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

Reply Brief of Plaintiff-Appellant Case Leroy

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Defendants' response brief,[1] laden with *ad hominem* disparagement of Leroy, scours the case law yet returns not a single case justifying their punishment of a student's off-campus, non-threatening, non-directed speech. Especially after *Mahanoy*, this Court should not be the first to do so.

I. *Mahanoy* confirms Leroy's speech is protected.

Seeking to relitigate *Mahanoy*, Defendants insist (DB42) there is "no functional difference" between on- and off-campus student speech. But, even though the district court and now Defendants ignore it, *Mahanoy* explains at length the three factors that functionally differentiate off-campus from on-campus speech. OB19-21; *accord* First Amendment Scholars *Amicus* Br. 2-8.

First, off-campus speech "normally fall[s] within the zone of parental, rather than school-related, responsibility." *Mahanoy*, 594 U.S. at 189. This is precisely why Defendants' and their *amici*'s appeals to

[1] "A" indicates the joint appendix for this appeal and "SPA" indicates the special appendix appended to Leroy's opening brief. "Dkt." indicates docket entries in the underlying district-court case, No. 7:21-cv-06008-NSR-AEK (S.D.N.Y.). "OB" indicates Leroy's opening brief, "ADD" indicates the addendum, and "DB" indicates Defendants' response brief.

enforcing civility[2] cannot carry the day here. *Mahanoy* leaves no room for doubt: a school's *Fraser* authority to punish bare vulgarity or incivility does not extend to off-campus speech. 594 U.S. at 192 (quoting *Morse*, 551 U.S. at 405). That's a parent's job. *See* Center for Individual Rights & Volokh *Amicus* Br. 10-11.

Second, unbounded school authority equates to a wholesale ban on unpopular student speech. Students would have no time, place, or refuge to "engage in that kind of speech at all." *Mahanoy*, 594 U.S. at 190. Such a rule usurps parental duties and turns students into "closed-circuit recipients" of the school's "officially approved" "sentiments." *Tinker*, 393 U.S. at 511. It also harms school districts and taxpayers by opening them up to liability for failing to police their students' speech around the clock. OB29-30. Defendants purport to fear such liability (DB52-53), but propose a rule that, by expanding their jurisdiction, massively increases their exposure to such risk.

Third, erasing the line between on- and off-campus speech corrodes the school's obligation to teach students about the virtue of open exchange and to prepare students as future participants in the democratic "marketplace of ideas." *Mahanoy*, 594 U.S. at 190.

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[2] DB51-52 (citing exclusively in-school speech cases); School Boards *Amicus* 21-22 (quoting *Fraser*).

These three features provide the "functional difference" between school authority that extends to the schoolyard gates or beyond them. Rather than acknowledge that, Defendants would "dilute[] the speech rights" of all students by erasing the on-campus/off-campus distinction. ACLU *Amicus* Br. 3.

Many of the in-school speech cases that Defendants muster recognize the distinction themselves. Take *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874 (7th Cir. 2011). That case involved students seeking to wear disparaging "Be Happy, Not Gay" t-shirts to school. Defendants cite (DB37) *Zamecnik* in support of their discretion, yet it *affirmed* summary judgment for the student plaintiffs, refusing to defer to the school on the question of substantial disruption. 636 F.3d at 878-81. It also said, even before *Mahanoy*, that plaintiff's "right to [speak] outside of school is not questioned." *Id.* at 875. This followed an earlier decision in the same litigation reasoning that school restrictions on derogatory speech "probably would not wash…outside of the school, where students who would be hurt by the remarks could avoid exposure to them." *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 674 (7th Cir. 2008).

Take another example, *L.M. v. Town of Middleborough*, 103 F.4th 854 (1st Cir. 2024) (cited by DB51-52). *L.M.* too involved a disparaging student t-shirt ("There are only two genders") worn to school. *L.M*

disagrees with *Zamecnik* on the merits of substantial disruption,[3] but it agrees that schools overreach when they punish incivility off-campus: "There is a much broader plainly legitimate area of speech that can be regulated at school than outside school." *Id.* at 885 (simplified). "It is significant, therefore, that the hate-speech provision applies only to apparel and then only when worn 'to school." *Id.*

Beyond the litany of in-school speech cases, Defendants rely on inapposite case law involving speech targeting schools or its students or staff; facts not present here. *See* OB30-32 (discussing the reasoning of *Doninger I*, *Doninger II*, and *Thomas*). For example, *Kutchinski v. Freeland Community School District* (DB39), holds that a school may constitutionally punish a student for posting "a fake Instagram account that impersonated a Freeland teacher and directed sexual and violent posts at three Freeland teachers and a student." 69 F.4th 350, 359 (6th Cir. 2023). In other words, schools may discipline speech within *Mahanoy*'s leeway for "serious or severe bullying or harassment targeting particular individuals." *Id.* at 357 (quoting *Mahanoy*, 594 U.S. at 188). When "vulgar" or "crude" online speech does not target other students,

[3] L.M. has since filed for a certiorari petition; the Court has called for a response. *See L.M. v. Town of Middleborough*, No. 24-410 (U.S.).

teachers or the school itself, however, it is fully protected, and "clearly established" as such. *See Diei v. Boyd*, 116 F.4th 637 (6th Cir. 2024).[4]

Here, Defendants admit, as they must, that Leroy's speech was "not directed at a particular individual." DB40. Even the school's own hearing officer found "no evidence" that Leroy directed his post "toward any specific person," and so dismissed the charges of harassment and discrimination. A-461 n.2. But rather than admit original error, Defendants dig in, proclaiming that "Leroy's post targeted a class of people who reasonably felt bullied, harassed, and unsafe in school." DB40. It didn't, but more importantly, that's not *Mahanoy*'s rule. *Mahanoy* affords more school authority where the speech amounts to "serious or severe bullying or harassment *targeting particular individuals.*" 594 U.S. at 188 (emphasis added). *See generally* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013).

If *Mahanoy* had accepted Defendants' false equivalence, the outcome would have been different because the class of people associated with the cheerleading squad naturally felt targeted by B.L's speech.

[4] Defendants' *amici* refer the Court to the Sixth Circuit's divided decision in *Parents Defending Education v. Olentangy Local Sch. Dist. Bd. of Educ.*, 109 F.4th 453 (2024). *See* School Boards *Amicus* 10, 29. Last month, the Sixth Circuit granted *en banc* rehearing of *Parents Defending Education*, thus vacating the panel decision. Order, No. 23-3630 (6th Cir. Nov. 1, 2024).

Perhaps Defendants would say that only classes protected under civil rights law count. Then what about *Siegfried*? OB24-25 (discussing *C1.G v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022)). "Me and the boys bout to exterminate the Jews" is far more incendiary—and "class-targeted"—than is Leroy's "Cops got another" post. Defendants there argued the student's speech was "uniquely regulable because it is 'hate speech targeting the Jewish community' and 'not just a crude attempt at a joke about the Holocaust.'" *Siegfried*, 38 F.4th at 1277. But the Tenth Circuit correctly rejected that legal rule, noting that "offensive, controversial speech can still be protected." *Id.* (citing *Mahanoy*, 594 U.S. at 205-07 (Alito, J., concurring)).

There's a good reason that the law requires more; eroding the distinction between individual harassment and class-based offense "strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2000) (Alito, J.). Otherwise, schools would be able to reframe any generalized commentary as class-based harassment of one sort or another.

This "redefinition of harm infantilizes people." Foundation Against Intolerance and Racism, *Erec Smith: Redefining 'Harm' Infantilizes People of Color*, YOUTUBE, https://www.youtube.com/watch?v=BX5TSVE0SrI&t=109 (last visited

Dec. 3, 2024). It's "cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood." *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 280 (2023) (Thomas, J., concurring). Leroy's post simply is not "a threat of violence toward Black people." *Contra* DB40-41.

Schools like Livingston Manor have taught their students to feel victimized and triggered whenever they encounter offensive speech. As Columbia University professor John McWhorter explains, they've taught their black students that they "must think of their primary trait as being someone who could suffer [George] Floyd's fate." WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED BLACK AMERICA 114 (2021). And then to protect students from that redefined "harm," these schools indulge the illiberal impulses for "safetyism" that fully emerged in the past decade. Greg Lukianoff & Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND 268-69 (2018).

But the First Amendment chooses a different path. Public schools must instead "ensur[e] 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.'" *Mahanoy*, 594 U.S. at 190. They must provide "scrupulous protection of Constitutional freedom of the individual" lest they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 318 U.S. 624, 637

(1943). The First Amendment understands that students "are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

Without resort to this psychic offense-based harm, Defendants are left to search in vain to distinguish this case from *Mahanoy* and *Siegfried*. They spend more than a dozen pages of their brief (DB6-20) meticulously chronicling the 23 email exchanges that Defendants had with community members after Leroy's post. Defendants' description of those community emails spills far more ink than the 1,084 (mostly boilerplate) words used to respond to them. ADD-16.

To be sure, Livingston Manor is a small town. DB45. So too is Mahanoy City, Pennsylvania. As of 2016, the enrollment in grades 9-12 of Mahanoy's secondary school was 271.[5] So too, for that matter, was the "quiet town" of Granville sixty miles north of Albany. *Thomas*, 607 F.2d at 1045. Granville submitted affidavits from "three school administrators from neighboring towns, predict[ing] a 'devasting' effect on public education." *Id.* at 1046. But small town or large, there can be no deference to school officials when they "reach beyond the schoolhouse gate." *Id.* at 1045. Schools may not seek refuge in community clamoring for

[5] https://en.wikipedia.org/wiki/Mahanoy_Area_High_School (last visited Dec. 3, 2024).

punishment of "expression that took place off school property." *Id.* at 1051; *accord* Section II, *infra* at 14-19 (addressing heckler's veto).

Although Defendants characterize (DB44) the disruption as "grind[ing] the school day to a halt," the record reveals the only disruption to regularly scheduled classes to be nothing more some student discussion during and between classes, an impromptu assembly that Defendant Evans chose to hold, and a nine-minute supervised and silent student protest. OB10-11, 16. That is not materially distinguishable from *Mahanoy*. OB18.[6]

Worse, the district court credited the disruption from the assembly that Defendant Evans had independently initiated. SPA-18. Below, Defendants persuaded the court that they were forced into the assembly by their "obligation" to teach antiracism. SPA-18. On appeal, they shift gears and argue that Evans' decision to host the assembly and protest was "because he feared otherwise 'unsupervised minors leaving school grounds.'" DB48. Even if that were so (and he never states that in the record), the record reveals a clearly available alternative: putting protesters on notice that Evans would enforce the school's code of conduct and attendance policy. Evans testified that when he got wind that the protesters intended to livestream their protest, he "explained to them

[6] Defendants' bold claim (DB33) that the "disruptions continued throughout the remainder of the year" is unsupported by the record. Nor did the district court make such findings.

about the Code of Conduct violations and using electronic devices in school. They did not end up livestreaming anything." A-279.

With the disruption so minimal, Defendants grasp for one last straw to argue against First Amendment protection for Leroy: his speech was just too low-value. DB32, 41; *contra Russo v. Central School Dist.,* 469 F.2d 623, 634 (2d Cir. 1972) (First Amendment protects even "personally obnoxious" speech). And so, goes their argument, the value of the joke "cannot outweigh the school's interest[s]." DB41. Leroy already preempted this argument. OB47-48.[7] Student speech is not subject to the same "public concern" threshold as government employee speech. *Garcia v. SUNY Health Sciences Ctr.*, 280 F.3d 98, 105 (2d Cir. 2005). Nor does the *Pickering* balancing test apply to student speech. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Friend v. Gasparino*, 61 F.4th 77, 88 (2d Cir. 2023) (*quoting Stevens*, 559 U.S. at 470). Yet employee speech cases litter Defendants' brief. DB42, 55-57. Using an erroneous explanatory parenthetical, Defendants even misrepresent one of these cases as "in the school

[7] Ironically, the School Boards *amici* suggest (at 6) the exact opposite, equally wrong argument that Leroy's speech should receive less protection because it referenced a matter of national, rather than local, concern. *Tinker* determined otherwise. *See* OB29.

context" when it involved a municipal transportation driver. DB42 (citing *Zalewska v. Cnty. of Sullivan N.Y.*, 316 F.3d 314, 319 (2d Cir. 2003)).

Further afield still are the handful of expressive *conduct* cases Defendants cite. DB42. Posting on social media is "pure speech," *Mahanoy*, 594 U.S. at 191, unlike wearing masks, purchasing a gun, or drinking alcohol underage. *See respectively Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *Heller v. Bedford Cent. Sch. Dist.*, 665 Fed. Appx. 49 (2d Cir. 2016); *Cheadle v. N. Platte R-1 Sch. Dist.*, 555 F. Supp. 3d 726 (W.D. Mo. 2021).

Ultimately, adopting Defendants' arguments would disobey *Mahanoy*, create a circuit split with *Siegfried*, and upset this Circuit's existing school-speech precedents. This Court should decline the invitation.

II. Defendants violated Leroy's free speech rights by embracing a heckler's veto and engaging in viewpoint discrimination to punish him.

A. Preservation

To begin, Leroy has properly preserved his heckler's veto and viewpoint discrimination arguments. *Contra* DB49-50. The "no heckler's veto" rule is integral to Justice Alito's *Mahanoy* concurrence (594 U.S. at 206 & n.17) and Leroy's summary judgment papers quote from that concurrence at length. *See* Dkt. 79 at 15-16; Dkt. 75 at 4-5 ("hecklers don't get the veto"). Leroy's reply expressly maintains that "community

pressure" is no "justification for violation of a student's civil rights." Dkt. 75 at 5. True enough, Leroy did not frame his heckler's veto point as a matter of "viewpoint discrimination" below, but the arguments flow together, and forfeiture doctrine does not amount to a magic words requirement. *See Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99, 104 n.11 (2d Cir. 2007); *Mango v. Buzzfeed, Inc.*, 970 F.3d 167, 173 n.4 (2d Cir. 2020)

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Heckler's veto, viewpoint discrimination, and *Mahanoy* speech infringement "are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the [discipline] effect[ed] [a First Amendment violation]." *Id.* at 535; *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (argument that Amtrak is a government entity is not a new claim but a new argument relating to "consistent claim" that it "did not accord him the rights it was obliged to provide by the First Amendment.")

Leroy "has maintained throughout this litigation [that Defendants violated his First Amendment rights by disciplining him for his social media post], and [he] is 'not confined to the same arguments which were advanced in the courts below upon the federal question there discussed.'" *Everytown for Gun Safety Support Fund v. BATFE*, 984 F.3d 30, 38 n.4

(2d Cir. 2020) (quoting *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899)). Leroy's viewpoint discrimination argument requires no "additional fact finding." *Id.* It presents a question of constitutional law that shapes the rights of public school students in this Circuit. The decision below authorizes public schools—worse yet, imposes on them the "duty"—to superimpose school-approved viewpoints over the off-campus private speech of its students. Moreover, Defendants suffer no prejudice from considering this new legal framing; they have responded at length to Leroy's arguments against viewpoint discrimination and heckler's veto. DB50-58

Without exception, Defendants' citations to case law are inapt. The defendants in *Doe v. Trump Corp.* abandoned their claim because they pursued the opposite argument in the district court, not because they failed to raise it. 6 F.4th 400, 410 (2d Cir. 2021). The *Goldman v. Rio* plaintiff completely failed to "identify the cause of action or describe the elements of the claim," 788 Fed. Appx. 82, 84 (2d Cir. 2019). And Defendants' other cases involved either (1) fact-intensive questions not raised or passed on in the district court;[8] (2) unreviewable issues;[9] or (3)

[8] *United States v. Keshner*, 794 F.3d 232, 234 (2d Cir. 2015) ("Scrutiny of individual fee entries, however, is a task akin to fact-finding, better reserved for a district court in the first instance." (citation omitted)).

[9] *Singh v. Mem'l Sloan Kettering Cancer Ctr.*, No. 23-63-CV, 2024 WL 4586396, at *2 (2d Cir. Oct. 28, 2024) ("Even if Singh had properly

forfeiture not because the argument wasn't preserved below but because it was not raised until the reply brief.[10] None of these cases counsel finding waiver, forfeiture, or lack of preservation for Leroy's arguments.

B. Heckler's veto

Livingston Manor can't justify its punishment of Leroy's "by the fact that other people inside or outside the school community are clamoring for it: that's an impermissible heckler's veto." OB42 (citing, *inter alia*, *Mahanoy*, 594 U.S. at 206 (Alito, J., concurring) and *Burnham*); *see also* First Amendment Scholars *Amicus* Br. 9-11 (citing other authorities); *contra* DB58 ("Appellant has cited no legal authority…"). Nothing in Justices Alito and Gorsuch's *Mahanoy* concurrence is at odds with *Mahanoy*'s majority opinion. *Contra* DB31. It simply adds more flesh on the jurisprudential bones.

Nor was the *Mahanoy* concurrence breaking new ground by invoking the no heckler's veto rule in the school context. *Tinker* did so! *see* 393 U.S. at 508 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949), the

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raised such an argument in a motion for a new trial at the District Court, a district court's denial of a motion for new trial on weight-of-the-evidence grounds is not reviewable on appeal." (simplified)).

[10] *Tripathy v. McKoy*, 103 F.4th 106, 118 (2d Cir. 2024); *Greater New York Mut. Ins. Co. v. Burlington Ins.*, No. 23-892, 2024 WL 1827249, at *1 (2d Cir. Apr. 26, 2024); *Bey v. City of New York*, 999 F.3d 157, 169 (2d Cir. 2021).

seminal heckler's veto case). This Court was even more explicit 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. Nor may courts endorse such punishment because the populace would approve." 607 F.2d at 1051. Instead of looking to *Thomas*, Defendants brandish the dicta-on-dicta in *Eisner v. Stamford Board of Education*, 440 F.2d 803 (2d Cir. 1971). DB55. But *Eisner* doesn't even directionally support their view that heckler's veto doesn't apply to school discipline. The issue in *Eisner* was unpopular opinions expressed "on secondary school property." *Id.* at 809 n.6. And this Court advised that school officials consider "reasonable measures to minimize or forestall potential disorder and disruption that might otherwise be generated in reaction to the distribution of controversial or unpopular opinions, ***before*** they resort to banishing the ideas from school grounds." *Id.* at 809. Defendants' only other in-circuit cases are inapposite employee speech cases. DB55-57 (discussing *Melzer* and *Locurto*).

A consensus of circuits, in accordance with *Thomas* and foreshadowing *Mahanoy*, have applied the heckler's veto principle to student speech cases. *See Shanley v. Northeast Indep. Sch. Dist.,* 462 F.2d 960, 974 (5th Cir. 1972) (*Tinker* forbids a heckler's veto); *Zamecnik*, 636 F.3d at 879 (same); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274-76 (11th Cir. 2004) (same).

Defendants rely (DB57) on *Dariano v. Morgan Hill Unified School District*. 767 F.3d 764 (9th Cir. 2014). But a closer inspection offers no support for Livingston Manor's persecution of Leroy. In *Dariano* "school officials' actions were tailored to avert violence and focused on student safety." *Id.* at 777. First, "officials restricted the wearing of certain clothing, but did not punish the students. School officials have greater constitutional latitude to suppress student speech than to punish it." *Id.*; *accord* Frank D. LoMonte, *"The Key Word is Student": Hazelwood Censorship Crashes the Ivy-Colored Gates"* 11 FIRST AMEND. L. REV. 305, 351-53 (2013) (making similar argument). This Circuit adopts a similar approach: "unusual deference" to school officials ends when an investigative "temporary removal" of a student becomes a disciplinary decision. *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 274 (2d Cir. 2011). Second, officials "allowed two students to return to class when it became clear that their shirts were unlikely to make them targets of violence." *Dariano*, 767 F.3d at 777. Third, "the events…took place in the shadow of similar disruptions a year earlier, and pitted racial or ethnic groups against each other," warning of "physical fighting at the break." *Id.* None of this applies here. Livingston Manor used community "calls for action" (DB32) as the predicate to punish Leroy. DB7 (admitting that community emails criticized the District for tolerating the behavior and demanded the District take disciplinary action"); DB8 (student "asked her teacher to do something about it."); DB13 (parent "urged the District

to take serious action against the students."); DB14 (former student "urged the current administration to handle the matter" with serious punishment); DB14 (community member "asked the District to take action" against Leroy's "terrorism"); DB16 (community member "called for 'some sort of disciplinary action'"); DB16 (community member "urged the District to 'hold these students accountable and create policies that no longer condone any racist/hateful behavior from…students or community members.'"); DB17 (community member "asked that the students be held accountable for their actions"); DB17 (community member told district "to hold your students accountable for their actions. ….[W]ill do right and hold them accountable for their behavior." And that the "community is depending on [district] to make this right.").

Livingston Manor's actions weren't tailored to maintaining order, they were tailored to endorsing the community's condemnation of Leroy. School Boards *amici* protest (at 24) that holding Leroy home was simply "a proactive step to protect [his safety]." But this ignores they instructed him to come to the school the very same day for a meeting with Evans and Davis![11] OB10; DB24; A-169, 183-84, 273-74. In any event, the

11 *Siegfried* addressed a similar contradiction. As to whether the school was genuine in its claim the student was a threat sufficient to justify his immediate suspension, the Tenth Circuit noted the "school officials apparently did not consider C.G.…a threat" since they allowed him on school grounds the day following his social media post. 38 F.4th at 1277 n.4. If Defendants feared for Leroy's safety, why did they bring

school's single day stay-home request did not drive Leroy to bring this suit. Suspending him for more than a month, banning him from all extracurricular and senior activities for his remaining time at Livingston Manor, while branding him as an odious racist did. Rather than condition Leroy's return to school on the maintenance of order, Defendants conditioned it on Leroy's commitment to the school's "Restorative Justice" and DEI orthodoxy.[12] OB40. And lastly, the school faced no previous pattern of disruptions that portended "physical fighting at the break."

Nor does *Taylor v. Roswell* (DB58) support Leroy's punishment. 713 F.3d 25 (10th Cir. 2013). Unlike in *Taylor*, here "there is [an] indication…that the problematic student disruptions were aimed at stopping [Leroy's] expression." 713 F.3d at 38 n.11. Leroy has "develop[ed] such an argument." *Id.* Defendants do not once mention the cancellation campaign conducted against Leroy by his former girlfriend. *See* OB8-10.

To hear Defendants describe it, Leroy's hecklers and their outrage were just the "effect" of Leroy's offensive speech. DB33. That's not how the First Amendment works. Listeners have agency. If the speech does

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him on campus the same day they told him not to come to school for that reason?

[12] Evans letter made no reference to safety, order, or disruption, it maintained that "the behavior"—*i.e.*, Leroy's speech—"is unacceptable and warrants a long term suspension." A-465.

not amount to unprotected "fighting words,"—and there can be no argument that Leroy's social media posting constituted "fighting words"—then the First Amendment demands that the government not cede speakers' rights to the will of community opinion, outraged or not. In 2020 and 2021, schools were particularly poor at adhering to this constitutional obligation, less yet teaching students that "protection must include the protection of unpopular ideas." *Mahanoy*, 594 U.S. at 190; id. at 195 (Alito J., concurring) (agreeing with majority).

In punishing Leroy, Livingston Manor failed to "prepar[e] [its students] for…a polity that value the free exchange of ideas." ACLU Br. 5; *accord* FIRE, et al. *Amicus* Br. 20. In finding the hecklers' outrage, and the hecklers' intended disruption, to be a mere "effect" (DB33), a mere "react[ion]" (DB54), Livingston Manor deprived the hecklers of agency. It disempowered all its students. *See generally* Matthew Abraham & Erec Smith, THE LURE OF DISEMPOWERMENT: RECLAIMING AGENCY IN THE AGE OF CRT (2022). It "poison[ed]" "the habits and attitudes necessary to democracy." CIR & Prof. Eugene Volokh *Amicus* Br. 16.

C. Viewpoint discrimination

Indulging a heckler's veto is simply viewpoint discrimination "in a different guise." *Wandering Dago v. Destito,* 879 F.3d 20, 32 (2d Cir. 2017) (quoting *Matal v. Tam*, 582 U.S. 218, 250 (2017) (Kennedy, J., concurring)). Again, Defendants insist that the rule against viewpoint

discrimination does not apply to student speech. DB33 ("poor fit for the school environment"). And again, this Court has already decided otherwise. OB3, 36 (citing *Peck* and *Collins*); *accord Kristoffersson v. Port Jefferson Union Free Sch. Dist.,* No. 23-7232, 2024 WL 3385137, at *3 (2d Cir. July 12, 2024) ("Under either standard, [*Tinker* or *Hazelwood*], a public school violates the First Amendment if it engages in viewpoint discrimination").

Defendants fail to grapple with the consequences of their rule permitting viewpoint discrimination. Administrators could punish pro-LGBT speech as disruptive to the community and the school's educational mission. *Contra* OB49-50 (citing cases). They could punish unpatriotic speech. *Contra, e.g., Holloman*. They could punish the same antiracist views that they espouse. *Contra Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1229 (N.D. Fla. 2022) (enjoining viewpoint discriminatory provision of the Stop W.O.K.E. Act). Unfortunately, like Livingston Manor, many schools continue to disregard the First Amendment and compel ideological conformity. *See* Liberty Justice Center *Amicus* Br. (providing other recent examples).

No one doubts that schools may discipline students for engaging in acts of racial discrimination. DB51. That's because racial discrimination is conduct, not protected speech. But this case is about Livingston Manor's viewpoint-based regulation of Leroy's speech, not any regulation of discrimination. *See Wandering Dago*, 879 F.3d at 32 (illustrating the

difference); *Saxe*, 240 F.3d at 207-08 (same). Defendants cannot just re-label controversial speech as the punishable conduct of "discrimination" or "harassment." *See Siegfried*, 38 F.4th at 1279. Offensive speech is not "discrimination." *Wandering Dago*, 879 F.3d at 32.

Defendants' fear of liability for not acting (DB52-53) rings hollow, when one realizes that their proposed rule would enlarge liability by enlarging the scope of their jurisdiction. OB29-30 (quoting *Amicus* Br. of La., et al., *Mahanoy*, No. 20-255 (Mar 31, 2021)). Nor is there a risk of liability for allowing non-targeted student speech on topics of social concern (assuming that there is no failure to evenhandedly enforce content-neutral school rules). Hostile environment liability ends where the First Amendment begins. "Where pure expression is involved, anti-discrimination law steers into the territory of the First Amendment." *Saxe*, 200 F.3d at 206 (internal quotation omitted); *see also Honeyfund, Inc. v. Governor,* 94 F.4th 1272, 1282 (11th Cir. 2024); *Rodriguez v. Maricopa Cmty. Coll. Dist.,* 605 F.3d 703 (9th Cir. 2010); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir.1995).

Leroy's rule does not leave schools powerless. The proper course here was "more speech not less." OB43 "But in acceding to the demands of the mob, [Livingston Manor] decided not to stop at government speech; they punished the speaker." OB43 Defendants somehow misread this as a "suggestion" that Leroy "suffered a constitutional injury ***because***" of the decision to hold an assembly and host the student protest. DB54. Just

the opposite: the First Amendment only draws its line at imposing viewpoint through discipline or other adverse action.

Defendants take umbrage at Leroy's "offensive" reference to "the mob" that clamored for his punishment. DB53. In their view, participating in that disruptive cancellation attempt—or even initiating it in the case of Leroy's ex-girlfriend—was simply a "response to an overt act of racism." OB54. Nothing that "warrants punishment of [participants]." OB54. Yet, Defendants "certain[ty]" (DB53) about Leroy's ambiguous "Cops got another" post only confirms that the school was imputing its own views, mirroring those of outraged community members, on to Leroy's speech. *See* OB46; *see also supra* at 18 n.13. Leroy's own view, as described in a school essay penned months before the Snapchat incident, was that the officers had used excessive force on George Floyd and that Chauvin "deserved jail time." A-537.

On appeal, Defendants no longer tout their obligation to teach antiracism,[13] and make no mention of their requirement that Leroy participate in "Restorative Justice, Diversity, Equity, and Inclusivity training opportunities" as a condition of returning to school. A-469. Still, antiracist ideology permeates their argument. *See supra* at 6-7, 18-19.

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[13] *Compare* Dkt. 70 at 19 ("Even Justice Julian Schreibman…recognized that 'our public schools have an obligation to teach students antiracism, to be antiracist and to engage in antiracist conduct.'") *and* SPA-18 (district court adopting this obligation rationale).

On the other hand, Defendants also feign ignorance of how Leroy's speech even constitutes "unpopular expression." DB42. One "need not delineate the full extent of message that [Leroy was] trying to convey. Whatever the intended message, [his] use of [an inflammatory reenactment] reflects a viewpoint about when and how such language should be used." *Wandering Dago*, 879 F.3d at 33. Given the witch hunt that the school had already embroiled him in, it is no surprise that Leroy or any student caught in Livingston Manor's crosshairs would refuse to admit potential awareness to what, if anything, his friends were staging. *Contra* DB53. As Judge Bibas explained, upon receiving complaints about offensive speech, administrators often seek to extract a "corruption of apology" from the respondent—a public performance regularly "demanded by Twitter mobs" these days. David Lat, *Yale Law School and the Federalist Society Caught In a Bad Romance*, ORIGINAL JURISDICTION, https://davidlat.substack.com/p/yale-law-school-and-the-federalist (Nov. 13, 2021).

Defendants discriminated against Leroy's speech based on its perceived viewpoint, and continue to argue that they were right to do so. They were not. To express a viewpoint, governments must use speech, not punishment.

III. Evidenced by the totality of his complaint, Leroy pled both personal and official capacity claims against Superintendent Evans.

When a complaint is silent as to whether it brings claims against an government actor in a personal, or merely an official, capacity,[14] this Court looks "look[s] to the totality of the complaint [and] the course of proceedings to determine" the question. *Rodriguez v. City of Rochester*, 624 Fed. Appx. 16, 18 (2d Cir. 2015) (quoting *Yorktown Med. Lab., Inc. v. Perales*, 948 F.2d 84, 88-89 (2d Cir. 1991)). Here, as in *Rodriguez*, "the totality of the complaint" indicates that Leroy intended to sue Superintendent Evans in both his individual and his official capacity for violating Leroy's free speech rights. First, Leroy named Evans, pleading that he was a resident of New York, "which would have been duplicative had [he] intended to bring only official-capacity claims." *Compare id.* with A-21. Second, Leroy "requests punitive damages, which are available only in an individual-capacity suit." *Compare id. with* A-30. Third, Leroy's complaint and litigation papers focus on Evans' unconstitutional enforcement of the school district's policy, not the written policy itself. *Compare id.* at 19 *with* A-24-28. Thus, Leroy's First Amendment claim against Evans should not be dismissed as duplicative. *Contra* DB59.

[14] Leroy's complaint is silent on "official" or "personal" capacity. A-20-30.

Conclusion

For the foregoing reasons, the Court should reverse the decision granting summary judgment to Defendants, and remand for entry of summary judgment in Leroy's favor.

Dated: December 4, 2024

Respectfully submitted,

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