24-1241

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CASE LEROY,

Plaintiff-Appellant,

v.

LIVINGSTON MANOR CENTRAL SCHOOL DISTRICT, et al.,

Defendants-Appellees.

BRIEF *AMICI CURIAE*
NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AND NATIONAL SCHOOL BOARDS ASSOCIATION
In Support of Defendant-Appellee Livingston Manor Central School District

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the New York State School Boards Association, Inc. and the National School Boards Association each certify that it is a non-profit organization, that it does not have a parent corporation, and that no publicly held corporation owns more than ten percent of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that represent the interests and concerns of member school boards responsible for the governance and operation of public schools systems. The New York State School Boards Association (NYSSBA) is a not-for-profit membership organization incorporated under the laws of the State of New York. Its membership consists of approximately six hundred and seventy-eight (678) or ninety-three percent (93%) of all public school districts and boards of cooperative educational services in New York State. Pursuant to § 1618 of New York's Education Law, NYSSBA has a statutory responsibility for devising practical ways and means for obtaining greater economy and efficiency in the administration of the affairs and projects of public school districts and boards of cooperative educational services (BOCES) across New York. Consistent with that charge, NYSSBA often appears as an *amicus curiae* before both federal and state court proceedings involving constitutional and statutory issues affecting the governance and operation of public schools, and indeed has done so previously before this Court. In the case herein, NYSSBA appears on behalf of its member Livingston Manor

[1] The *amici curiae* submit this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Central School District (the School District) on the grounds that the issues presently before this Court are of statewide importance to all school districts across New York.

The National School Boards Association (NSBA) is a non-profit organization founded in 1940 that represents state associations of school boards, and the Board of Education of the U.S. Virgin Islands. NSBA ensures that each student everywhere has access to excellent and equitable education governed by high-performing school board leaders and supported by the community. NSBA regularly represents its members' interests before federal and state courts and has participated as *amicus curiae* in numerous cases addressing the First Amendment, including *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).

NYSSBA and NSBA fully support the constitutional rights of all public school students. So do their members who bear the weight of compliance therewith while navigating the tension that at times arises when, as in this case, a student's exercise of free speech rights conflicts with a school district's concurrent obligation to ensure its schools provide a safe and orderly environment where all students can learn and become productive members of society.

NYSSBA and NSBA write to share with this Court their perspective as representatives of school boards, and to invite the court's attention to law and arguments that might otherwise escape its consideration and be of special assistance to the court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The appeal herein calls upon this Court to again resolve issues that inhere in the tension between the constitutional right of public school students "freely to express [themselves]" (*Guiles v. Marineau*, 461 F.3d 320, 324 (2d Cir. 2006) (citations omitted)), and the authority of public school officials to regulate student speech subject to the "special characteristics of the school environment" (*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) both citing *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 506 (1960) (citations omitted)). This time around, however, resolution of the issues presently before this Court, requires consideration and application of the three-year old U.S. Supreme Court decision in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021).

As expressly articulated by the High Court in *Mahanoy*, the precise question presented for its review was "[w]hether [*Tinker*], 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." (*Mahanoy*, 594 U.S. at 187). In response, the High Court confirmed that, albeit in a diminished capacity, a public school's authority to regulate student speech extends to speech that occurs off-campus. That diminished capacity derives from certain specific concerns raised by the High Court and discussed further below. In addition,

the *Mahanoy* decision confirmed the applicability of *Tinker* to the resolution of off-campus student speech cases.

In resolving the issues presently before it, this Court will not be writing on a clean slate. Almost a decade and a half before *Mahanoy*, it had already concluded that off-campus speech may be the basis for school disciplinary action. And, in the years since, this Court has consistently applied *Tinker* to resolve such cases. Moreover, a review of this Court's off-campus student speech decisions demonstrates that this Court's application of *Tinker* to such cases satisfies the High Court's concerns regarding school regulation of off-campus speech. Decisions from other circuit courts of appeals offer additional guidance in this regard. See *Parents Defending Education v. Olentangy Local Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (6th Cir. 2024); *Kutchinski v. Freeland Community Sch. Dist.* 69 F.4th 350 (6th Cir. 2023); *Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708 (9th Cir. 2022); *C1.G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022)).

As a quick factual reference, *Mahanoy* involved a high school freshman, B.L., who was offered a position in the junior varsity team after not being selected for the varsity cheerleading squad. In reaction, she posted on Snapchat, a multimedia messaging application, a photo of her and a friend with their middle fingers raised with a caption that read "Fuck school fuck softball fuck cheer fuck everything." B.L. posted the photo during the weekend while at a local convenience store, using her

own personal phone. A feature of Snapchat allowed any person in the student's "friend" group to view the images for a 24-hour period. B.L.'s friend group had about 250 friends, including other students at the high school, some of whom also belonged to the cheerleading squad, and at least one of whom took pictures of the post on a separate cellphone and shared them with other members of the cheerleading squad (*Mahanoy* 594 U.S. at 184-85). Following her suspension from the junior varsity team for the upcoming year as a result of those activities, B.L. and her parents commenced litigation against the school district. A federal district court concluded that the disciplinary action taken against her violated the First Amendment because the photo at issue "had not caused substantial disruption at the school" (*Mahanoy*, 594 U.S. at 185-86). Thereafter, a panel of the U.S. Court of Appeals for the Third Circuit held that a school's authority to discipline students for otherwise protected speech does not extend to off-campus speech (*Id.* at 186-87). On appeal, the High Court in *Mahanoy* determined that, absent evidence of substantial disruption or interference with the rights of others, the school district's interest in prohibiting student use of vulgar language was insufficient to overcome B.L.'s interest in free expression (*Id*. at 192).

For comparison purposes, the more salient facts in the present case are set out in the decision of the court below and the School District's Brief. The only factual contention relates to whether the Appellant's off-campus speech constituted a

"sufficient 'material disruption'" to warrant the disciplinary action taken against him (*Leroy v. Livingston Manor Central Sch. Dist.*, 2024 WL 1484254 (S.D.N.Y. Apr. 5, 2024)).

Briefly, however, like in *Mahanoy* this case involves a photo taken and transmitted from an off-campus location through a personal cell phone to Snapchat friends who included a "good amount" of students at the School District's high school. The photo depicted Appellant lying on the ground while one of his friends knelt over him with a "thumps-up" and a smile. Appellant added the caption "Cops got another" to his copy of the photo and sent it to his Snapchat friends, who included most members in his graduating class and others at the high school. Another student also posted the photo but with the caption "Another one down" with a Black Lives Matter logo. The photos were deleted shortly after their posting when Appellant's phone started "blowing up" with life threatening and other negative messages. The other students deleted their photos as well after receiving their own barrage of negative messages. In addition, people began showing up at two of the students' homes and the employment places of Appellant's parents.

School District administrators and other personnel received a flood of email complaints from students and community members expressing upset over the racist connotations of the photos, and concerns for safety in the school. Those who saw the photos recognized them as referencing the murder of George Floyd, a black man

who died during his arrest after a police officer kneeled on his neck for nine minutes. Some also remembered that the Appellant had previously taken another photo during class that showed another student holding a student of color over a classroom desk at the high school with his hands behind his back, which was also circulated on social media.

Based on this quick and negative reaction to the photos at issue herein, and concern for their safety, school officials asked the Appellant and the other students involved to remain home the next day. School administrators had to take time away from regular school operations to respond to the emails received.

The following day at school staff and teachers interrupted their regular responsibilities to discuss the incident with students who were talking about it throughout the day. In addition, the school held an assembly for students in grades 7 through 12 that was also attended by teachers, guidance counselors and continued discussions following a student-planned nine-minute demonstration over the photos and their connotations. State troopers and other law enforcement officers remained on school grounds throughout the day, the school superintendent issued an official statement regarding the matter, and media requests continued.

For the reasons that follow the *amici* respectfully submit that this Court should affirm the decision of the court below.

ARGUMENT

In proceeding to explain why we maintain that Appellant's arguments are unavailing, the *amici* are mindful that, as noted by this Court, "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools" (*Guiles v. Marineau*, 461 F.3d at 324 (citations omitted)). However, as this Court has also observed, "application of the prohibitions of the First Amendment [in the context of] public education presents complexities [that concern the] well-being of . . . youth . . . whether it be to teach the ABC's or multiplication tables or to transmit the basic values of the community" (*Pico v. Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26*, 638 F.2d 404, 412 (2d Cir. 1980) (citations omitted)). And although "frustrating" the process "does not admit of safe analytical harbors" (*Id.* at 413 (citations omitted)), and "simplistic formulas or handy scales for weighing competing values (*James v. Bd. of Ed. of Central Dist. No. 1 of the Towns of Addison*, 461 F.2d 566 (2d Cir. 1972)). Therefore, the *amici* will proceed thoughtfully in our analysis and discussion of the issues herein and our presentation of matters that may be of special assistance to this Court.

I. *MAHANOY* WARRANTS AFFIRMANCE OF THE DECISION OF THE COURT BELOW INSTEAD OF RESOLVING THIS CASE IN THE APPELLANT'S FAVOR.

The Appellant asks this Court to reverse the decision of the court below and remand for entry of summary judgment in his favor.[2] He contends, in part, that the U.S. Supreme Court's decision in *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021) "resolves this case in his favor for two reasons."[3] First, because there is no meaningful difference between *Mahanoy* and the present case. Second, because the features identified by the High Court in that case that can diminish the leeway afforded school officials in the regulation of student speech preclude judgment against him.

However, for the following reasons, the *amici* submit that such an argument is misguided and without merit.

a. There are insurmountable significant differences between *Mahanoy* and the case herein.

The Appellant posits that there is no factual material distinction between *Mahanoy* and the case herein. In so arguing, he emphasizes similarities between the

[2] The *amici* will not recite a separate statement of facts, except as specifically cited within the text of this brief. Instead, we will defer to the facts in the Opinion and Order of the court below, those submitted by the School District and the brief summary thereof in the Introduction and Summary of Argument section of this brief.

[3] In his main brief, the Appellant also argues that even if the School District acted appropriately under *Mahanoy*, his discipline violated his free speech rights because it was based on impermissible viewpoint discrimination. To the extent that he did not preserve this issue for review by this Court, the *amici* will not address it but rely on the School District's discussion of the issue.

two cases in terms of location, mode of communication, and intended audience. In both cases the student speech at issue occurred off school premises and involved the communication of a photo initially transmitted through a personal cellphone to an audience consisting of Snapchat friends. However, notwithstanding Appellant's assertion to the contrary, the consequences of the expressive activity at issue in each case are markedly different.

First, in *Mahanoy* students upset by the Snapchat posting reacted by taking at most 5-10 minutes of an Algebra class for just a couple of days to discuss the matter (594 U.S. at 192). But in the present case, the reaction to the photos included threats against the Appellant's life and the safety of three of his friends also involved in the postings; unrest on the part of school administrators and other students; and consequential disruption to the school's regular operations and instructional programming.

Second, as pointed out by the High Court in *Mahanoy*:

> [p]utting aside the vulgar language [at issue therein], the listener would hear criticism, of the team, the team's coaches and the school – in a word or two, criticism of the rules of a community of which [the student] forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. [The] posts, while crude, did not amount to fighting words (594 U.S. at 190-191 (citations omitted)).

But in the present case, the photos and captions at issue referenced an event that garnered national attention, and which those who saw them recognized as

referencing the murder of George Floyd by a police officer who kneeled on his neck for nine minutes. Posted the day before a jury verdict was expected in that case, the photos herein, unlike those in *Mahanoy*, contained features that were understood as inciting, if not violence, a "breach of peace . . . or [as having] the effect of force" (see *Eisner v. Stamford Board of Ed.*, 440 F.2d 803, 807 (2d Cir. 1971) (citations omitted)), thus falling outside the protection of the Appellant's free speech rights. Even if, as claimed by one of the students involved, the postings were intended as a joke, "intent is irrelevant" (see *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sh. Dist.*, 494 F.3d 34, 36 (2d Cir. 2007), *cert. denied* 552 U.S. 1296 (2008)). "The . . . focus [is] not on the intent of the student" (*Cuff v. Valley Central Sch. Dist.*, 677 F.3d 109, 113 (2d Cir. 2012)).

Third, the school district's interest asserted in *Mahanoy* concerned "the teaching [of] good manners and . . . punish[ment for] the use of vulgar language aimed at part of the school community" (594 U.S. at 91-192). However, the school presented no evidence of a foreseeable or actual disruption in the school. And, when asked if "she had 'any reason to think that [the posting] incident would disrupt class or school activities other than the fact that kids kept asking … about it'" a cheerleading coach said no.

In comparison, the pervading school interest here relates to the ability of school officials to protect students who constitute a captive audience within a school

from speech by fellow students whose words are "capable of perpetrating grievous harm[,]" (*Thomas v. Board. of Ed., Granville Central Sch. Dist.*, 607 F.2d 1043, 1047,1049 (2d Cir. 1979)), regardless of the location of the speech (see *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977); *cert. denied*, 435 U.S. 925 (1978)). That interest extends even to situations where the potential harm is not physical but psychological" (*Id.* at 516-517; see *Eisner*, 440 F.2d at 816) and the regulation of student speech is necessary "to protect the psychological well being of the young" (*Pico*, 638 F.2d at 415). "For a blow to the psyche may do more permanent damage than a blow to the chin" (*Trachtman*, 563 F.2d at 520 (J. Gurfein, concurring)). In addition, student conduct, "in class or out of it, which for any reason . . . invad[es] the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech" (*Id.*, quoting *Tinker* at 512-513); see *Wisniewski* 494 F.3d at 39). Moreover, unlike in *Mahanoy*, there is evidence of a substantial material disruption in the school, discussed further below. Thus, the *amici* submit that the School District's interest in protecting the safety of its students under the circumstances herein was sufficient to overcome the Appellant's interest in free expression.

Finally, a ruling in favor of the Appellant based on similarity grounds would be antithetical to the High Court's acknowledgement in *Mahanoy* of:

> "the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the

> differing extent to which those justifications may call for First Amendment leeway" (594 U.S. at 190).

Indeed, it was consistent with that acknowledgment, that the High Court declined to establish "a broad, highly general First Amendment rule stating just what counts as 'off-campus' speech and how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community" (*Id.* at 189).

b. The features identified by the High Court in *Mahanoy* that can diminish the leeway normally afforded to school officials in the regulation of student on-campus speech do not in and of themselves preclude a judgment against the Appellant.

In confirming that school officials have authority to regulate off-campus student speech, the High Court in *Mahanoy* expressly stated that it:

> [did] not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances (594 U.S. at 188).

Nonetheless, the High Court identified "three features of off-campus speech that **often, even if not always**, distinguish schools' efforts to regulate off-campus speech from their efforts to regulate on-campus speech" (*Id*. (emphasis added)). Those features posed differing concerns for the High Court which in its view "diminish the strength of the unique educational characteristics that might call for special First

Amendment leeway" (*Id*.). The first of those features is that in an off-campus speech situation, a public school will rarely stand *in loco parentis*, and a student's off-campus behavior is normally a parental rather than school-related responsibility. Second, when coupled with on-campus speech, regulation of off-campus speech can extend a school's speech regulatory authority throughout a full 24-hour day period, impairing the ability of students to speak their mind after the end of the school day. Third, representative democracies like ours require protection of the "market place of ideas" and schools themselves have an "interest in protecting a student's "unpopular expression especially when [it occurs off-campus]" (*Id*. at 189-90).

But notwithstanding its concerns, the High Court "[left it] for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference" (*Id.* at 190). The present case is not one where the locality of the speech makes that critical difference. Furthermore, the High Court's view that the off-campus location of a student's speech may serve to diminish "the strength of the unique educational characteristics that might call for First Amendment leeway" (*Id.* at 189) does not make those characteristics irrelevant.

As pertinent to the present case, some of those unique characteristics involve: (1) "the role and purpose of the American public school system" including the preparation of students for citizenship, and inculcation of "the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-

government in the community and the nation" (*Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); and (2) the need to consider the age and emotional maturity of students exposed to other students' speech (see *Fraser*, 478 U.S. at 684; *Hazelwood*, 484 U.S. at 272)).

Regarding the role and purpose of public education in particular, notwithstanding his reliance on the *Mahanoy* concurrence the Appellant misrepresents the duty of schools in the student free speech context to be limited to "teach[ing] students that freedom of speech including unpopular speech is essential to our form of self-government." In actuality, the duty of public schools is much broader.

> [P]ublic education must prepare pupils for citizenship in the Republic … It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (*Fraser*, 478 U.S. at 681 (citations omitted)).

Indeed, the High Court has characterized "the essence of this statement of the objectives of public education as the 'inculcat[ion] of fundamental values necessary to the maintenance of a democratic political system" (*Id.*, quoting *Amback v. Norwick*, 441 U.S. 68, 76-77 (1979)). Moreover,

> [t]hese fundamental values of 'habits and manners of civility' essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But 'these fundamental values' must also take into account consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate

> unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences (*Fraser*, 478 U.S. at 681).

The *amici* respectfully submit that although the above statements were made in cases that did not involve student off-campus speech, the fundamental principles embedded in them are axiomatic and remain true regardless of the location of the speech. In addition, it is precisely in this unique characteristic that the *amici* further submit lies the answer to the question posed by the *Mahanoy* concurrence as to "Why should enrollment in a public school result in the diminution of a student's free-speech rights?" (594 U.S. at 197).

For all the foregoing reasons *Mahanoy* does not resolve the present case in Appellant's favor, and his contentions to the contrary are without merit.

II. THE POSTING OF THE PHOTOS AT ISSUE HEREIN MATERIALLY AND SUBSTANTIALLY DISRUPTED THE WORK AND DISCIPLINE OF THE SCHOOL.

The court below found that "the parties only dispute . . . whether the[ ] events that resulted from the [Appellant's] off-campus speech constitute a sufficient 'material disruption' so that it was appropriate for the school to take disciplinary action against [him]." He continues to maintain before this Court that it did not.

a. The Appellant's reasons for asserting his speech did not cause a material disruption to the school are misguided.

Among a myriad of reasons the Appellant advances in support of his argument is that the "purported disruption here – 'a quick and emotional response from students who deemed [the photos] inappropriate and offensive,' in-school discussion, and a planned nine minute kneeling protest [ ] – closely resembles that alleged, but insufficient, in *Mahanoy*" (Appellant's Brief at pp. 22-23). However, for the reasons discussed above, the consequences of the student off-campus speech in both cases are markedly different.

The Appellant also asserts that the School District failed "to show a genuine disruption or substantial likelihood thereof" as required under *Tinker* and instead "manufacture[d] a disruption by directing the speakers to stay home from school and then claiming that as 'evidence[ ]' of 'apprehension' of potential disturbance"[4] (Appellant's Brief at p. 23). However, this Court has determined that:

> '[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place'. . . [and that] [t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue (*Doninger*, 527 F.3d at 51, quoting *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2011); see also *Cuff*, 677 F.3d at 113 (citations omitted)).

[4] According to the Appellant, crediting the complaints of community members offended and upset by the postings herein would amount to "a heckler's veto (Appellant's Brief at pp. 23-24). To the extent that the Appellant did not preserve this issue for review by this Court, the *amici* will not address it but rely, instead, on the School District's discussion of the issue.

In addition, school officials

> must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will face years of litigation second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance (*Cuff* at 113).

Given the threatening reaction to the photos herein, the School District's request that the Appellant and the others remain home did not constitute an effort to manufacture a disruption but a proactive step to protect their safety and to guard them from threatened and palpable harm (see *DeFabio v. East Hampton Union Free Sch. Dist*., 623 F.3d 71 (2d Cir. 2020)).

Next, the Appellant questions how his speech could constitute a substantial disruption when the court below deemed the assembly, discussion sessions and a nine-minute protest as a pedagogical obligation (Appellant's Brief at p. 25). The *amici* respectfully submit that the question misapprehends the duty of school districts to ameliorate the effects of disruption and to prevent them from happening. That duty encompasses, consistent with the role and responsibilities of public education discussed above, efforts to promote tolerance of divergent views, inculcate the habits and manners of civility, teach boundaries of socially appropriate behavior, and instill in students a sense of safety within the school.

b. The Appellant misunderstands the nature and scope of the *Tinker* standard applicable to school disruption determinations.

As noted by this Court, it is "long-established" that, with "well-worn" limitations, public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*DeFabio v. East Hampton Union Free Sch. Dist*., 623 F.3d at 77). That basic principle of First Amendment jurisprudence in student free speech cases was soundly established in *Tinker* (393 U.S. at 503, 506) and repeated in thousands[5] of decisions since, including *Mahanoy* 594 U.S. at 187 (see also *Doninger*, 527 F.3d at 48). However, student free speech rights "are not automatically coextensive with the right of adults in other settings" (*Fraser*, 478 U.S. at 682; see *Hazelwood*, 484 U.S. at 266; *Doninger*, 527 F.3d at 48), and public school officials may regulate student speech subject to the "special characteristics of the school environment" (*Hazelwood*, 484 U.S. at 266; see *Mahanoy,* 594 U.S. at 187-188; *Tinker*, 393 U.S. at 506; *Doninger*, 527 F.3d at 48, (citations omitted)), some of which were discussed above.

Tinker involved the wearing of black armbands during the school day by students wishing to express their opposition to the Vietnam War. The High Court therein made clear that a student:

> may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially

[5] *Tinker* has been cited in 2,697 decisions, including by the High Court (Westlaw.com last searched November 5, 2024).

> interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others . . . But conduct by the student, in class or out of it, which for any reason . . . disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech (*Tinker*, 393 U.S. at 513).

Regarding the interference/disruption element of that standard, the High Court has since clarified that its holding in *Tinker* was that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school'" (*Morse v. Frederick*, 551 U.S. 393 (2007); see also *Doninger*, 527 F.3d at 48).

This Court has further determined that "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus" (*Doninger*, 527 F.3d at 48, citing *Wisniewski*, 494 F.3d at 50). This foreseeability determination is consistent with the basic premise that *Tinker* "does not require school officials to wait until disruption actually occurs before they may act. [ ] The question is … whether school officials 'might reasonably portend disruption' from the student expression at issue" (*Doninger*, 527 F.3d at 51, citing *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)). *Tinker* does not require a showing of actual disruption to justify a restraint on student speech (*Doninger*, 527 F.3d at 51).

c. This Court's pre-*Mahanoy* precedent satisfies the concerns raised by the High Court over a school's regulation of student off-campus expressive conduct.

The *amici* submit that criterion established by this Court's pre-*Mahanoy* case law on student free speech rights allay the High Court's concerns over the regulation of student off-campus expressions by school authorities.

For example, as discussed above, this Court has imposed specific foreseeability requirements that limit the authority of public officials to regulate off-campus speech to instances where both a risk of substantial disruption and a likelihood the off-campus speech might reach the school are foreseeable (*Doninger*, 527 F.3d at 48, citing *Wisniewski*, 494 F.3d at 50). Here, the evidentiary record clearly establishes it was foreseeable the photos would create a risk of substantial disruption, and indeed they did. Also given the ease with which social media communications can be copied and/or shown to others, it was foreseeable, as well, that the photos would reach the school (see *Doninger*, 527 F.3d at 48). Indeed, once the photos became known, the impact was significant both to the Appellant, the other students involved in the posting, school administrators and other personnel, as well as to the other students in the school.

Furthermore, this Court also has made clear that in the context of student off-campus speech, "a clear line [must be drawn] between student activity that 'affects matter of legitimate concern to the school community,' and activity that does not"

(*Doninger*, 527 F.3d at 48 (citation omitted)), It is the former that would be susceptible to disciplinary action if it will or does "materially and substantially disrupt the work and discipline of the school" (*Morse v. Frederick*, 551 U.S. 393 (2007); see also *Tinker*, 393 U.S. at 513; *Doninger*, 527 F.3d at 48), or infringe on the rights of others (*Tinker*, 393 U.S. at 513). Here, the photos were understood to communicate intimidation and threaten the use of force – a matter clearly of legitimate concern for schools. And, the Appellant was properly disciplined not only because the threatening message of the photos exempted them from free speech protection, but also because of the material and substantial disruption they caused.

Finally, the *amici* respectfully submit that the concerns raised by the High Court in *Mahanoy* do not rise to the level of an absolute rule. Indeed the High Court recognized as much when it referred to features of off-campus speech that gave rise to its concerns as "features . . . that **often, even if not always** . . ." (594 U.S. at 188 (emphasis added)). Thus, for example, although a student's off-campus expressions, including through social media, are normally a parental rather than school responsibility, school officials may retain *in loco parentis* responsibilities at least with respect to other students who constitute a captive audience in school and whose rights may be affected by a classmate's off-campus expressive activity, including interference with their own rights such as in the case herein where students who saw the photos were intimidated and concerned about their safety in school

notwithstanding their right to a safe learning environment. Also, because of their duty to prevent disruption in the first place as discussed above.

As noted above, post-*Mahanoy* decisions from other circuit courts of appeals may be instructive regarding consideration of the *Mahanoy* Court's concerns in the making of off-campus speech disruption determinations. See *Parents Defending Education v. Olentangy Local Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (6th Cir. 2024); *Kutchinski v. Freeland Community Sch. Dist.* 69 F.4th 350 (6th Cir. 2023); *Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708 (9th Cir. 2022); *C1.G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022)). To the extent that the outcome in those decisions may have been dependent on the finding of a nexus between the expressive activity at issue and the school, the *amici* submit that this Court's pre-*Mahanoy* precedent sets the criterion for determining the existence or absence of such a nexus.

For all the foregoing reasons, this Court should affirm the decision of the court below.

A decision to the contrary will make more difficult the capacity of public school officials within this Court's jurisdiction to impart and reinforce to their students the fundamental principle that words matter and that there are consequences for expressive activities that disrupt the school environment, interfere with the rights of fellow students, or cause them harm physically, psychologically and emotionally. The *amici* respectfully submit that given the undisputed facts and consequences of

the Appellant's off-campus speech herein, it is important to remember that nothing in "the Federal Constitution compels [ ] teachers . . . and school officials to surrender control of the American public school system to public school students" (*Tinker*, 393 U.S. at 526 (J. Black, dissenting); see also *Hazelwood*, 484 U.S. fn. 4; *Fraser*, 478 U.S. at 685-686).

CONCLUSION

For all the foregoing reasons, the *amici curiae* respectfully request that this Court affirm the decision of the court below granting summary judgment in favor of the School District and grant any such other relief as this Court might deem appropriate.

Dated: November 20, 2024
Latham, New York

Respectfully Submitted by:

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