No. 20-255

In the Supreme Court of the United States

MAHANOY AREA SCHOOL DISTRICT,

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether allowing public schools to punish students for off-campus speech the schools deem substantially disruptive or even socially inappropriate unconstitutionally chills religious speech.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Becket frequently represents students seeking to vindicate their constitutional rights against government overreach. In *C.H. ex rel. Z.H.* v. *Oliva*, Becket represented Zachary Hood, a first-grade student who was told by his teacher that he could not share a story from his favorite book with his classmates solely because of its religious message. 226 F.3d 198 (3d Cir. 2000). Similarly, Becket represented Amandeep Singh, a ninth-grade honors student who was reprimanded and suspended indefinitely for bringing his kirpan—a ceremonial religious item worn by members of the Sikh faith—to school. After Becket's intervention, the school district dropped its objection to Amandeep's religious practice. See *Cheema* v. *Thompson*, 36 F.3d 1102 (9th Cir. 1994). And Becket has frequently represented students excluded from public forums on campus. See, *e.g., Business Leaders in Christ* v. *University of Iowa*, No. 19-1696, 2021 WL 1080556 (8th Cir. Mar. 22, 2021); *InterVarsity Christian Fellowship/USA* v. *Board of Governors of Wayne State Univ.*, 413 F. Supp. 3d 687 (E.D. Mich. 2019).

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Central to religious liberty is the right of parents to direct the religious upbringing of their children. Accordingly, Becket frequently argues in support of protecting religious education and the right of parents to direct the religious upbringing of their children. See, *e.g.*, *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Danville Christian Acad., Inc.* v. *Beshear*, 141 S. Ct. 527 (2020) (*amicus*); *Lebovits* v. *Cuomo*, 1:20-cv-01284 (N.D.N.Y. filed Oct. 16, 2020); *Moses* v. *Skandera*, 367 P.3d 838 (N.M. 2015), cert. granted, judgment vacated sub nom. *New Mexico Ass'n of Non-public Sch.* v. *Moses*, 137 S. Ct. 2325 (2017); *Moss* v. *Spartanburg Cnty. Sch. Dist. Seven*, 683 F.3d 599 (4th Cir.), cert. denied, 568 U.S. 1011 (2012); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012).

Becket submits this brief to explain how the rule advanced by Petitioner—giving public school administrators the power to police student speech whenever and wherever it occurs—would chill students' religious expression and restrict parental rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner seeks universal jurisdiction to police student speech—even if it occurs on a weekend, off campus, and is shared solely with the speaker's friends. Petitioner then argues that it can use this authority to punish any student speech that will "materially and substantially disrupt" the school environment or that is "socially [in]appropriate." But such a vague standard would expose *all* student speech—including religious speech and expression—to the school's close scrutiny. This is already a concern for religious students speaking on campus, as some lower courts have

watered down *Tinker*'s built-in protections for private student speech on public school campuses. But, applied off campus, Petitioner's rule would severely impair core First Amendment rights by chilling students' religious speech and interfering with parents' right to direct the religious upbringing of their children.

Unpopular or minority religious beliefs are often targets of government discrimination and hostility—and this frequently carries over to public schools. Examples abound of public school administrators treating certain religious beliefs not only as different or unusual, but as disruptive and offensive. This hostility often results from misperceptions and misunderstandings. But there is a significant risk that even well-intentioned attempts by school administrators to review off-campus student speech under *Tinker*'s material-disruption standard (or worse, the "socially appropriate behavior" standard) may be manipulated to chill or suppress students' private, off-campus, religious speech.

Expanding the jurisdiction of public-school administrators to sanction speech made in public, in a house of worship, or even at home also infringes on the right of parents to direct the religious upbringing of their children. For numerous faith traditions, religious education is a sacred duty entrusted primarily to a child's parents. Reflecting the importance of this religious practice, the Court has protected parental rights for over 100 years.

Crucial to protecting parental rights is ensuring that government actors do not usurp the role of parents in teaching their children religious, moral, and civic values outside the school environment. But giving public school authorities universal jurisdiction

over student speech would elevate the judgment of government actors over that of parents and impose government oversight on the intimate relationship of parent and child. When parents teach their children the faith, evangelize publicly with them, or even engage in religious worship, Petitioner's rule would allow public school authorities to sift through students' (or even parents') speech and decide whether any of it could be deemed sufficiently "disruptive." This gives public schools far greater coercive power over their students than *Tinker* allows and discourages parents from teaching their children unfamiliar (or unpopular) religious beliefs for fear of government sanction.

B.L.'s speech was juvenile and crude, but the Constitution protects the speech of both Billy Graham and Howard Stern. This is a feature, not a bug. The Founders did not trust the government—or even federal courts—to distinguish between worthless and valuable speech. To protect one, courts must allow both.

ARGUMENT

I. Giving public schools universal jurisdiction over student speech chills religious speech.

Petitioner views government control over student speech as the "default" position. Pet'r Br. 13. But this gets the Constitution and case law exactly backward; schools can regulate on-campus student speech *only* because of the unique nature of the school environment—and even then, this Court has been careful to limit government interference with a students' First Amendment rights. *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.")

(quoting *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)); *Morse* v. *Frederick*, 551 U.S. 393, 415 (2007) (Alito, J., concurring) (allowing public schools to ban on-campus speech advocating illegal drug use is "at the far reaches of what the First Amendment permits"). Instead, the constitutional baseline is one of freedom—freedom to speak without government censure and freedom of religious expression.

A. Petitioner's rule sweeps far too broadly.

Petitioner claims universal jurisdiction over its students—to police their speech regardless of where and when it is made. See Resp. Br. 1 ("Petitioner's only limitation * * * is no limit at all."). This threatens core First Amendment activity. Applying Petitioner's proposed expansive rule to *all* student speech and expression "give[s] school administrators the power to quash student expression deemed crude or offensive—which far too easily metastasizes into the power to censor valuable speech and legitimate criticism." Pet. App. 42a. And it "raises the specter of officials asserting the power to regulate 'any student speech that interferes with [the] school's educational mission,' a power that 'can easily be manipulated in dangerous ways.'" Pet. App. 30a. See *J.S. ex rel. Snyder* v. *Blue Mountain Sch. Dist.*, 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring) ("Applying *Tinker* to off-campus speech would * * * empower schools to regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves.").

As this Court has explained, "First Amendment freedoms need breathing space to survive." *Keyishian* v. *Board of Regents of Univ. of N.Y.*, 385 U.S. 589, 603-604 (1967). The decision below struck this balance—

protecting off-campus student speech under standard First Amendment principles, while still ensuring that public schools can adequately address any conduct or speech on campus under *Tinker*. Pet. App. 34a (schools can punish speech "that meets *Tinker*'s standards—no matter how that disruption was provoked"); *Morse*, 551 U.S. at 424-425 (Alito, J., concurring) (identifying "the physical safety of students" as a "special characteristic" which gives school officials "greater authority to" control speech and actions within the school environment).

Protecting a private sphere—a breathing space—free from government intrusion is crucial because "the threat of sanctions may deter almost as potently as the actual application of sanctions." *Keyishian*, 385 U.S. at 603-604. When the government claims the broad authority to sift through a student's private, off-campus speech to determine whether it disrupts the school environment, students must "guess what conduct or utterance may" result in school sanction, imposing a dangerous "chilling effect upon the exercise of vital First Amendment rights." *Ibid.*; Pet. App. 33a ("To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when not."). See also *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (The Free Exercise Clause prohibits "indirect coercion or penalties on the free exercise of religion, not just outright prohibition.").

B. Petitioner's rule gives students and administrators a heckler's veto to suppress religious speech.

Petitioner advocates for a rule that would allow public schools to "address speech" made by students *regardless of where it occurs* if that speech is deemed socially unacceptable or if it "materially disrupts classwork or involves substantial disorder[.]" Pet'r Br. 19, 22; Pet. App. 16a ("The School District principally defends its actions based on its power 'to enforce socially acceptable behavior.'"). But this dramatic expansion of *Tinker* would perversely incentivize students who may dislike a classmate's *off*-campus speech to manufacture a disturbance *on* campus in response to that speech. See Pet. App. 32a ("[A]ny effect on the school environment will depend on others' choices and reactions."). Overblown reactions, fabricated classroom disruptions, or even overt religious hostility could all be used to censure unpopular religious speech. Worse, if this happens even once, public school administrators may then be "justified" in preemptively silencing off-campus religious speech by citing past student reactions and the possibility of future disruption.

But we need not merely speculate about these concerns. In this case, a fellow student (who was not an original recipient of B.L.'s "snap") brought B.L.'s private speech into the school environment. Pet. App. 5a ("One of B.L.'s teammates took a screenshot of her first snap and sent it to one of MAHS's two cheerleading coaches."); Resp. Br. 4. The reaction of fellow students was then used to justify B.L.'s suspension from the team. Pet. App. 6a.

The First Amendment forbids this "heckler's veto" of unpopular speech. "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson* v. *City of Memphis,* 373 U.S. 526, 535 (1963). Indeed, courts have long recognized the "heckler's veto" as "one of the most persistent and insidious threats to first amendment rights." *Berger* v. *Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985).

Allowing public school officials to silence off-campus speech that may be "perceived" to be offensive, see Pet'r Br. 17, would "effectively empower a majority to silence dissidents simply as a matter of personal predilections," *Cohen* v. *California*, 403 U.S. 15, 21 (1971); accord *Snyder* v. *Phelps*, 562 U.S. 443, 448 (2011). And this rule against heckler's vetoes applies fully to religious speech. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (rejecting "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what" others "might misperceive").

For a similar reason, this Court in *Morse* rejected "the broader rule [advanced by petitioner] that * * * speech is proscribable because it is plainly 'offensive.'" *Morse*, 551 U.S. at 409. As this Court explained, such a rule "stretches" the precedent "too far," as "much political and religious speech might be perceived as offensive to some." *Ibid.* See *id*. at 423 (Alito, J., concurring) ("[A] license to suppress speech on political and social issues based on disagreement with the viewpoint expressed * * * strikes at the very heart of the First Amendment.").

And especially pernicious is the combination of broad, vague government authority, *supra* Part I.A, with the heckler's veto. When students are unsure what speech may subject them to censure, and when they know that the actions of third parties beyond their control could turn their private, off-campus speech into a material disruption if taken on campus, students will simply self-censor. Cf. *Tinker*, 393 U.S. at 513 ("Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.").

C. Religious speech is often targeted for government censure.

Religious speech and expression are often targets of government sanction. Examples abound of public-school administrators and other government officials suppressing religious speech or discriminating against religious speakers. School administrators frequently sanction students for private, non-disruptive religious speech on campus—despite *Tinker*'s express protections for such speech. And there is nothing to suggest that this unconstitutional behavior will change when school administrators are given *even broader* authority to sift through private student conversations. To the contrary, this Court has recognized the "inherent risk" that unchecked government power may be used "not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994).

For example, some public-school officials have "lump[ed] religious speech with obscenity and libel for outright prohibition." *Hedges* v. *Wauconda Cmty. Unit. Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) (school policy prohibited the distribution of religious materials, as well as obscene or libelous materials, that occurred near but outside school grounds). Others have equated students' attempts to share their religious beliefs as rising to the level of "fighting words." *Uzuegbunam* v. *Preczewski*, No. 19-968, 2021 WL 850106, at *3 (Mar. 8, 2021). And still others have thought it appropriate to call law enforcement when elementary school students invited their peers to attend a church play and shared pencils inscribed with the phrase, "Jesus loves me this I know for the Bible tells me so." *Morgan* v. *Swanson*, 659 F.3d 359, 397 (5th Cir. 2011) (en banc). This despite much of the supposedly controversial activity occurring "after school hours" and "outside of the school." *Id*. at 398.

Public school officials have even argued that recognizing a Christian student group on campus would mean that public schools "lose the power to combat bias and discrimination," such that schools would become "balkanized" and "hate-filled." *Hsu* v. *Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 867, 871 (2d Cir. 1996) (public school argued that permitting Christian club to meet on campus "would be disruptive to the educational mission of the school"). See also *C.H.* v. *Bridgeton Bd. of Educ.*, No. 09-cv-5815, 2010 WL 1644612, at *7-8 (D.N.J. Apr. 22, 2010) (describing as "unfounded fear-mongering" public school's argument that allowing a religious student to wear a pro-life

armband would force it to permit gang-affiliated clothing); *Business Leaders in Christ* v. *University of Iowa*, No. 19-1696, 2021 WL 1080556, at *9-13 (8th Cir. Mar. 22, 2021) (public university officials accused student group of discrimination and denied access to campus because student group required its leaders to sign a statement of faith); Mot. to Dismiss at 17, *InterVarsity Christian Fellowship/USA* v. *Board of Governors of Wayne State Univ.*, No. 18-cv-231 (E.D. Mich. May 7, 2018), ECF No. 18 (public school officials excluded religious student organization, saying its religious leadership requirements would "make second-class citizens of students who refuse to accept" those standards).

And, in similar incidents, two public school districts paid monetary damages to students after wrongly sanctioning their religious speech and expression. In *Dominguez,* a high school student alleged that public school administrators confiscated his Bible and suspended him for sharing his faith during free time. Compl. at ¶¶ 19-30, *Dominguez* v. *Grossmont Union High Sch.* No. 11-cv-587, (S.D. Cal. Mar. 24, 2011), ECF No. 1. And in *R.H.,* a middle school student alleged he was repeatedly suspended by public school administrators because he wore his rosary as an expression of his Christian faith. Compl. at ¶¶ 19-20, *R.H.* v. *Schenectady City Sch. Dist.,* No. 10-cv-640, (N.D.N.Y. June 1, 2010), ECF No. 1. In both cases, the school districts paid monetary damages to the wronged students.

An even more recent example confirms both the danger of a heckler's veto and the proclivity of some public school administrators to mischaracterize religious beliefs as hateful or offensive. In California, a public school teacher displayed a Christian student group's leadership statement in his classroom with the caption, "I am deeply saddened that a club on * * * campus asks its members to affirm these statements." *Roe* v. *San Jose Unified Sch. Dist. Bd.*, No. 20-cv-02798, 2021 WL 292035, at *1 (N.D. Cal. Jan. 28, 2021). The Christian student group's members then faced "harassment" from students and teachers, including another teacher who "'encouraged and participated in demonstrations' against" the Christian group. *Id.* at *3-4.

Shortly thereafter, the school derecognized the group, which caused other public schools in the same school district to take similar action. *Roe*, 2021 WL 292035 at *3-4. But, at the same time, the school recognized a Satanic Temple Club and allegedly failed to sanction that group's members after they disrupted the Christian group's meetings and "disparag[ed] their religious beliefs." *Id.* at *4; *Ibid.* (citing additional examples of student and teacher behavior "calculated to harass").

This danger of government hostility is particularly acute for speakers with unfamiliar religious beliefs. Cf. Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 400 (2018) (finding that a disproportionate share of

RFRA cases involve small religious minorities). Minority religions often are unfamiliar to public officials and judges, and lack the political or financial clout to defend against confusion over their beliefs and practices. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 336 (1987) (a religious "organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission").

Religious minorities are thus particularly susceptible to suffering unfair restrictions on their faith. See, *e.g.*, *Church of the Lukumi Babalu Aye*, *Inc.* v. *City of Hialeah*, 508 U.S. 520, 521 (1993) (rejecting a law that deliberately targeted only Santeria beliefs); *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly,* 309 F.3d 144, 153 (3d Cir. 2002), cert. denied, 539 U.S. 942 (2003) (striking down an ordinance enacted out of "fear" that "Orthodox Jews [would] move to Tenafly" and "take over"; one resident "voiced his 'serious concern' that 'Ultra-Orthodox' Jews might 'stone [] cars that drive down the streets on the Sabbath.'"); *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995) (addressing a case of "animosity toward Orthodox Jews as a group" where citizens had incorporated a village and stated that "'the reason [for] forming this village is to keep people like you [*i.e.*, Orthodox Jews] out of this neighborhood'"); *Islamic Soc'y of Basking Ridge* v. *Township of Bernards*, 226 F. Supp. 3d 320, 327-328 (D.N.J. 2016) (documenting destruction of property, government hostility, and false accusations regarding Islamic beliefs and practices following proposal to build a Mosque in the community).

And public school administrators are no exception. See*, e.g.*, *A.A. ex rel. Betenbaugh* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248, 260-261 (5th Cir. 2010) (school district questioned the religious necessity of Native American student's belief in "keep[ing his] hair long and in braids as a tenet of [his] sincere religious beliefs"); *Gonzales* v. *Mathis Indep. Sch. Dist.*, No. 2:18-cv-43, 2018 WL 6804595, at *4 (S.D. Tex. Dec. 27, 2018) (school district argued that plaintiff's traditional religious *promesa* (promise) was not "religious" because it was "not an established tenet of their Catholic faith"); cf. *Stately* v. *Indian Cmty. Sch. of Milwaukee, Inc.*, 351 F. Supp. 2d 858, 862, 869 (E.D. Wis. 2004) (recognizing the "conceptual difficulties" posed by Native American religious beliefs to "conventional western-religious thought").

* * *

Petitioner asks this Court for sweeping authority to police all student speech, while gesturing at "[o]ther legal principles" which could be used to stop schools from engaging in viewpoint discrimination. Pet'r Br. 11. But Petitioner fails to account for the chilling effect caused by applying *Tinker* (or Petitioner's other, even more restrictive, suggested standards) to all student speech. Many students, fearing school sanction, will simply remain silent. And Petitioner ignores the reams of evidence confirming that government officials are not deterred from engaging in religious discrimination by "[o]ther legal principles"—principles which can be notoriously difficult to enforce even when

evidence of discrimination is overt, and which are almost impossible to police when public school administrators engage in covert discrimination or rely on pretextual claims of classroom disruption to silence unpopular speakers.

This Court should therefore reaffirm *Tinker*'s narrow holding and limited applicability. *Tinker* never claimed to address off-campus student speech, and instead closely circumscribes government authority even *on* campus. Public school administrators may not punish student speech "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or even "upon an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S. at 509-510. These are much-needed limits on public schools' authority and make clear that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id.* at 511.

II. Giving public schools universal jurisdiction over student speech interferes with the right of parents to direct the religious upbringing of their children.

This Court has long recognized and protected the parental right to direct the religious education of one's children. *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972) ("*Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."). This right is not forfeited when parents send their children to public schools; instead, public school adminis-

trators—as government actors subject to the Constitution—are limited in their authority to sanction private student speech even on campus.

But extending *Tinker* to cover all student speech would correspondingly expand the coercive authority of public school administrators at the expense of parental rights. And the looming threat of sanctions for "disruptive" speech—a vague standard which could easily be manipulated to punish religious speech—will discourage parents from teaching their children religious beliefs that are today unpopular or easily misunderstood.

A. Parents have the right to direct the religious upbringing of their children.

Many religious traditions entrust parents with primary responsibility for educating their children in the faith. In Judaism, parents are principally responsible for teaching their children the Torah. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2065 (2020); see also Deuteronomy 6:6-7 ("And be it that these laws which I command unto you today, you shall teach them diligently to your children."). Catholicism teaches that "[i]t is particularly in the Christian family * * * that children should be taught from their early years to have a knowledge of God." Declaration on Christian Education, *Gravissimum Educationis* § 3 (1965). And the Church of Jesus Christ of Latter-day Saints confirms that "[p]arents have a sacred duty to rear their children in love and righteousness, to provide for their physical and spiritual needs, and to teach them to * * * observe the commandments of God[.]" The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day

Saints, *The Family: A Proclamation to the World* (1995).

This religious obligation has been protected by the Court for close to 100 years. See *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (parental rights are "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."). The earliest cases establishing this right were decided before the Religion Clauses were incorporated against the states. *Meyer* v. *Nebraska* concerned parents penalized for sending their children to a Lutheran parochial school, where the children learned the German language in violation of Nebraska law. 262 U.S. 390, 397 (1923). In ruling against this regulation of a religious school, the Court concluded that "[w]hile this court has not attempted to define with exactness the liberty thus guaranteed * * * [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to * * * establish a home and bring up children." *Id.* at 399.

Similarly, in *Pierce* v. *Society of the Sisters of the Holy Names of Jesus & Mary*, the Court confronted an Oregon law that effectively outlawed private religious education in the state, including for the Catholic school plaintiff. 268 U.S. 510 (1925). The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-535. The Court also rejected "any general power of the state to standardize its children," confirming instead that a "child is not the mere creature of the

state" and that his education is primarily entrusted to "those who nurture him." *Ibid*.

After the Free Exercise Clause was incorporated against the states in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), this Court began treating *Meyer* and *Pierce* as First Amendment decisions. See, *e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158, 165-166 (1944) (describing *Pierce* and *Meyer* as vindicating "[t]he rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief"); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) (discussing *Meyer* and *Pierce*).

Even *Gobitis*—a dark spot on this Court's long history of protecting religious exercise—recognized that parental rights were an important means of counteracting the government's coercive influence on public school students. *Gobitis* wrongly permitted public schools to force Jehovah's Witness students to salute the American flag even though doing so violated their sincere religious beliefs. *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 599 (1940), overruled by *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). And *Gobitis* did not deny the purpose of the government's coercive actions: "What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag *contrary to those implanted by the parent*." *Gobitis*, 310 U.S. at 599. (emphasis added).

But even this miserly approach to religious freedom acknowledged the importance of parental rights outside the school environment. As the Court went on to explain, a "vital aspect of religious toleration" consisted of ensuring that parents remained "unmolested"

in their ability to "counteract by their own persuasiveness the wisdom" of the public school's inculcation of patriotic values:

> In such an attempt [to coerce adherence to patriotic values] the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote.

Ibid. Thus, even at its lowest ebb, this Court affirmed the importance of protecting, "unmolested," parental authority outside the school environment as a check on government coercion in public schools.

Yoder also stands firmly in the tradition of protecting parental religious education, but, as it came after incorporation, the Court relied on the Free Exercise Clause. In *Yoder*, the Court vindicated the right of the Old Order Amish to educate their children[2] in continuous contact with their "community, physically and emotionally, during the crucial and formative adolescent period of life," 406 U.S. at 211—even when that meant noncompliance with Wisconsin's compulsory education laws. As the Court explained, "the values of

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[2] *Yoder* makes clear that this Court rested its decision on *parents'* First Amendment right to provide religious education for their children: "Contrary to the suggestion of the dissenting opinion of Mr. Justice Douglas, our holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents." 406 U.S. at 230-231.

parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Id.* at 213-214. See also *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). Where Amish parents sought to remove their children from school before the age of 16, the Court reasoned that any "speculative gain[s]" from an additional year or two of schooling could not "justify the severe interference with religious freedom such additional compulsory attendance would entail." *Yoder*, 406 U.S. at 207, 227.

Yoder also imposed heightened scrutiny on the government's actions. Despite acknowledging that universal education is certainly an important governmental interest, the Court explained that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder*, 406 U.S. at 215.

Employment Division v. *Smith* did not eliminate or even purport to eliminate *Yoder*'s protective rule as applied to religious education. In fact, it expressly put to one side claims regarding "the right of parents * * * to direct the education of their children," recognizing that these claims still receive heightened scrutiny. 494 U.S. 872, 881 (1990). And in doing so, it cited both *Yoder* and *Pierce*. *Ibid.*

This Court's decisions since *Smith* have only reinforced that *Smith* did not alter *Yoder*. For example, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006), this Court cited

Yoder favorably, explaining that the case "permitted an exemption for Amish children from a compulsory school attendance law," despite the State's "paramount" interest in education. And, just last Term, *Espinoza* reaffirmed as an "'enduring American tradition' * * * the rights of parents to direct 'the religious upbringing' of their children." *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (quoting *Yoder*, 406 U.S. at 213-214, 232). This provided the foundation for the Court's determination that Montana's no-aid provision not only harmed religious schools, but also "penalize[d]" the families who chose to send their children to those schools by infringing on the constitutionally-protected parental "choice" of religious education. *Ibid.* (citing *Pierce*, 268 U.S. at 534-535). As this Court explained, any restriction on the free exercise of religious schools "burdens not only religious schools but also the families whose children attend or hope to attend them." *Ibid.* See also *id.* at 2284 (Breyer, J., dissenting) ("[T]he Free Exercise Clause draws upon a history that places great value upon the freedom of parents to teach their children the tenets of their faith."); *Danville Christian Acad., Inc.* v. *Beshear*, 141 S. Ct. 527, 528 (2020) (per curiam) (citing *Pierce* and *Yoder*).

B. Parental rights do not evaporate when parents send their children to public school.

Many religious parents either cannot afford to or (for any number of reasons) choose not to send their children to religious schools. See *Morse*, 551 U.S. at 424 (Alito, J., concurring) ("Most parents, realistically, have no choice but to send their children to a public school."). These parents do not relinquish the right to

direct their children's religious education. This Court's precedents instead closely circumscribe the authority of public schools, limiting the extent to which they may impose (even undeniably laudable) civic, religious, or moral values on students.

When parents choose to send their children to religious schools, they delegate some of their parental authority to these private, religious institutions to instruct their children. And these schools (as private entities) are not subject to the constitutional constraints of the First Amendment. They therefore may seek to impart religious knowledge, inculcate religious faith, and even discipline students for speech undermining their educational mission. *Our Lady of Guadalupe*, 140 S. Ct. at 2064 ("[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.").

But public schools are different. First, public schools do not stand *in loco parentis*. This Court has already confirmed that public schools are government actors constrained by the Constitution. See *New Jersey* v. *T.L.O.*, 469 U.S. 325, 336 (1985) ("In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents."). As *T.L.O.* explained, the argument that schools exercise parental rights "is in tension with contemporary reality and the teachings of this Court," which make clear that public school administrators are "subject to the commands of the First Amendment." *Ibid.* See *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 795 n.3 (2011) (noting "absence of any precedent for state control, uninvited by the parents, over a child's

speech and religion"); *Morse*, 551 U.S. at 424 (Alito, J., concurring) ("It is a dangerous fiction to pretend that parents simply delegate their authority—including their authority to determine what their children may say and hear—to public school authorities.").

Second, absent the ability to send one's children to a private school, attendance is compulsory. Many parents therefore have no choice but to send their children to government-run schools—regardless of whether they agree with the values or beliefs of the school's educators. See *Morse*, 551 U.S. at 424 (Alito, J., concurring).

Third, our nation is religiously diverse. Parents teach their children different (and often conflicting) religious beliefs and civic values. Therefore, as a practical matter, there is no way that public schools can inculcate only shared or "least common denominator" values and beliefs. See *Barnette*, 319 U.S. at 637 ("Free public education * * * will not be partisan or enemy of any class, creed, party, or faction.").

For these reasons, whenever public schools seek to "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children under their control," the schools' actions are subject to heightened constitutional scrutiny as government actors exercising government authority. *Pierce*, 268 U.S. at 534-535; *Yoder*, 406 U.S. at 213-214, 227 (finding unconstitutional government's "severe interference with" the "parental direction of the religious upbringing and education of their children."); *Brown*, 564 U.S. at 795 n.3 ("In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion * * * and in the absence of any justification for such control that would

satisfy strict scrutiny, those laws must be unconstitutional.").

C. Applying *Tinker* to off-campus speech "unreasonably interferes" with parental rights.

Because government interference with parental rights is subject to heightened scrutiny, Petitioner must come forward with a sufficiently important interest to justify the universal policing of student speech. Pet. App. 16a. Cf. *Morse*, 551 U.S. at 407 ("deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest."). When children are within the schoolhouse gate—and public schools' authority is at its zenith, *id.* at 424 (Alito, J., concurring)—this Court has given school administrators greater constitutional latitude. But even here, the guardrails remain firmly in place. See *Tinker*, 393 U.S. at 506-507 (discussing *Meyer*, *Pierce*, and *Barnette*). *Tinker* balanced respect for constitutional rights, *id.* at 511 ("Students in school as well as out of school are 'persons' under our Constitution."), with the need for school officials "to prescribe and control conduct *in the schools*," *id.* at 507 (emphasis added). And *Tinker* did not mince words when circumscribing this authority:

> [S]tate-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. * * * In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. *In the absence of a specific showing of*

> *constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.*

Id. at 511 (emphasis added). *Tinker*'s rule is thus defensible because of the public school's "constitutionally valid" need to create a safe educational environment within the schoolhouse gate. *Ibid.*

But this narrow interest does not support Petitioner's significant expansion of *Tinker*. See *supra* I.A. To the contrary, Petitioner's rule "unreasonably interfere[s]" with the liberty of parents to direct the religious education of their children in several meaningful ways. *Pierce*, 268 U.S. at 534.

First, it greatly increases the coercive, conforming pressure schools can bring to bear on students with out-of-step beliefs or values. As this Court has recognized, public schools can exert pressure to influence student behavior, expression, and even belief. See *Yoder*, 406 U.S. at 211 (public school education can put "pressure to conform to the styles, manners, and ways of the peer group" and takes students "away from their community, physically and emotionally"); *Barnette*, 319 U.S. at 641 (noting the dangers inherent in "public educational officials" possessing power to "compel youth to * * * embrac[e]" certain beliefs). It is therefore crucial that this coercive government power is appropriately limited. But expanding *Tinker* to cover off-campus speech ignores this Court's prior limited justification for intruding into the private sphere and threatens to override parental rights by subjecting students to constant government oversight. See Resp. Br. 1.

This will be most harmful and intrusive for children raised in unpopular or minority religious traditions, as they and their parents will face the greatest pressure to conform to the values and beliefs approved and endorsed by school administrators. See *Morse*, 551 U.S. at 423 (Alito, J., concurring); *Troxel*, 530 U.S. at 72-73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.").

For Jehovah's Witnesses, sharing their faith with others through public, often door-to-door, evangelization is an important part of their religious exercise. See Acts 5:42; 20:20 (spreading the Gospel "from house to house"). But for several decades in the early 1900s, the literature they shared was considered "provocative, abusive, and ill-mannered." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115-116 (1943). Imagine if a public school administrator could have punished Jehovah's Witness students for their "provocative" weekend evangelizing. As this Court rightly pointed out, if the government could sanction speakers because their belief or ideas were unpopular, "there would [be] forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor." *Id.* at 116.

Second, the threat of punishment from an overly zealous school administrator can deter parents from providing their children with religious education. See *Keyishian*, 385 U.S. at 604 ("When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone.") (cleaned up). When all other students and teachers are potential informants, parents will rightly

be concerned that what they teach or even explain to their children could inadvertently (or surreptitiously) be shared with a school administrator who deems their beliefs out of step, outdated, or even offensive. Pet. App. 49a-50a (Petitioner's rule would "allow school children to serve as Thought Police—reporting every profanity uttered—for the District"); *supra* Part I.B.

Many religious beliefs are nuanced, complex, and easy to misunderstand. *Supra* Part I.C. Children—especially young children—may not be tactful communicators. But parents should not worry that exposing their children to even difficult religious teachings will open them or their children to school sanction when a child seeks to share, question, or discuss their religious beliefs with friends. See Pet'r Br. 18-19 ("[A]dults may be punished for off-campus speech that disrupts the school."). Explaining to your child how the Eucharist is Jesus Christ's "body and blood," why the Catholic Church does not support same-sex marriage, or what Islam's teachings regarding Jihad mean for a Muslim living in America today are difficult enough without government officials looking over parents' shoulders—ready to punish "disruptive" speech. See Pet'r Br. 30 (acknowledging that "drawing the line between merely offensive and substantially disruptive speech requires close judgment calls").

And Petitioner's rule is especially pernicious today—when COVID-19 has pushed more religious worship, religious fellowship, and religious evangelization online. Students may participate in online religious services by reading passages from religious texts, students may share stories about their faith or their conversion online, students may blog about their faith, or

students may seek to evangelize online. Other students may then bring this online speech to campus, potentially subjecting the speaker to school sanction for core First Amendment activity.

The antidote to this government intrusion is, as the Court has already recognized, the strengthening of the Constitution's protection of a private sphere of individual liberty free from government interference. *Kyishian*, 385 U.S. at 604. Instead of treating government control as the baseline, the correct approach recognizes that government intervention is the exception—permitted only in compelling circumstances. The private sphere thus acts as a "constitutional shelter" from "unjustified interference by the State" and helps protect parental rights. *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618-619 (1984); Pet'r Br. 19-23. See *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) (explaining that the "private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs" "has often served as a shield against oppressive civil laws").

* * *

B.L.'s snap was "crude, rude, and juvenile," Pet. App. 42a, but our Constitution does not protect the freedom of speech solely because our "forefathers expected * * * that its exercise always would be wise, temperate, or useful." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). Quite the opposite: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." *Ibid.* There is no other way to guarantee that government censorship doesn't sweep too far, swallowing the good with the bad.

The dangers of holding otherwise are readily apparent. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection." *Keyishian*, 385 U.S. at 603 (cleaned up). And, as the Third Circuit below concluded, "by enforcing the Constitution's limits and upholding free speech rights, we teach a deeper and more enduring version of respect for civility and the 'hazardous freedom' that is our national treasure and 'the basis of our national strength.'" Pet. App. 42a.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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