*'s dicta. Were *Cohen* and *Morse* taken to have enshrined the crudest of expletives within the First Amendment, even for persons addressing minors, there would be little if anything that could be done to fend off foul language in any context where more polite fare would be protected, from prime-time TV to strangers spewing expletives in the presence of children to hotheads breaching the peace with profanity. *Cf. Liebenguth v. Connecticut*, U.S. No. 20-1045 (Feb. 22, 2021) (denying certiorari where lower court upheld conviction for breach of peace for using "f" word and "n" word to parking enforcement officer).

The present case does not even test the limit of this Court's precedents on the matter. *See Fox TV*, 556 U.S. at 529 ("we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives *may not* be forbidden. To the contrary, we explicitly left for another day whether 'an occasional expletive' in 'a telecast of an Elizabethan

comedy' could be prohibited. [*Pacifica*,] 438 U.S., at 748-750") (emphasis added). To borrow from this Court's *Young* opinion, "few of us would march our sons and daughters off to war to preserve the citizen's right to" drop the "'f' bomb" or "flip the bird."

This is not a case where a minor utters a dirty word in private, or discusses the academic significance of expletives with a friend. And this is certainly not a case of adults using salty language among themselves. Rather, this case involves a blanket spewing of foul language, used as an offensive, provocative expletive, intentionally broadcast to minors in a medium pervasively accessible to those minors.[20] If an adult stranger could constitutionally be barred from firing a profanity-laced message to hundreds of minors, thereby "enlarg[ing] [each] child's vocabulary in an instant," *Pacifica*, 438 U.S. at 749, then it cannot be that the venerable right to free speech protects such crudity here.[21]

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[20] Of course, were the school to invoke an aversion to coarse language in a *viewpoint-based* manner – punishing curse words in disfavored contexts but not favored contexts – this would raise the "realistic possibility that official suppression of ideas is afoot." *RAV v. City of St. Paul*, 505 U.S. 377, 390 (1992). But here, there is no reason to think the school would have tolerated, for example, B.L. snapping "F– those who diss cheer or diss my school."

[21] The increasingly frequent use of such expletives does not trigger constitutional protection. As this Court explained,

> The [court below] believed that children today "likely hear this language far more often from other sources . . ." and that this cuts against more stringent regulation of broadcasts. Assuming
>
> (continued...)

Since B.L..'s speech was not protected under the First Amendment, her free speech claim fails, and the respondent school district was entitled to judgment in its favor on Count I of the Verified Complaint.[22] This Court should therefore reverse the judgment below and remand for consideration of B.L.'s remaining claims.

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[21] (...continued)

> the premise is true . . . the conclusion does not necessarily follow. [An agency] could reasonably conclude that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.

*Fox TV*, 556 U.S. at 529-30 (citation omitted).

[22] Amicus does here address B.L.'s remaining counts.

## CONCLUSION

This Court should reverse the judgment of the Third Circuit and remand for further proceedings.

Respectfully submitted,

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