

No. 20-255

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**In the Supreme Court of the United States**

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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

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**BRIEF OF THE STUDENT PRESS LAW CENTER,  
ASSOCIATED COLLEGIATE PRESS, CENTER FOR  
SCHOLASTIC JOURNALISM, FREEDOM TO READ  
FOUNDATION, JOURNALISM EDUCATION  
ASSOCIATION, NATIONAL SCHOLASTIC PRESS  
ASSOCIATION, QUILL AND SCROLL, AND TULLY  
CENTER FOR FREE SPEECH AS *AMICI CURIAE*  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF THE *AMICI CURIAE***<sup>1</sup>

*Amici* are organizations committed to protecting the free speech rights of student journalists, both on and off campus. *Amici*'s collective decades of educating student journalists provide them with a unique perspective about how the decisions of this Court in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), affect the work of student journalists and their advisers on a daily basis. In today's media environment where independent publications and online mediums are often the only platforms available to student journalists, *Amici* believe that reducing the First Amendment protections for off-campus speech would improperly expose student journalists and student "whistleblowers" to school discipline and chill their socially valuable speech.

**The Student Press Law Center ("SPLC")** is a national, nonprofit, nonpartisan organization established in 1974 that works to promote, support, and defend the First Amendment and press freedom rights of high school and college journalists and their advisers. As the only national organization in the country devoted exclusively to defending the legal rights of the school-sponsored and independent student press,

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<sup>1</sup> Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), all parties have given consent to the filing of this brief.

SPLC collects information on student press cases nationwide and produces a number of publications on student press law, including its book, *Law of the Student Press* (4th ed. 2014). SPLC is especially concerned with upholding constitutional protection for off-campus student journalism. Because of the heavy censorship of school publications, student journalists are increasingly taking their speech off campus in order to address issues important to their lives.

**The Associated Collegiate Press (“ACP”)** is the collegiate division of National Scholastic Press Association, a 501(c)(3) nonprofit association of student-media groups at colleges, universities, and secondary schools throughout the United States and in several other countries. Founded in 1921, the college/university division represents about 700 media organizations and more than 20,000 collegiate journalists and media students. The ACP provides journalism education and recognition programs for its members, including the nation’s leading competitions in collegiate journalism, as well as training programs in reporting, press law, ethics, and leadership.

**The Center for Scholastic Journalism** at Kent State University is a national clearinghouse of information for and about student journalists and their advisers, a research center on issues affecting scholastic media, an educator of journalism teachers, and an advocate for student press freedom and the First Amendment. Through an agenda that includes research, programming, teaching, and advocacy, the Center leads efforts to increase and improve scholastic journalism education and editorially independent

student media in America's high schools and helps raise awareness of the importance of scholastic journalism as a tool for First Amendment and civic education.

**The Freedom to Read Foundation** is an organization established by the American Library Association to defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read for all citizens. It achieves these goals by promoting and protecting the freedom of speech and freedom of the press, protecting the public's right of access to information and materials stored in the nation's libraries, and supporting libraries and librarians in their defense of First Amendment rights.

**The Journalism Education Association ("JEA")**, founded in 1924, supports free and responsible scholastic journalism by providing resources and educational opportunities, promoting professionalism, encouraging and rewarding student excellence and teacher achievement, and fostering an atmosphere that encompasses diversity yet builds unity. The organization supports journalism advisers and their students and has a long history of advocating for First Amendment rights. JEA believes, as affirmed in *Tinker*, that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. JEA is committed to an informed, vibrant nation where free expression is expected and practiced as part of our

diverse American heritage. In concert with the Student Press Law Center, JEA's Scholastic Press Rights Committee ("SPRC") is fully focused on these issues, promoting the First Amendment, helping students and advisers threatened with prior review and prior restraint, and advocating for legislation to uphold the precedent set by *Tinker* and the values it represents. SPRC has been providing this support for nearly fifty years. JEA has a strong interest in supporting students' First Amendment rights both on and off campus.

**The National Scholastic Press Association ("NSPA")** is a 501(c)(3) nonprofit membership organization for middle school, high school, and other secondary school publications, including yearbooks, newspapers, magazines, broadcast programs, and digital and online publications. Since 1921, NSPA has served its members with educational programs, recognition programs, and critique services to improve their publications. These services are also offered through the nation's largest gatherings of high school journalists, advisers, and journalism educators.

**The Quill and Scroll International Honor Society for High School Journalists** is a 501(c)(3) nonprofit organization that serves student journalists at high schools and other non-governmental organizations in thirty countries. Founded in 1926, Quill and Scroll promotes journalistic excellence and freedom of expression through contests, scholarships, and critiques for its members, as well as the membership itself, which urges students to practice ethical journalism through adherence to its eight guiding principles:

truth, leadership, learning, loyalty, initiative, integrity, judgment, and friendship. In its ninety-five years, Quill and Scroll has inducted more than 500,000 student journalists into the Society.

**The Tully Center for Free Speech** at Syracuse University promotes and supports free speech through research, education, and a series of events, including the presentation of the Tully Award for Free Speech, which is given annually to a journalist who has shown courage in facing a free speech threat.

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*Amici* are committed to protecting all manner of student journalism that take place both on and off campus. Student journalism is a unique vehicle for civic education and results in important stories that serve both schools and communities at large. Permitting school administrators to punish students for off-campus speech based on a relaxed form of First Amendment scrutiny designed for the school environment would deter student journalists from doing valuable work to expose misconduct and cover controversial issues of local and national significance—or even from publishing their opinions in an off-campus forum—simply because the administrators label the journalism “substantially disruptive.” Petitioner’s proposed outcome for this case would dramatically limit the First Amendment protection all public school students receive, no matter their age or the societal benefit of their expression. Nothing in the Constitution or this Court’s precedents supports establishing second-class citizenship as a consequence of school enrollment.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Last year, the editor-in-chief of the student newspaper at North Platte High School began reporting about racial tension at the southwest Nebraska school. Sophia Walsh’s article was prompted by a high school senior’s theft of a Confederate flag from another student’s car, which through interviews she discovered came in the wake of racist incidents at the school. Ms. Walsh and a fellow student journalist wrote a carefully reported article that included a history of the Confederate flag and featured opinions both from students who favored banning the flag from campus and those who opposed such a ban. But after she submitted the article to the school principal for review, and made changes the principal requested, the principal spiked the story. So Ms. Walsh approached the editor-in-chief of a local newspaper, who immediately found her article newsworthy and ran it.<sup>2</sup>

But if Petitioner’s view of the First Amendment were the law, this story could have ended differently. The principal, citing the “substantial disruption” that might result from reporting on racial tensions at the school, could have kicked the editor off the school student newspaper—or even suspended her from school—for publishing her journalism off campus. Or perhaps the editor, knowing that the long arm of the school administration could reach off campus and unwilling to roll the dice on how a court might eventually

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<sup>2</sup> Allison Schatz, *Nebraska High School Journalist Refuses to Back Down, Publishes Her Censored Article on Confederate Flags and Racism at School in Local Paper*, Student Press L. Ctr. (Mar. 11, 2021), <https://bit.ly/3f97nDI>.

define “substantial disruption,” simply would not have pursued the story at all. The result: less speech on a matter of undeniable social importance.

If a high school student goes home and plays a violent video game, that speech enjoys full constitutional protection and can be regulated only subject to strict scrutiny. *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011). But if the same student goes home and practices journalism—writing in a local newspaper about a dialogue on race at her school, or creating an independent website to expose waste or corruption or harassment at the school, *see, e.g., infra* p. 29—that speech would be less protected under Petitioner’s view of the law. Rather than needing to satisfy strict scrutiny, Petitioner would let school administrators subject that speech to discipline based on the often amorphous standard of whether it might cause substantial disruption. Such an anomalous understanding of the First Amendment should be rejected.

1. In many areas of this country, students are the only journalists keeping local communities informed. Student journalists often uncover and report on stories that are not covered by the professional media. Over the last year, for instance, student journalists have been at the forefront of covering the impact of COVID-19 in their schools and localities. Allowing school administrators to censor off-campus speech thus threatens not only the student journalists but the communities they serve. It would likewise discourage participation in an activity—journalism—that invites students to exercise their First Amendment rights and learn about the Constitution more

broadly, at a time when such hands-on civics education is sorely needed.

2. Student journalism today also increasingly takes place off campus, in independent print publications, websites, and social media platforms unaffiliated with the school. Students often choose to publish their work in these off-campus forums for a simple reason: to avoid school censorship. Indeed, off-campus publication is the only manner that allows many student journalists to engage in their valuable speech free of threat. Petitioner's proposed rule would permit increased censorship of student journalists' work, even when it occurs away from school without school sponsorship. The Court should instead protect the socially valuable speech of student journalists in this modern reality.

The First Amendment protects student journalists' ability to publish their work off campus without reprisal from school administrators. The mere existence of this safe harbor has a moderating effect on administrators' choices regarding censorship in on-campus publications. But Petitioner seeks to chip away at this essential free-speech protection so that all student speech—including student journalism—would be subject to school censorship or retribution, even when it occurs entirely off campus and is not part of a school-sponsored publication. The rule advocated by Petitioner would invest school officials with unprecedented authority over students' speech around the clock, regardless of whether they are at school, at home, or anywhere else. Such overreach offends the First Amendment.

*Tinker* carves out a narrow exception to the general First Amendment standard prohibiting content discrimination, and it should stay confined to the on-campus school environment. If *Tinker* remains appropriately cabined to on-campus speech, student journalists will know that their work outside of school—so long as it is published through a non-school sponsored medium—remains free from the specter of the school administration’s censorship. But if, as Petitioner urges, this Court empowers school administrators to censor students’ off-campus speech, a student journalist would not be able to publish a story in a local newspaper or independent website, simply because the story—or even *other* students’ reactions to the story—supposedly causes substantial disruption to the school environment. And even if a school’s claim of substantial disruption might ultimately fail after years of litigation, many student journalists (weighing college admissions, future career implications, or other factors) would just submit to the prior restraint. Worse, many students would self-censor and never write their stories at all. This expanded risk of censorship would chill student journalists from performing an important service, exposing uncomfortable truths, and holding those in power accountable—from the classroom to City Hall and beyond.

3. Petitioner’s proposed rule similarly risks increasing school authority to discipline and retaliate against students for journalistic or other whistleblowing activities. The opinion below allows conscientious student journalists to do their important work freely and unafraid, as they can clearly “determine when they are subject to schools’ authority and when [they are] not,” Pet. App. 33a, whether they are engaged in

newsgathering or simply promoting newsworthy stories through social media. That freedom is critical to all students, but student journalists—since they report on important and controversial topics *while being students*—are particularly vulnerable to retaliation from school administrators in ways that directly contravene core First Amendment values.

## ARGUMENT

### I. Student Journalism Is Important for Students and Their Communities.

In southeastern Kansas, student newspaper reporters were the first to uncover a jarring secret: their newly appointed principal claimed educational credentials that could not be verified. After the students published their weeks-long investigation, the principal resigned.<sup>3</sup> In Massachusetts, a student journalist reported that his high school was using prison labor to reupholster the seats in his school's auditorium, sparking public debate, attention in local newspapers and radio stations, and a change in policy for future projects.<sup>4</sup> And in Missouri, student journalists recently reported that two students were hospitalized with COVID-19—despite ardent assertions from university officials to the contrary—and reported that the

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<sup>3</sup> Samantha Schmidt, *These High School Journalists Investigated a New Principal's Credentials. Days Later, She Resigned.*, Wash. Post (Apr. 5, 2017), <https://wapo.st/2NOOLgW>.

<sup>4</sup> Eli Hager, *First Big Scoop: Student Journalists Expose High School's Use of Prison Labor*, Marshall Project (June 24, 2019), <https://bit.ly/3cYpp8M>.

university had instructed staff to “publicly support” all university decisions regarding COVID-19.<sup>5</sup>

1. Student journalists frequently uncover and report on important stories not covered in the professional media. That is due, in part, to student journalists’ access to campuses and to fellow students and teachers. For example, reporting on campus COVID-19 outbreaks has often come from student newspapers such as the *Michigan Daily*, which similarly exposed a COVID-19 cluster tied to fraternities and sororities. Days later, the county imposed a stay-at-home order for the University of Michigan.<sup>6</sup>

Student journalism is not limited to the confines of the campus. Student journalists also report on stories affecting their communities more broadly. In Louisville, Kentucky, for example, a high school student newspaper uncovered that the Kentucky State Police used a training manual that celebrated quotations from Adolf Hitler, urged cadets to be “ruthless killer[s],” and used an online training video featuring a Nazi symbol. The students’ journalism led to the

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<sup>5</sup> Amelia Nierenberg, *Covid Is the Big Story on Campus. College Reporters Have the Scoop.*, N.Y. Times (Nov. 20, 2020), <https://nyti.ms/3cSTt5y>.

<sup>6</sup> *Id.* Because lower courts have applied *Tinker* and its progeny in the context of both high school and college student speech, *see, e.g., Ala. Student Party v. Student Gov’t Ass’n of Univ. of Ala.*, 867 F.2d 1344 (11th Cir. 1989), this brief includes examples of student journalism from both levels.

resignation of the Kentucky State Police Commissioner.<sup>7</sup>

In fact, in many communities, students are the only journalists due to the closure of local print newspapers.<sup>8</sup> As a nonstudent resident of Ann Arbor, Michigan, told the *New York Times*, without the *Michigan Daily*, “this town would be a lot poorer for knowledge about what’s actually happening.”<sup>9</sup>

2. Student journalism is important not only in providing information to students, teacher, parents, and communities at large, but also as a critical—and fast-disappearing—component of students’ civics education. Schools are entrusted with teaching students about the rights and responsibilities of living in a democracy. This Court has recognized that “educating

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<sup>7</sup> Anna Bauman & Meghna Chakrabarti, *In Kentucky, Student Journalists Uncover Nazi Imagery in Police Training*, WBUR: On Point (Dec. 10, 2020), <https://wbur.fm/3f9lgBQ>.

<sup>8</sup> Between 2004 and 2019, approximately one quarter of all local newspapers closed in the United States; as of 2020, about 1,800 communities that had a local newspaper in 2004 no longer had any form of original local reporting, either in digital or print form. Tom Stites, *A Quarter of All U.S. Newspapers Have Died in 15 Years, a New UNC News Deserts Study Found*, Poynter (June 24, 2020), <https://www.poynter.org/locally/2020/unc-news-deserts-report-2020>. The COVID-19 pandemic has exacerbated the closure of local daily newspapers. Paul Farhi et al., *The Coronavirus Crisis Is Devastating the News Industry. Many Newspapers Won’t Survive It.*, Wash. Post (Apr. 8, 2020), <https://wapo.st/396Zniu>.

<sup>9</sup> Dan Levin, *When the Student Newspaper Is the Only Daily Paper in Town*, N.Y. Times (Oct. 19, 2019), <https://nyti.ms/3reRON1>.

the young for citizenship,” and protecting their constitutional freedoms while doing so, is necessary “if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 634, 637 (1943). Journalism serves as a critical laboratory in that project by teaching students about the value of free speech.

That laboratory is vital to countering the trend of waning student engagement with the First Amendment generally. Students who have taken a high school class dealing with the First Amendment are more likely to think about their freedoms than those who have not taken such a class. But in the last twelve years, the number of high school students who reported being exposed to the First Amendment through their coursework decreased by ten percent.<sup>10</sup>

Student journalism is a form of “participatory civics” that permits students to understand firsthand the workings of our Constitution.<sup>11</sup> As journalists, students have the opportunity to learn about constitutional rights by exercising them, all while

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<sup>10</sup> See Scott Bomboy, *Survey: High School Students, Teachers Differ on the First Amendment*, Const. Daily (Dec. 6, 2018), <https://bit.ly/2Pqbm3W>.

<sup>11</sup> Involvement with student journalism also promotes overall educational attainment. A 2008 study found that high school students who take journalism courses or work for a student publication earn better grades in high school and as college freshmen. See *The Value of Scholastic Journalism*, Ctr. for Scholastic Journalism, <https://www.kent.edu/csaj/value-scholastic-journalism> (last accessed Mar. 30, 2021).

completing an important public service for their schools and local communities.

## **II. Permitting Administrators to Punish Students for Off-Campus Student Journalism Would Embolden Censorship.**

If the Court were to adopt Petitioner's rule, school administrators could seek to punish students for their off-campus student journalism—a growing source of important speech in light of the closure of school student newspapers and the censorship that school administrators employ. Students' ability to publish their journalism independently also tempers the heavy-handed censorship of school student newspapers, since principals are sometimes persuaded that permitting students to publish on campus, under the guidance of a journalism adviser, is preferable to a student self-publishing on the Internet.

But under Petitioner's view of the First Amendment, some school administrators may be emboldened to require students to submit off-campus journalism to them for approval and prevent them from publishing altogether. Or they could punish students, after the fact, for work that they consider substantially disruptive. The uncertainty of how such a standard could be applied would alone chill important student journalistic speech.

**A. Off-Campus Student Media Is a Critical Vehicle for Student Journalism and a Safeguard Against Censorship.**

School-sponsored student newspapers, a staple of the American school since the country's founding,<sup>12</sup> are closing down at a rapid clip. This leaves many high school students in urban and rural areas alike without a school-affiliated news source.<sup>13</sup> Faced with the decline in school-sponsored publications, student journalists have increasingly published their work independently on the Internet, on social media, and through mobile applications (“apps”).<sup>14</sup>

For example, when the public high school in Ellenville, New York, shut down its student newspaper in 2017, students created a free smartphone app, the *Devil's Advocate* (the school mascot is the “Blue

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<sup>12</sup> See Jean S. Straub, *Magazines in the Friends Latin School of Philadelphia in the 1770's*, *Quaker Hist.*, Spring 1996, at 38, 38.

<sup>13</sup> About 900,000 New York City students attend a school without a newspaper. Lara Bergen, *Bergen: Too Many Schools Lack a Student Newspaper. When Schools Reopen, However They Reopen, Every School Should Have One*, *The 74* (Aug. 12, 2020), <https://bit.ly/3lYuDpn>; see also Vikki Ortiz, *Lack of Money, Interest Forcing Many High School Newspapers To Fold*, *Chi. Trib.* (Apr. 13, 2015), <https://bit.ly/3slqtdg> (percentage of Chicago high schools with newspapers dropped from nearly 100 percent in 1991 to 60 percent in 2006); Alicia Thomas, *Student Journalists Talk About Their Role in the Community, Censorship, Backlash and Press Freedom*, *Student Press L. Ctr.* (Jan. 30, 2020), <https://bit.ly/3rlWQaq> (discussing lack of student-sponsored newspapers in Appalachia and other rural areas).

<sup>14</sup> *SPLC Guide to Surviving Underground*, *Student Press L. Ctr.* (July 27, 2001), <https://splc.org/2001/07/splc-guide-to-surviving-underground/>.

Devil”), which issues daily student-produced content such as opinion pieces on foreign affairs, music reviews, and photo galleries of school events.<sup>15</sup> Its success inspired other students to create student news apps of their own.<sup>16</sup> Indeed, reporting through online media is now so ubiquitous that *Amicus* National Scholastic Press Association—whose awards are considered the Pulitzer Prize of high school journalism—created a category for the “Best Use of Social Media Reporting.”<sup>17</sup>

1. Student journalists publish off-campus in part to avoid censorship by school administrators. Because school officials are permitted to exercise broad control over what a student may publish in school-sponsored media under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), independent off-campus publications often remain the only manner by which student journalists can engage in valuable speech free of threat.

In *Hazelwood*, the Court held that schools can exercise “editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” 484 U.S. at 273. The Court held that schools may censor student

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<sup>15</sup> Alicia Thomas, *An Underground News Operation: How Student Journalists Paved Their Own Space at Their School*, Student Press L. Ctr. (Feb. 27, 2020), <https://bit.ly/3faTLHL>.

<sup>16</sup> *Id.*

<sup>17</sup> *2020 Best Use of Social Media*, Nat’l Scholastic Press Ass’n (Nov. 21, 2020), <http://studentpress.org/nsipa/2020-best-use-of-social-media>.

“speech that is ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences,” or speech that advocates “conduct otherwise inconsistent with ‘the shared values of a civilized social order.’” *Id.* at 271–72 (citation omitted). With such an expansive standard, it is no surprise that censorship under *Hazelwood* has been pervasive.

*Hazelwood* and its progeny have shifted the “balance of power” sharply “in favor of school administrators,” as explained by Frank LoMonte, director of the Brechner Center for Freedom of Information at the University of Florida. The ruling created a sense that “a vindictive administrator can get away with anything,” including “ruining a kid’s shot at college,” and “the law will not step in and correct the wrong.”<sup>18</sup>

In the years since *Hazelwood*, school administrators have censored countless stories in school student media on the basis that such stories are insufficiently “positive” about the school. Those include articles about a tennis coach who had pocketed money from students,<sup>19</sup> teachers who smoked in a room next to an occupied classroom that caused students to become

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<sup>18</sup> Daniel Reimold, *8 Ways a Landmark Supreme Court Ruling Has Changed Student Journalism*, Poynter (Feb. 21, 2013), <https://bit.ly/2OVSyTv>.

<sup>19</sup> See Freedom Forum, *Death by Cheeseburger: High School Journalism in the 1990’s and Beyond* 113–15 (1994), available at <https://bit.ly/39cjvkv>.

sick,<sup>20</sup> and a gap in test scores between white and minority students.<sup>21</sup> In Illinois, school officials refused to print a student’s story concerning the drunk-driving arrest of the school superintendent because, in the school principal’s view, the “focus of a school newspaper is to be positive.”<sup>22</sup> Similarly, in Washington, a principal forced a school student newspaper to pull an article regarding a controversial school coach because she did not believe a student newspaper was “an appropriate vehicle for airing concerns, complaints, or criticism about [school] staff.”<sup>23</sup> More recently, school administrators have forbidden student journalists from reporting on teachers resigning due to safety concerns over COVID-19, inadequate educational attainment due to distance learning, and on-campus COVID-19 infection rates.<sup>24</sup>

The basis of *Hazelwood*’s license of censorship in the context of school-sponsored publications was that such publications could be viewed as “bear[ing] the imprimatur of the school.” 484 U.S. at 271. The question, in the Court’s view, was thus “whether the First

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<sup>20</sup> *Principal Censors Anti-Smoking Editorial*, Student Press L. Ctr. Rep., Winter 1992–93, at 9, available at <https://issuu.com/splc/docs/v14n1-winter92/9>.

<sup>21</sup> *Florida High School Newspapers Passed Out with a Hole*, Student Press L. Ctr. (Oct. 1, 2006), <https://bit.ly/3vXTiPm>.

<sup>22</sup> *Principal Silences Article on Drunk Driving Arrest of School Superintendent*, Student Press L. Ctr. Rep., Fall 1992, at 17, available at <https://issuu.com/splc/docs/v13n3-fall92/17>.

<sup>23</sup> *High School Students Lose Censorship Appeal to School Board*, Student Press L. Ctr. (May 15, 2007), <https://bit.ly/3d6gQZK>.

<sup>24</sup> *Student Journalists in 2020: Journalism Against the Odds*, Student Press L. Ctr. (2021), <https://bit.ly/3vZ4JWK>.

Amendment requires a school affirmatively to promote particular student speech.” *Id.* at 270–71. Indeed, the Court expressly distinguished school-sponsored publications from “off-campus ‘underground’ newspaper[s].” *Id.* at 271 n.3. With the Court drawing this distinction, it has become all the more important for students to continue to have access to *non*-school-sponsored avenues—which no one would reasonably associate with the school’s imprimatur—to exercise their right to speech and practice meaningful journalism.

2. That is what has happened in practice: faced with threatened or actual censorship, many student journalists have published online or through other non-school-affiliated outlets.<sup>25</sup>

For instance, in Herriman, Utah, a group of student journalists working for their high school’s student newspaper posted a story on the paper’s website breaking news that local police were investigating a former teacher for allegedly sending inappropriate text messages to a student. Early the next morning, school administrators deleted the story and took down the newspaper’s website, without notifying the students or providing an explanation to them. The student journalists then created a new, student-run website to serve as an “independent news source that will not censor material.”<sup>26</sup>

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<sup>25</sup> *Student Media Guide to Maintaining an Off-Campus Website*, Student Press L. Ctr. (Aug. 25, 2014), <https://bit.ly/31cbOoS>.

<sup>26</sup> Taylor Hartman, *Herriman High School Students Claim School Newspaper Is Being Censored*, Fox13 Salt Lake City (Jan. 22, 2018), <https://bit.ly/3cgbFae>.

Similarly, high school students in Faribault, Minnesota, started an online independent newspaper when their superintendent shut down the school's student newspaper because student editors would not show him an article regarding an investigation into a middle school teacher.<sup>27</sup> High school students in Little Rock, Arkansas, launched an independent paper to publish a story about gang fighting when their principal threatened to suspend them if they printed the story in the school student newspaper.<sup>28</sup> In Covina, California, high school students started an independent newspaper after the school censored a letter to the editor from the school's official student newspaper criticizing the principal's refusal to allow them to start a political science club.<sup>29</sup> Over the following year, the independent newspaper in Covina led students in a number of important campaigns, including organizing a petition to establish a student bill of rights.<sup>30</sup>

3. Student journalists rely on the ability to publish and conduct their work through independent, off-campus media. Indeed, the availability of off-campus student journalism can temper overreach by school administrators in censoring *school-affiliated* student

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<sup>27</sup> Katie Fowley, *School Newspaper Circumvents Censorship by Going Public*, Nat'l Coal. Against Censorship (Jan. 12, 2019), <https://bit.ly/2NRuDuA>.

<sup>28</sup> Herbert N. Foerstel, *Banned in the Media: A Reference Guide to Censorship in the Press, Motion Pictures, Broadcasting, and the Internet* 212 (1998), available at <https://bit.ly/3rk5PJo>.

<sup>29</sup> Denise Hamilton, *Underground Paper Irks School's Administration*, L.A. Times (May 5, 1990), <https://lat.ms/39faDto>.

<sup>30</sup> *Hammer Makes Waves, Keeps On Publishing*, Student Press L. Ctr. Rep., Fall 1990, at 14, available at <https://splc.org/wp-content/uploads/2018/10/fall90.pdf>.

newspapers. In its work counseling student journalists, *Amicus* Student Press Law Center has found that the possibility that student journalists may simply publish censored work in an independent forum sometimes leads administrators to relent on censorship threats and permit publication of student journalism in school-sponsored student newspapers.

Petitioner would disrupt this balance and choke off a valuable avenue for students to engage in meaningful journalism. As explained below, allowing school administrators to punish student journalists for their off-campus work under the *Tinker* framework would threaten the only remaining way that many student journalists can speak free of censorship or reprisals. This would chill important reporting in both on- and off-campus student media.

**B. Allowing Administrators to Punish Students for Off-Campus Speech They Deem “Substantially Disruptive” Would Chill Valuable Student Journalism.**

This Court’s narrow limitations on student free speech and press rights have been limited to the confines of the “school environment.” *See Tinker*, 393 U.S. at 507 (noting that “school officials, consistent with fundamental constitutional safeguards,” have the authority to “prescribe and control conduct *in the schools*” (emphasis added)); *Hazelwood*, 484 U.S. at 271 n.3 (distinguishing between “speech that is sponsored by the school” and speech in an “off-campus ‘underground’ newspaper”); *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (restricting student speech

that promotes illegal drug use “at a school-sanctioned event”). Petitioner’s rule, however, seeks to extend school administrators’ already expansive authority—allowing them to police students’ out-of-school speech, including student journalism that is not affiliated with school-sponsored publications, under a standard developed specifically for the school environment.

Indeed, school administrators have demonstrated that punishing students for independent publications is exactly how they intend to use any newfound power granted by this Court. Petitioner’s brief (at 15) favorably cites a century-old Wisconsin case in which a principal suspended, and demanded a fine and apology from, high school students who submitted to the village newspaper a student-written poem that parodied the school’s rules. *State ex rel. Dresser v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232 (1908). Despite being characterized as harmless, the poem “found its way into the homes of many of the children attending the high school,” which according to the principal created a “direct and injurious effect upon the good order and discipline of the school.” *Id.* at 235.<sup>31</sup>

Petitioner urges this Court to transform decisions such as *Dresser* into First Amendment law—such that a school administrator could punish a student for publishing “offensive” content in a non-school-affiliated newspaper under the guise of “substantial disruption.” Such a rule would endanger not only student investigative journalism published off-campus, but

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<sup>31</sup> The poem, “The School House Jail,” is reproduced in the appendix to this brief.

also student opinion pieces published in newspapers,<sup>32</sup> in conjunction with public radio,<sup>33</sup> in online fora,<sup>34</sup> or simply on a student’s blog or Facebook page. And this expansion would also endanger important stories in school student media by closing off independent publications as a censorship-free forum for expression.

1. Petitioner argues that its proposed legal standard protects students’ First Amendment rights because schools may regulate a student’s off-campus speech only if it creates a risk of “substantial disruption.” *See, e.g.*, Pet’r Br. 26–30. But this would not adequately safeguard protected speech. Courts already struggle with how to apply *Tinker* to “student speech that takes place off-campus and is later brought on-campus either by the communicating student or others to whom the message was communicated.” *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (cited in *Morse*, 551 U.S. at 401). As a result, school administrators—and lower courts—apply the “substantial disruption” standard inconsistently and often broadly. Resp’ts Br. 20–21 (citing examples).

Those concerns are more relevant today and will increase in complexity over time. Applying *Tinker*’s

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<sup>32</sup> *See, e.g.*, The Learning Network, *What Students Are Saying About Renaming Schools, Creative Expression and Social Media Trends*, N.Y. Times (Feb. 11, 2021), <https://nyti.ms/2QPRFDf>.

<sup>33</sup> *See, e.g.*, The Students’ Podcast, NPR, <https://www.npr.org/podcasts/510354/the-students-podcast>.

<sup>34</sup> *See, e.g.*, Youth Voices, <https://www.youthvoices.live/> (last accessed Mar. 30, 2021).

“substantial disruption” standard to scenarios where a student newspaper is printed off campus and physically brought to campus is difficult enough. But, as discussed above, today’s student journalism is increasingly conducted not in print but in cyberspace and thus can be transmitted from outside a school to inside a school instantaneously without any affirmative effort by the student author.

The Court has expressed that in the First Amendment context in particular, rules must be made clear to avoid chilling constitutionally protected speech. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (“Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” (internal quotation marks and citation omitted)). If student journalists are unclear as to the law’s protections, they will be deterred from investigating and reporting on serious issues—including those that their peers and communities often rely on them to address.

2. Petitioner purports to narrow its proposed standard by allowing schools to regulate only student speech that is “intentionally directed \* \* \* at the school environment” and “foreseeably reach[es] [the school] environment.” Pet’r Br. 27. Petitioner clarifies that by “direct[ed]” “at the school community,” it means to include speech that merely “refer[s] to school affairs” or speech that is “sen[t] \* \* \* directly to classmates.” *Id.* at 28. By its own terms, Petitioner’s standard provides little limit as to what student speech school administrators may censor. Moreover, Petitioner’s standard would rarely if ever provide comfort to student journalists who publish off campus;

as the examples highlighted in this brief reflect, one of the highest values of student journalism is to shed light on controversies or misconduct affecting the school community. When, for example, a student journalist exposes a principal's lack of credentials, that principal would undoubtedly claim that the story is directed at the school environment.<sup>35</sup> Petitioner argues that the Court should permit administrators to punish a student for an email to classmates over the weekend to urge a mass biology class walkout. Pet'r Br. 29. That same theory might permit a principal to punish a student for an op-ed in the *San Francisco Chronicle* urging a protest of the school district not returning to in-person schooling.<sup>36</sup>

And the second purported "constraint" is just as vague—in light of modern media's ubiquity, even a statement far removed from a school's doors can "enter" school grounds within moments. But beyond the standard's vagueness lies an equally troubling implication: that what school administrators will seek to prohibit students from publishing are precisely those stories that student journalists are uniquely situated to produce. What is more appropriate for a student journalist to investigate and report than a matter concerning and relevant to her "school environment"?

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<sup>35</sup> See Samantha Schmidt, *These High School Journalists Investigated a New Principal's Credentials. Days Later, She Resigned.*, Wash. Post (Apr. 5, 2017), <https://wapo.st/2NOOLgW>.

<sup>36</sup> See Emma Talley, *SFUSD Families and Breed to Protest, Demanding Full Reopening of Schools for All Students*, S.F. Chron. (Mar. 12, 2021), <https://bit.ly/3dfzbn3>; Olivia Wynkoop, *One Year After City Schools Closed, Parents Rally for a Full Reopening*, S.F. Exam'r (Mar. 13, 2021), <https://bit.ly/3u0ie6M>.

This “substantial disruption” standard is particularly dangerous as applied to off-campus student investigative journalism and opinion pieces. Good student journalism—like all journalism—is meant to be disruptive in a sense. It is often thought-provoking and sparks debate. Certainly, many of the episodes discussed in this brief caused school officials to receive complaints from parents, teachers, and students alike. Yet under the rule advocated by Petitioner, those indications that off-campus student journalism is important and interesting would be grounds to censor or punish its authors.

And even if a claim of substantial disruption might eventually be rejected in court, serious constitutional injury will already have occurred. Such a threat—aided by an amorphous standard—would undoubtedly chill some student journalists unwilling to risk school discipline.<sup>37</sup> Would an ambitious student journalist, who needs to rely on the school’s counseling office for support in applying to selective universities, risk suspension and mount a lawsuit against her school on the chance a court might eventually vindicate her rights?

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<sup>37</sup> A recent study found that many student journalists self-censor and refrain from covering certain topics in school student media. See Piotr S. Bobkowski & Genelle I. Belmas, *Mixed Message Media: Girls’ Voices and Civic Engagement in Student Journalism*, 10(1) *Girlhood Studies* 89, 97, 99 (2017) (concluding that “[n]early one in 10 students (9 percent)” felt that they could not cover issues that were “generally controversial, that might offend, upset, disturb, be harmful, touchy, or sensitive” or “suggested the school’s employees or students were somehow flawed”).

If the answer is even “maybe not,” protected speech has been chilled.<sup>38</sup>

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The First Amendment prevents school administrators from assuming such expansive powers of censorship. As one court reasoned in holding that a school administrator’s censorship of an article about a lawsuit against the school district violated the First Amendment: “if the role of the press in a democratic society is to have any value, all journalists—including student journalists—must be allowed to publish viewpoints contrary to those of state authorities without intervention or censorship by the authorities themselves.” *Dean v. Utica*, 345 F. Supp. 2d 799, 804 (E.D. Mich. 2004).

And again, even if a court ultimately disagreed with the school, many student journalists would likely decide not to publish at all, rather than gamble scholastic and professional consequences on years of litigation with uncertain results. The inevitable consequence of Petitioner’s rule would be less speech by student journalists, and less valuable reporting on matters of community concern.

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<sup>38</sup> See Eli Hager, *First Big Scoop: Student Journalists Expose High School’s Use of Prison Labor*, Marshall Project (June 24, 2019), <https://bit.ly/3cYpp8M> (explaining that a student journalist’s reservations about reporting a controversial story were eased by the fact that he was a senior who would be graduating from high school soon).

### III. The First Amendment Prohibits Administrators from Punishing Student Journalists for Off-Campus Newsgathering.

In addition to permitting censorship of journalistic content published beyond the schoolhouse gates, extending *Tinker* to apply to off-campus speech would undoubtedly chill off-campus activity associated with student journalism that should be protected under the First Amendment, such as newsgathering or promoting newsworthy stories through social media.

Student journalists have always conducted reporting activities—from attending school board meetings to conducting interviews—outside of the schoolhouse gates. For instance, hundreds of student journalists covered the demonstrations that followed the shooting at Marjory Stoneman Douglas High School in Parkland, Florida.<sup>39</sup> And in Bloomington, Indiana, student reporters working for Indiana University’s newspaper—through interviews of Uber drivers who transported students between local Greek houses—uncovered that many students in sororities and fraternities were not complying with campus quarantine rules during the pandemic.<sup>40</sup>

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<sup>39</sup> Gabriel Greschler & Taylor Potter, *Student Journalists Nationwide Cover March for Our Lives Rallies*, Student Press L. Ctr. (Mar. 24, 2018), <https://bit.ly/3d7liWO>.

<sup>40</sup> Phyllis Cha, *Students in Greek Houses Have Been Breaking Quarantine, Uber Drivers Say*, Ind. Daily Student (updated Oct. 2, 2020), <https://bit.ly/2PkdPN7>.

In this digital age, even more reporting occurs off-campus, including through online platforms. For instance, when reporting on sexual harassment within their school in Plantation, Florida, student magazine journalists sent their classmates a Google Form containing questions about the topic. Nearly 300 students responded to the questionnaire, which the student journalists used to write articles and create accompanying infographics.<sup>41</sup>

But under the murky jurisprudence that has evolved post-*Tinker*, student journalists continue to face threats of discipline from school administrators. For instance, last fall, the editor-in-chief of the student newspaper at Haskell Indian Nations University in Kansas e-mailed the police with a routine request for public information concerning a university employee's death as part of the journalist's ongoing investigation. But when the university's president learned of the journalist's request, he threatened the student with disciplinary action if he performed similar work in the future. Only after the student sued alleging violation of his First Amendment rights did the administrator relent.<sup>42</sup> Should this Court adopt Petitioner's rule, school administrators may not be so hesitant to carry out their threats.

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<sup>41</sup> Avani Kalra, *Covering Misconduct Allegations as a High School Journalist*, Colum. Journalism Rev. (Oct. 3, 2019), <https://bit.ly/3ckYLIh>.

<sup>42</sup> Johan Marin, *Haskell University President Threatened Action Against Student Newspaper's Editor-in-Chief*, U. Daily Kan. (Oct. 26, 2020), <https://bit.ly/2QCp7Nt>.

Similarly, students who are not journalists have been punished for off-campus social media posts that became the subject of student and professional media reporting. They have used social media to shed light on important topics such as rats infesting their high school<sup>43</sup> and suspect school lunches.<sup>44</sup> School administrators have punished students for posting videos of an unsanitary school restroom sink.<sup>45</sup> And school administrators shut down a Young Conservatives Club for posting a video criticizing students who refused to stand during the playing of “Taps” at a Veterans Day assembly.<sup>46</sup>

If the Court were to adopt Petitioner’s rule, a wide variety of off-campus social media posts and other speech crucial to student and professional news reporting could make students vulnerable to discipline by school administrators.

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When this Court has previously limited the free speech rights of students, it has been careful to explain those limitations as justified by “the special characteristics of the school environment.” *Morse*, 551

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<sup>43</sup> *Barron Collier Students Say Rats Are Taking Over High School*, WINK News (updated Mar. 31, 2015), <https://bit.ly/3vXMCAv>.

<sup>44</sup> Maria Godoy, *This Is What America’s School Lunches Really Look Like*, NPR (Nov. 22, 2013), <https://n.pr/39eP7oB>.

<sup>45</sup> Kim Russell, *Student Suspended After Posting Picture of Discolored Water in School Bathroom to Social Media*, WXYZ Detroit (updated Sept. 24, 2016), <https://bit.ly/3siE4lC>.

<sup>46</sup> Solvejg Wastvedt, *Settlement Ends Edina Students’ Free-Speech Lawsuit*, MPR News (Mar. 2, 2018), <https://bit.ly/3d46Sb9>.

U.S. at 397 (quoting *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506)). Student journalists already face significant limits on their free speech for their on-campus and school-affiliated work. The Court should not endorse a rule that would relax student journalists' protections for *off-campus*, *non-school-affiliated* journalism, which would inevitably lead to both censorship and self-censorship of the most valuable forms of speech.

## CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit should be affirmed.

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March 31, 2021

**APPENDIX**

**“The School House Jail”**

Sit gazing strictly to the front,  
Until the teacher says “Stand,”  
And then with dignity arise,  
And march to the Brass Band.

Step mincingly upon your toes,  
And bring your heels down light,  
Just mimic your elders,  
And you’ll get there all right.

For goodness sake you must keep time,  
Lift your feet off from the floor,  
If you don’t choose to go down stair,  
Go in at the northern door.

Look straight ahead, keep single file,  
Come right back to your seat,  
Imagine that you are in jail,  
Sing-Sing our school can beat.

And as you go down the stairs,  
One step at a time if you please,  
Cling closely to the banisters,  
Don’t whisper, smile or sneeze.

You must shut your mouth at noontime,  
You must shut it at recess,  
You must keep it shut at morning,  
And all other times I guess.

2a

When you get up to leave the room  
Don't take a friend along,  
You must not once quit working hard,  
Because you know that's wrong.

Can't even stop to tie your shoe,  
Or blow your nose or cough,  
Don't look up from your book at all,  
Nor don't you dare to laugh.

Just calmly wait till four o'clock,  
You know that comes round soon,  
And then you're free from prison  
Until the next forenoon.<sup>47</sup>

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<sup>47</sup> Della Jastram, *The School House Jail* (Oct. 10, 1906), reprinted in *Calls School a Prison*, Eau Claire Leader (Wis.), Feb. 16, 1907, at 7.