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 of *Amici Curiae* Center for Individual Rights And Prof. Eugene Volokh in Support of Plaintiff-Appellant

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Table of Contents

Table of Contents i

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 2

Argument 5

I. Justice Alito's *Mahanoy* concurrence offers the correct approach to off-campus student speech on political, religious, or social matters 5

II. The approach in Justice Alito's concurrence would also implement the majority's concern about parental rights 10

III. Protecting ideological expression may still leave some room for preventing off-campus individually targeted bullying 11

IV. Protecting off-campus speech helps advance education and democracy 14

Conclusion 18

Table of Authorities

Cases

Bailey v. Iles, 87 F.4th 275 (5th Cir. 2023)..14

Healy v. James, 408 U.S. 169 (1972) 16

Heffernan v. City of Paterson, 578 U.S. 266, 273 (2016)........................14

Mahanoy Area Sch. Dist. v. B. L., 594 U.S. 180 (2021) .... passim

Papish v. Board of Curators of Univ. of Missouri, 410 U.S. 667 (1973) 16

Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969) 3

Articles

Anti-Defamation League, *Extremist Sects Within the Black Hebrew Israelite Movement* (Aug. 7, 2020)...............................13

Hannah Gross, *NJ High Schoolers Say Their Pro-Palestinian Protests Have Led to Threats*, NJ Spotlight News (Dec. 19, 2023)...8

Jeffrey M. Jones, *More Say Birth Gender Should Dictate Sports Participation*, Gallup (June 12, 2023) 9

Lev Gringauz, *Edina a Microcosm for How Israel-Hamas War Affects Schools, Jewish Community Response*, TC Jewfolk (Nov. 1, 2023)...8

Masha Rozenfeld, *Redwood City Residents Rally in Support of Israel*, Scot Scoop (Oct. 12, 2023) 8

Interest of *Amici Curiae*[1]

The Center for Individual Rights (CIR) is a non-profit public interest law firm dedicated to the defense of individual freedoms guaranteed by the Constitution. It has participated in litigating many cases concerning issues related to the First Amendment, including *Friedrichs v. Cal. Teachers Ass'n*, 578 U.S. 1 (2016), *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002), *Davi v. Guinn*, 2024 U.S. Dist. LEXIS 95431, 2024 WL 2746940 (E.D.N.Y. May 29, 2024), and *Wang v. Univ. of Pittsburgh*, 2023 U.S. Dist. LEXIS 146957, 2023 WL 5412576 (W.D. Pa. Aug. 22, 2023).

CIR is particularly concerned with the increasing use of a "heckler's veto" in certain settings by those who disagree with someone's speech. The *Sypniewski* case involved allegedly offensive student speech in a high

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[1] Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, *amici* state that no party or counsel for a party authored this brief in whole or in part and no person other than *amici* made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

school setting. *Davi* and *Wang* involve public employees against whom adverse employment actions were taken for speech that employers considered controversial or offensive.

Eugene Volokh is the Gary T. Schwartz Distinguished Professor of Law Emeritus at UCLA and the Thomas M. Siebel Senior Fellow at the Hoover Institution. He is the author of over 50 law review articles on First Amendment law, and of the casebook *The First Amendment and Related Statutes* (8th ed. 2024). His interest in this case is in the sound development of First Amendment law.

Summary of Argument

Under the *Tinker* substantial disruption test, as applied to in-school speech, students might sometimes have to forgo certain controversial statements in school and limit themselves to out-of-school speech instead. But if *Tinker* is also applied to out-of-school speech, as it was here, students could be foreclosed from expressing controversial views at all, 24/7, everywhere—on the Internet, in letters to the editor, at political rallies, in conversation at church, and wherever else.

A student who has strong feelings on the Israeli-Palestinian conflict, for instance, would then be wise to just shut up about them, for fear of being suspended (and perhaps, if the speech is repeated, transferred to a different school or expelled outright). Likewise for students who disapprove of transgender athletes participating in women's sports, or who endorse religious views about gender identity or sexual orientation that some might find offensive. Likewise for students whose views are seen as unpatriotic, anti-police, pro-Communist, or whatever else arouses public hostility. Expressing a view anywhere and anytime could be punished, so long as it offends enough people that it leads to some number of outraged e-mails to school authorities, and possibly some students disapproving of it at school and perhaps acting badly as a result,

America would then shift away from *Tinker*'s admonition that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Comm. School Dist.*, 393 U.S. 503, 506 (1969), to a rule under which students shed their constitutional rights even far outside the schoolhouse gate. And such an approach would

embrace a heckler's veto, under which student speech, even outside school, could be punished so long as enough people disapprove of it or threaten disruption as a result of it.

The majority in *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 189-90 (2021), declined to conclusively determine when off-campus student speech may be restricted, though it did make clear that such restrictions are not easy to justify. But Justice Alito's concurrence (joined by Justice Gorsuch) offered a sound solution: Speech that does not expressly target students, school employees, or the school, but instead simply "addresses matters of public concern, including sensitive subjects like politics, religion, and social relations," must "almost always [be] beyond the regulatory authority of a public school." *Id.* at 205 (Alito, J., concurring). "Almost always" is not "always": There will remain exceptions such as for incitement, solicitation, true threats, defamation, and the like, and some restrictions that pass strict scrutiny might be constitutional. Yet students would, under this approach, remain generally free to express their views on even the most controversial issues of the day.

This Court should therefore reverse the district court's grant of Defendants' motion for summary judgment.

Argument

I. Justice Alito's *Mahanoy* concurrence offers the correct approach to off-campus student speech on political, religious, or social matters

In *Mahanoy*, the Supreme Court held that public high schools must meet a "heavy burden" when they seek to punish off-campus political speech, 594 U.S. 189-90:.

> [R]egulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means 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. The Court did not draw a bright line as to what it would take to discharge this "heavy burden," because it had no need to on the facts of that case. But Justice Alito's concurrence offers a helpful analysis:

> [T]here is a category of speech that is almost always beyond the regulatory authority of a public school. This is student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations. Speech on such matters lies at the heart of the First Amendment's protection, and the connection between student speech in this category and the ability of a public school to carry out its instructional program is tenuous.

Id. at 205 (Alito, J., concurring) (citations omitted). And the school cannot regain authority over such speech simply on the grounds that the speech is offensive and therefore will disrupt the school's operations:

> If a school tried to regulate such speech, the most that it could claim is that offensive off-premises speech on important matters may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises. But it is a "bedrock principle" that speech may not be suppressed simply because it expresses ideas that are "offensive or disagreeable" . . . .
>
> To her credit, petitioner's attorney acknowledged this during oral argument. As she explained, even if such speech is deeply offensive to members of the school community and may cause a disruption, the school cannot punish the student who spoke out; "that would be a heckler's veto." The school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct. . . . "[I]f listeners riot because they find speech offensive, schools should punish the rioters, not the speaker. In other words, the hecklers don't get the veto" . . . .

Id.

To be sure, Justice Alito made clear that such off-campus speech is only "almost always" unrestrictable by the school, not categorically "always." But that simply reflects that even adult speech outside school is not always protected. There would remain First Amendment exceptions, such as for incitement, solicitation, true threats, and defamation, and there would remain the possibility that the government could justify

content-based restrictions (though perhaps not viewpoint-based restrictions, Leroy Br. 35-36) under strict scrutiny.

When the speech falls within an exception or is restrictable under strict scrutiny, the "heavy burden" referred to by the *Mahanoy* majority could be discharged. But it cannot be discharged simply on the grounds that the speech offends enough people and that those people therefore complain or misbehave. First Amendment protections "must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy*, 594 U.S. at 190 (majority opinion)..

This is especially so because there is no limit to the potential reach of a heckler's veto. Even in a case where students spoke to people other than their classmates (perhaps to fellow church members, or to attendees at a political rally), their off-campus speech could still cause a disruption at school. Anyone in the audience, or anyone who sees a recording of the event online, could then complain to the school, and urge others to complain further. *See* Leroy Br. at 8-10 (discussing how "[a]n activist" reposted the images after they had been posted by Leroy's former girlfriend, and the post was eventually shared together with "the phone number for

Livingston Manor Central school"). In the era of internet virality, people who are distant from a school may cause a disruption simply to spite a student whose speech they dislike. The only precaution that students can take to ensure that off-campus comments would not cause on-campus disruptions is silence.

Thus, for example, during the recent political conflagration over the war between Israel and Hamas, various high school students have taken public stances in support of both Israel and Gaza.[2] Unsurprisingly, given the tenor of our times, some outsiders have called for students to be suspended or expelled for their political speech, such as use of the slogan "from the river to the sea, Palestine will be free."[3] That particular

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[2] Masha Rozenfeld, *Redwood City Residents Rally in Support of Israel*, Scot Scoop (Oct. 12, 2023), https://scotscoop.com/locals-rally-for-israel/; Lev Gringauz, *Edina a Microcosm for How Israel-Hamas War Affects Schools, Jewish Community Response*, TC Jewfolk (Nov. 1, 2023), https://tcjewfolk.com/2023/11/01/edina-a-microcosm-for-how-israel-hamas-war-affects-schools-jewish-community-response/.

[3] *See*, e.g., Hannah Gross, *NJ High Schoolers Say Their Pro-Palestinian Protests Have Led to Threats*, NJ Spotlight News (Dec. 19, 2023), https://www.njspotlightnews.org/2023/12/nj-high-school-pro-palestinian-protesters-say-threats-online-absence-unfair-school-sanctions/ ("In West Orange, adults on Facebook called for the student organizers to be doxxed, suspended, expelled and arrested.").

incident appeared to involve both on-campus speech and speech at an off-campus demonstration; but similar calls could easily take place based entirely on students' off-campus speech.

Likewise, the country is sharply split on questions related to gender identity: A 2023 Gallup survey, for instance, reports that 69% of respondents say transgender athletes "should only be allowed to play on sports teams that match their birth gender," and only 26% say they "should be able to play on sports teams that match their current gender identity."[4] Whoever is right or wrong, students have to be free to express both views outside school—however much their classmates, teachers, or outsiders might disagree—without fear of punishment by the school. Yet under the decision below, if enough people complained about a student's outside-school statement on either side of this debate, the student could be punished for it on the theory that the statement may cause disruption at school.

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[4] Jeffrey M. Jones, *More Say Birth Gender Should Dictate Sports Participation*, Gallup (June 12, 2023), https://news.gallup.com/poll/507023/say-birth-gender-dictate-sports-participation.aspx.

II. The approach in Justice Alito's concurrence would also implement the majority's concern about parental rights

The *Mahanoy* majority recognized that parents, not the government, have the primary responsibility to "protect, guide, and discipline" their children. 594 U.S. at 189. Off-campus speech typically falls "within the zone of parental, rather than school-related, responsibility." *Id.*

Parents may sometimes discipline their children for expressing certain views, or expressing them in certain ways. Teaching children which views are legitimate and which are repugnant—or teaching them how to argue effectively, or even that discretion is sometimes the better part of valor—is one of the things that we as parents are expected to do.

But other parents may sometimes compliment the children for their views and for their courage in expressing them. Many parents, after all, want to instill controversial views in their children, whether views related to the Israeli-Palestinian conflict, sexual orientation and gender identity, capitalism and Communism, religion or race, or any other matters on which people bitterly disagree. Parents are entitled to teach children such views, and to encourage or support their children in expressing

such views outside school, without fear that the consequence will be suspension or expulsion.

To be sure, if the parents' views are sufficiently sharply inconsistent with the views of public school administrators, they might theoretically prefer to part ways with the public schools altogether. But parents often lack the money for private secular or religious schooling and lack the time or expertise for home schooling. They cannot discharge their legal and moral duty to educate their children except through public schools. They should not be denied this ability—one of the most valuable benefits provided by the modern state—on the grounds that their children have expressed the family's controversial views in public.

III. Protecting ideological expression may still leave some room for preventing off-campus individually targeted bullying

As the *Mahanoy* majority indicated and as Justice Alito acknowledged, schools may have some leeway to restrict speech to prevent "serious or severe bullying or harassment targeting particular individuals" and "threats aimed at teachers or other students." *Id.* at 188; *see also id.* at 207-09 (Alito, J., concurring). But the majority rightly distinguishes off-campus statements that "identify the school . . . or target any member of

the school community with vulgar or abusive language" from statements that are not thus targeted but merely "risk[] transmission to the school." *Id.* at 191 (majority opinion). Likewise, Justice Alito rightly distinguishes "student speech that is . . . expressly and specifically directed at the school, school administrators, teachers, or fellow students" from speech that lacks such elements and instead "addresses matters of public concern, including sensitive subjects like politics, religion, and social relations." *Id.* at 205 (Alito, J., concurring).

And this distinction makes sense (even recognizing that much speech about the school and about administrators, teachers, or classmates may remain constitutionally protected). A student who is told, for instance, that she ought not harshly criticize a transgender classmate for participating on a girls' sports team would remain free to publicly express her political, religious, or scientific opinions about transgender athletes in women's sports. The message would be: Express what views you want, but do not make it personal—do not drag your classmates by name into a controversy that they would rather sit out. But a student who is told that even unpersonalized expression about the subject may lead to

punishment would be completely foreclosed from publicly discussing one of the major issues of the day.

This is true even as to the most controversial questions, such as those related to race. Let us take even an extreme example: A student attends a white supremacist rally at which racist or anti-Semitic views are expressed, or visibly participates in a black nationalist religious group that expresses racist or anti-Semitic views.[5] Perhaps a school may be able to restrict such speech inside school, if it is offensive enough that it causes disruption. Perhaps a school might insist that these students not post social media posts, even outside school, condemning their classmates in racist or anti-Semitic ways. But a school should not be able to suspend or expel a student simply for publicly adhering to such belief systems, even when classmates and others sharply and rightly disapprove of the beliefs.

Here, Plaintiff was not bullying or abusing anyone. He was not targeting the school or any member of the community. He did not identify the

[5] *See, e.g.*, Anti-Defamation League, *Extremist Sects Within the Black Hebrew Israelite Movement* (Aug. 7, 2020), https://www.adl.org/resources/backgrounder/extremist-sects-within-black-hebrew-israelite-movement.

school in his post. Instead, his speech was understood as referring to a matter of public concern unrelated to Livingston Manor Central School District: the then-ongoing trial of Derek Chauvin. A. 461. Whether the speech was serious or joking, in good taste or bad, it did not fall within any exception for individually targeted speech. *Cf. Bailey v. Iles*, 87 F.4th 275, 283 (5th Cir. 2023) ("The First Amendment's protections apply to jokes, parodies, satire, and the like, whether clever or in poor taste."). Indeed, even if the speech was not intended to express a political view, but led to school discipline because of the school's misperception of the message, the school's actions would still be unconstitutional. *See Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016) (holding, in a public employment case, "the government's reason for demoting Heffernan is what counts here," "even if . . . the employer makes a factual mistake about the employee's behavior").

IV. Protecting off-campus speech helps advance education and democracy

Public schools have "an interest in protecting a student's unpopular expression, especially when the expression takes place off campus," and "[t]hat protection must include the protection of unpopular ideas, for

popular ideas have less need for protection." *Mahanoy*, 594 U.S. at 190. "[S]chools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

In context, the Court's reference to the schools' "interest" in effect describes what schools should do—the school's protection of speech "*must* include the protection of unpopular ideas"—not just what they may do. As "nurseries of democracy," schools must protect the "marketplace of ideas." *Id.* (emphasis added). And protecting off-campus speech on political, religious, and social matters is an especially important facet of this duty. It is, of course, human nature for people to be upset with those near them whose views they see as repugnant, even if the views had been expressed far away. But part of American schools' obligation is to teach students to overcome that tendency.

Once the students graduate, they will have to work with people whose views they disapprove of. They will have to study with them in public universities, which have very limited authority to restrict students' out-

of-class speech. *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."); *Papish v. Board of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973) ("the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'"). They will have to make public decisions together, through the political process, sharing the franchise with fellow citizens of all ideological stripes. The future of the community and of the nation will often turn on people's ability to set aside their disapproval of their fellow citizens' views—however justified the disapproval may be—and work together in crafting compromises and finding areas of agreement.

Teaching students that the proper reaction to classmates' off-campus views is to cause enough disruption that the classmate will get suspended, transferred, or expelled is poison to the habits and attitudes necessary to democracy. Conversely, teaching students that, however much

they disagree with their classmates' views, they must learn to coexist in the common project of learning—or, in the future, of work or of self-government—is a necessary part of American public education. Indeed, even if a student protest occurs, that offers an opportunity for the school to teach the protestors that they have a right to protest (so long as they do not disrupt classes), but have no entitlement to government censorship of their classmates.

Defendants evidently did not view themselves as having an interest in protecting Plaintiff's unpopular expression. Far from defending "to the death" his right to unpopular expression, defendants would not even defend it to the inconvenience. As emails from offended parents and teachers began to arrive in their inboxes and they became aware of a planned student protest, administrators immediately suspended Plaintiff for five days. Leroy Br. 10. Superintendent Evans later extended this suspension for a month and prohibited Plaintiff from attending school activities through the remainder of the year. *Id.* at 13. In doing so, defendants violated Plaintiff's constitutional rights, and taught his classmates a lesson of intolerance.

Conclusion

Defendants claim the power to punish their students' expression on political, religious, and social matters round the clock, everywhere, so long as the expression conveys views that enough people find sufficiently offensive and therefore potentially disruptive. That is not consistent with *Mahanoy*, and with the First Amendment more broadly. The judgment below should therefore be reversed.

Respectfully submitted,

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/s/ Eugene Volokh

August 21, 2024