24-1241

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CASE LEROY,
Plaintiff – Appellant,

v.

LIVINGSTON MANOR CENTRAL SCHOOL DISTRICT and JOHN P. EVANS, in his capacity as Superintendent of Schools of Livingston Manor Central School District,
Defendants – Appellees.

On Appeal from the United States District Court
for the Southern District of New York, No. 21-cv-6008

BRIEF FOR *AMICI CURIAE*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, THE MANHATTAN INSTITUTE, AND NATIONAL COALITION AGAINST CENSORSHIP
IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of stock or ownership interest in *amici*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTERESTS OF AMICI CURIAE[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Founded in 1999 as the Foundation for Individual Rights in Education, FIRE's focus before the expansion of our mission in 2022 was defending student and faculty rights at our nation's colleges and universities. Given our decades of experience combating campus censorship, FIRE is all too familiar with the constitutional, pedagogical, and societal problems presented by silencing minority or dissenting viewpoints. Informed by our unique history, FIRE has a keen interest in ensuring the censorship we fight on college campuses and in society at large is not fostered in our public K-12 schools—both on and off school grounds.

Because today's students are tomorrow's leaders, FIRE places a special emphasis on educating grade school students about their

[1] All parties have consented to this amici curiae brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

expressive rights and defending them when those rights are violated.[2] FIRE strongly opposes attempts to discipline students for protected expression and litigates against schools that wrongfully punish student speakers. *See, e.g.*, *I.P. ex rel. B.P. v. Tullahoma City Sch.*, 4:23-cv-00026 (E.D. Tenn. filed July 19, 2023); *D.A. v. Tri County Area Schools*, 123-cv-00423 (W.D. Mich. filed April 25, 2023).

FIRE also files amicus curiae briefs in cases implicating student First Amendment rights. *See, e.g.*, Brief for FIRE as Amicus Curiae, *B.L. ex. rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020); Brief for FIRE as Amicus Curiae, *Mahanoy Area Sch. Dist. v. B.L. ex. rel. Levy*, 594 U.S. 180 (2021); Brief for FIRE as Amicus Curiae, *C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022). To best prepare students for success in our democracy, our nation's public schools must respect students' First Amendment right to freedom of expression.[3]

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[2] Josh Haverlock, *FIRE is bringing together the next generation of free speech leaders*, The Foundation for Individual Rights and Expression (Jan. 11, 2024), https://www.thefire.org/news/fire-bringing-together-next-generation-free-speech-leaders.

[3] *Pledge allegiance or else: Maryland public school forces students and teachers to salute the flag*, The Foundation for Individual Rights and Expression (May 30, 2024), https://www.thefire.org/news/pledge-allegiance-or-else-maryland-public-school-forces-students-and-teachers-salute-flag.

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed *amicus* briefs supporting the rule of law and opposing government overreach, including in the marketplace of ideas. MI has a particular interest in defending constitutional speech protections because its scholars have been targets of speech-suppression efforts.

The **National Coalition Against Censorship (NCAC)** is an alliance of more than 60 national non-profit educational, professional, labor, artistic, religious, and civil liberties groups that are united in their commitment to freedom of expression. The Coalition was founded in 1974 in response to the landmark Supreme Court decision *Miller v. California*, which narrowed First Amendment protections for sexual expression and opened the door to obscenity prosecutions. As a central part of its advocacy, NCAC's Youth Free Expression Program works with students and young people to empower them with knowledge, tools, and opportunities to assert and defend their right to free expression. NCAC frequently advocates for individual students who have been subject to

censorship, most often at the hands of school officials. Ensuring that students do not shed their First Amendment rights simply by virtue of attending a public school is a core priority for NCAC. The positions advocated in this brief do not necessarily reflect the views of all NCAC's member organizations.

INTRODUCTION

The year 2020 was one of the most politically contentious in modern American history, with a once-in-a-century pandemic, a combative presidential election, and nationwide protests for racial justice following the murder of George Floyd in Minneapolis.

On April 19, 2021, a day before a jury found police officer Derek Chauvin guilty of Floyd's murder, Plaintiff Case Leroy, a then student at Livingston Manor High School ("LMHS"), drove with classmates after school to pick up one of their siblings from a private dance class. In the dance studio parking lot, Case and his friends took a photograph emulating Floyd's death. The photo "depicts [Case] lying on the ground while his friend . . . kneels over him." *Leroy v. Livingston Manor Cent. Sch. Dist.*, 21-cv-6008, 2024 WL 1484254, at *2 (S.D.N.Y. Apr. 5, 2024). Before departing, Case and his friends posted the photo to their Snapchat stories. Case's photo contained the caption "Cops got another," and was visible to his Snapchat friends, including classmates. *Id.* He deleted the post that evening. *Id.* Even so, LMHS suspended Case for five days because the photos "caused a quick and emotional response from

students," some of whom disrupted LMHS and physically threatened Case and his friends. *Id.* at *2, 9.

Case's suspension was unconstitutional because the First Amendment squarely protects his photograph. That is because "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding burning the American flag is protected expression). "Indeed, the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011) (holding the First Amendment protected holding signs like "Thank God for Dead Soldiers" outside a military funeral).

LMHS betrayed these core constitutional promises. The Supreme Court held in 2021 that public schools do not sit as a 24/7 board of censors over students' private, off-campus expression. *Mahanoy Area Sch. Dist. v. B.L. ex. rel. Levy*, 594 U.S. 180, 189–90 (2021) (holding a high school student's off-campus Snapchat posts constituted protected expression). That a public-school student's off-campus speech "upsets" others does not

mean government employees may censor it. To the contrary: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969).

The district court, however, got the law precisely backwards. It held LMHS lawfully suspended Case because, even though Case did not disrupt school, students upset with his photo caused "unrest" at LMHS and threatened Case. *Leroy*, 2024 WL 1484254, at *8–9. But punishing a speaker for disorder caused by the speaker's opponents—what's known as a "heckler's veto"—has no place in a free society. *Cf. Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) ("[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.")

Case's photo does not fall within any category of unprotected expression; neither LMHS nor the district court assert otherwise. But under the district court's ruling, by enrolling in a public school, America's students surrender their First Amendment rights, even off campus, and may be subjected to year-round monitoring and punishment if their opinions prove too controversial for classmates. A student who posts a picture from a campaign rally of a disfavored political candidate could be

in a school's disciplinary crosshairs if classmates react adversely to that picture.

That is not tenable. It is also not the law. Instead, our public schools are "nurseries of democracy," training the next generation of Americans to live in a society where neighbors and coworkers might not think or express themselves the same way they do. *Mahanoy*, 594 U.S. at 190. Living in a pluralistic democracy requires preparation, and our public schools are there to provide it.

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. U.S.*, 277 U.S. 438, 468 (1928). Teaching the next generation that the way to respond to "offensive" expression is to disrupt school or silence the speaker is no way to protect the First Amendment. It is already a rare student who, despite the social pressures inherent in adolescence, chooses to express unpopular opinions. Should unpopular expression off campus also subject them to discipline, few will take the risk. Our First Amendment exists in order to prevent this precise sort of self-censorship and silencing of unpopular opinions.

If a student (or adult) cannot handle a speaker's constitutionally protected expression without resorting to threats or disorder, the problem isn't the speaker. The Supreme Court was crystal clear in *Mahanoy*: our public schools "ha[ve] an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." 594 U.S. at 190. LMHS and the district court ignored that interest and broke the First Amendment's promise of free expression to every American, young and old. This Court should reverse.

SUMMARY OF ARGUMENT

Just three years ago, the Supreme Court addressed the questions raised here. In *Mahanoy*, the Court warned "when it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." *Id.*

At the heart of *Mahanoy* is the critical distinction between student speech that occurs *on* versus *off* campus. At school and during school activities, schools stand in the shoes of parents and therefore possess limited authority to regulate student speech incompatible with the school environment. *Id.* at 189. But that authority does not extend to student

speech occurring elsewhere, when parents, not the government, are responsible for supervising minors. *Id.*

Upholding minors' freedom of expression depends on respecting the boundary of governmental authority. As the Court admonished, "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Id.* at 189–90. This applies explicitly to so-called "offensive" speech as well, because "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." *Id.* at 190 (emphasis added). As one columnist put it, "You cannot teach respect for constitutional rights to young people who experience the Constitution only as a meaningless abstraction in a textbook."[4]

While *Mahanoy* was the first Supreme Court case to analyze the constitutionality of a public school's attempt to regulate off-campus student speech, it followed a long tradition of First Amendment cases

[4] Frank D. Lomonte, *The Future of Student Free Speech Comes Down to a Foul-Mouthed Cheerleader*, SLATE (March 29, 2021), https://slate.com/technology/2021/03/mahanoy-area-school-district-supreme-court-snapchat-cheerleader.html.

significantly limiting a public school's authority over off-campus student speech. *See, e.g.*, *Layshock ex. rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216, 219 (3d. Cir. 2011) (en banc) (emphasizing that "the reach of school authorities is not without limits" and a school "may punish expressive conduct that occurs outside of school" only "under certain very limited circumstances"); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 927 (3d. Cir. 2011) (en banc) (drawing sharp distinction between a school's authority to regulate "plainly offensive," "lewd," "vulgar," and "indecent" speech on campus versus a lack of authority off campus); *Thomas v. Bd. of Ed., Granville Central Sch. Dist.*, 607 F.2d 1043, 1050 (2d. Cir. 1979) (strictly limiting a school's regulatory authority "beyond the schoolhouse gate").

In *Thomas*, this Court explained that where "school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Thomas*, 607 F.2d at 1050. It stressed that its "willingness to defer to the schoolmaster's expertise in administering school discipline

rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Id.* at 1045.

The district court's analysis ignored the distinction between on-campus and off-campus speech this Court has long recognized, and which the Supreme Court ratified in *Mahanoy*. Instead, it focused on one thing: whether a substantial disruption occurred—regardless of the nature of the speech or source of the disruption. Authorizing schools to regulate off-campus speech that bears no connection to school or school-related activities, based not on the actions of the speaker but the reactions to the speech, cannot be reconciled with the First Amendment or binding case law. We respectfully urge this Court to reverse the district court.

ARGUMENT

I. The First Amendment Squarely Protected Case Leroy's Off-Campus Political Speech.

The law is clear: "[M]inors are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975); *see also Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 804 (2011); *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). America's public schools play an important role preparing students to "live in this relatively permissive, often disputatious society."

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969). As the Supreme Court explained: "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, 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." *Barnette*, 319 U.S. at 637.

Minors' political speech, like Case's image invoking George Floyd's murder, is no different. Political speech "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation marks omitted); *see also Lane v. Franks*, 573 U.S. 228, 235 (2014) ("Speech by citizens on matters of public concern lies at the heart of the First Amendment . . .") So public schools have a critical role to play in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our [democratic] society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

This protection does not wane because someone deems expression "controversial" or "offensive." Safeguarding unpopular speech is why the First Amendment exists. Mainstream opinions need no protection. So "[i]f

there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414 (collecting cases). "[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder*, 562 U.S. at 458 (quoting *Hurley v. Irish–American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995)). Disputes are a feature, not a bug, of free speech. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[A]dvocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression.")

The Supreme Court "ha[s] not recognized an exception to this principle." *Johnson*, 491 U.S. at 414. And the Court has repeatedly rejected an exception based on the speaker's status as a minor who happens to attend public school. *See, e.g.*, *Mahanoy*, 594 U.S. at 189–91 (reaffirming that public schools may not regulate students' off-campus speech merely because it is offensive); *Tinker*, 393 U.S. at 508 ("Any word spoken in class, in the lunchroom, or on the campus, that deviates from

the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . ."); *see also J.S.*, 650 F.3d at 915, 932 (holding that the law "cannot be extended to justify a school's punishment of [student]" for use of "offensive" and "profane language outside the school, during non-school hours").

What is more, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." *Mahanoy*, 594 U.S. at 190. That is true even where, as here, community pressure to discipline off-premises speech weighs heavily on a public school's administration. As this Court explained in *Thomas*, "We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property." 607 F.2d at 1051.

Case's speech does not fall within any recognized exception to First Amendment protection, like incitement, fighting words, or obscenity. Defendants and the district court do not claim otherwise. And the Supreme Court has made clear the First Amendment does not contain a subjective poor taste exception. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54–55 (1988). That means Case's photograph remained firmly

within the First Amendment's robust protection for political expression. *See Mahanoy*, 594 U.S. at 191 (holding student's off-campus profane Snapchat post about cheerleading team remained protected expression when it did not constitute obscenity or fighting words).

II. The District Court's Ruling Defies Recent Supreme Court Precedent and Bedrock First Amendment Principles.

The district court's ruling grants the government unprecedented authority to police student speech anywhere and anytime if the speaker is enrolled in a public school. But the Supreme Court warned in *Mahanoy* that courts "must" honor the distinction between on-campus and off-campus student speech, because a failure to do so "may mean the student cannot engage in that kind of speech at all." *Id.* at 190. The district court disregarded *Mahanoy*'s unambiguous distinction. If allowed to stand, the district court's decision that Case's off-campus, non-school related, political post can be punished by school administrators will mean that Case "cannot engage in that kind of speech at all." *Id.*

A. The First Amendment permits only limited intrusion of students' First Amendment rights, even during school.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S at 506.

Under *Tinker*, students retain their First Amendment rights at school, and the government may only restrict expression which causes, or may be reasonably forecast to cause, substantial disruption, or which invades the rights of others. *Id.* at 513–14.

Tinker built on earlier holdings that the free speech rights of minors are subject to "scrupulous protection," and that school authorities are constrained by "the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637. A key factor in this line of cases is recognition that school officials may not exceed their limited sphere of authority: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

B. Under Mahanoy, Case's off-campus, non-school related speech is even further removed from LMHS's regulatory authority.

Mahanoy governs schools' ability to police off-campus student speech. *See* 594 U.S. at 194 (Alito, J., concurring) ("This is the first case in which [the Supreme Court] ha[s] considered the constitutionality of a

public school's attempt to regulate true off-premises student speech . . ."); *C1.G v. Siegfried*, 38 F.4th 1270, 1276 (10th Cir. 2022) (applying *Mahanoy* when student's speech occurred off-campus).

In *Mahanoy*, a high schooler disappointed at only making the junior varsity cheerleading team posted two rants to Snapchat expressing her displeasure. One post read, "Fuck school fuck softball fuck cheer fuck everything." *Mahanoy*, 594 U.S at 185. The second complained that the cheer coach gave preferential treatment to other students. *Id.* In response, the school suspended the student from the junior varsity squad for the upcoming year. *Id.*

The Supreme Court held the suspension violated the First Amendment. The Court explained the student's Snapchat's posts "did not involve features that would place it outside the First Amendment's ordinary protection." *Id.* at 191. The Court noted that the posts, "while crude, did not amount to fighting words" and "w[ere] not obscene as this Court has understood that term." *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cohen v. California*, 403 U.S. 15, 19–20 (1971)).

The Court rejected the school district's arguments attempting to bring the student's off-campus speech within its grasp. The Court emphasized the student spoke "outside of school hours from a location outside the school;" "did not identify the school in her posts or target any member of the school community with vulgar or abusive language;" and "transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends." *Mahanoy*, 594 U.S. at 191.

In sum, *Mahanoy* explained, the student "spoke outside the school on her own time," when her parents, not the school, were responsible for her supervision. *Id.* at 192; *see also C1.G*, 38 F.4th at 1277–78 (highlighting the focus *Mahanoy* placed on courts assessing off-campus speech's nexus to school, emphasizing "*Mahanoy* is clear that schools may not invoke the [in loco parentis] doctrine to justify regulating off-campus speech in normal circumstances"). The *Mahanoy* Court explained that, while a school's regulatory authority does not "always disappear when a school regulates speech that takes place off campus," this authority is significantly "diminished" and "courts must be more skeptical of a

school's efforts to regulate off-campus speech." 594 U.S. at 188–90 (emphasis added).

As *Mahanoy* acknowledges, speech occurring during situations where "the school is responsible for the student," which might include "remote learning" or "activities taken for school credit," "travel en route to and from the school," or during "extracurricular activities," is subject to a school's limited regulatory authority under *Tinker*. *Id.* at 188. But as Justice Alito noted in his concurrence, off-campus student speech unrelated to school about matters of public concern "is almost always beyond the regulatory authority of a public school" because "[s]peech on such matters lies at the heart of the First Amendment's protection." *Id.* at 205 (Alito, J., concurring).

Case's speech about George Floyd is at the "heart of the First Amendment's protection." *Id.* Case took his photograph and posted it to his private Snapchat account off campus. And unlike even the protected speech in *Mahanoy*, Case's photograph and caption related exclusively to a political issue of immense public concern, rather than to school-based activities, students, or faculty. *See id.* The First Amendment and *Mahanoy* place Case's off-campus political speech beyond the reach of his

teachers and administrators. *See also C1.G*, 38 F.4th at 1270–78 (holding that, under *Mahanoy*, the First Amendment protected a student's off-campus Snapchat picture of him and his friends wearing World War II regalia with the caption "Me and the boys bout to exterminate the Jews").

C. The district court disregarded the *Mahanoy* framework, instead purporting to distinguish Case's off-campus speech as "disruptive" under *Tinker*.

The district court's analysis ignores *Mahanoy*'s distinction between on- and off-campus speech. It is undisputed that Case's speech occurred exclusively off campus. Yet rather than determining whether the nature of his off-campus speech brought it within the school's *Mahanoy* regulatory framework, the district court decided at the outset that "the facts are distinguishable from *Mahanoy*" because a substantial disruption occurred, and thus applied *Tinker*. *Leroy*, 2024 WL 1484254, at *9.

This approach fundamentally misunderstands *Mahanoy* and its relationship to *Tinker*. *Tinker* does not, as the district court's ruling assumes, supplant *Mahanoy* wherever a court finds "substantial disruption." *Id.* at *9. Instead, as *Mahanoy* makes clear, the first question is whether the student's speech falls within a categorical exception to the

First Amendment. *See, e.g.*, *C1.G*, 38 F.4th at 1277–78. If the speech is protected, the question under *Mahanoy* is whether the nature of the off-campus speech or surrounding circumstances bring it within the school's regulatory authority. *Mahanoy*, 594 U.S. at 188–93. If the speech has a sufficient nexus to school such that responsibility for disciplining the speech lies with the school rather than the student's parents, only then do courts assess whether any impact on the school satisfies *Tinker*'s substantial disruption standard.

But the district court put the cart before the horse. It determined first (and only) that the speech triggered a disruption at school, collapsing the legal distinction between on-campus and off-campus speech.

To address the question the district court ignored—whether the nature of the off-campus speech or surrounding circumstances bring it within the school's regulatory authority—courts must consider more than the offensiveness of the speech. *See id.* at 190. As the Supreme Court explained, this standard is "demanding" and requires "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 193 (cleaned up). Offensiveness is not enough—particularly because "the school itself has

an interest in protecting a student's unpopular expression, especially when the expression takes place off campus." *Id.* at 190 (emphasis added).

Yet by focusing exclusively on the reactions of listeners, the district court considered the offensiveness of Case's speech alone. Indeed, the entirety of the district court's "substantial disruption" analysis is evidence of others' responses to Case's expression. *Leroy*, 2024 WL 1484254, at *9–10. This loose interpretation of "disruption," which focuses on the disruptiveness of the audience rather than of the speech itself, effectuates a classic heckler's veto.

III. The Supreme Court's Doctrinal Distinction Between On- and Off-Campus Student Speech is Critical to Maintaining Minors' First Amendment Rights.

If the district court's decision stands, public school students would have substantially fewer First Amendment protections than their private schooled or homeschooled peers—not just on campus, but anywhere that their actions might become known to classmates or school officials. All it would take for a student's off-campus speech to subject them to punishment is someone viewing it, becoming upset, and disrupting the student's school. That's what happened to Case.

So, under the district court's ruling, attending public school became the very vehicle by which Case's right to speak freely was eviscerated. This upends a core tenet of American public-school education, which should prepare students for the contentious nature of civic society through increased exposure to the marketplace of ideas. *See Ambach*, 441 U.S. at 76 ("Public education . . . fulfills a most fundamental obligation of government to its constituency" in "the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . ."") (cleaned up); *see also Tinker*, 393 U.S. at 512 (discussions between classmates are "not only an inevitable part of the process of attending school; [they are] also an important part of the educational process"); *Mahanoy*, 594 U.S. at 190 ("America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'")

The expansive authority the district court opinion suggests would stifle far more than the type of speech at issue here. It would empower school authorities to ban a wide swath of off-campus speech on matters which concern young people, including politics, religion, school administration, and anything else that might cause "controversy" at

school. The result would be widespread self-censorship, with students not daring to post controversial opinions which might provoke the loudest and worst-behaved of their classmates. Affirmance would place a stamp of judicial permission on reacting to disagreeable speech with disorder in order to silence it. That is no way to train the next generation of guardians of America's democracy.

Imagine, for instance, if in 1965, Mary Beth Tinker and her classmates had protested the Vietnam War, not by wearing black armbands to school, but by distributing anti-war pamphlets in a public park over the weekend. Under the district court's approach, if her classmates disrupted lessons on Monday because they were upset by those pamphlets, it would be Mary facing a suspension. Consider also a student in a conservative town posting an image from a Black Lives Matter protest he attended. Or a Jewish student posting a picture with Israeli Defense Forces soldiers during a summer trip to Israel. In the district court's view, even if these students do nothing more than post a picture to social media, public schools may discipline them if classmates or the general public respond to the pictures with disorder. The First Amendment stands guard against this heckler's veto.

This Court cautioned schools and district courts decades ago: "Our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Thomas*, 607 F.2d at 1044–45. The district court's expansion of government authority to reach (1) beyond the schoolhouse gate, (2) into the parking lot of a private business, (3) to punish speech unrelated to school, (4) outside school hours, is unprecedented, contrary to binding precedent, and violates the First Amendment.

CONCLUSION

Case's political speech aroused emotions about a highly charged issue of considerable national interest. That is precisely when the First Amendment's protection for unpopular speech is most important. What the Supreme Court said in *Mahanoy* is true here: "It might be tempting to dismiss [this student's speech] as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these

fundamental societal values are truly implicated." 594 U.S. at 193 (cleaned up).

The question before this Court directly implicates minors' most fundamental First Amendment freedoms. If the district court's expansion of government authority stands, the result will be self-censorship, and a generation taught to respond to disagreeable speech with disruption rather than counterarguments. We respectfully urge the Court to reverse the decision below.

Dated: August 22, 2024

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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Date: August 22, 2024

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Dated: August 22, 2024

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