No. 19-2167

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SHAEL NORRIS, on behalf of her minor child A.M.,

Plaintiff-Appellee,

v.

CAPE ELIZABETH SCHOOL DISTRICT;
DONNA WOLFROM, Superintendent of Cape Elizabeth Schools;
JEFFERY SHEDD, Principal of Cape Elizabeth High School;
NATHAN CARPENTER, Vice Principal of Cape Elizabeth High School;

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRIEF OF *AMICI CURIAE* ANA GOBLE AND FIRST AMENDMENT CLINIC AT DUKE LAW SCHOOL IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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I. INTRODUCTION

Nearly six months ago, Cape Elizabeth School Department ("the School") suspended a 15-year-old high school student ("A.M.") for speaking up about sexual assault in her school. This suspension sent a clear message to the School's students: those who speak out on this matter of public concern will be punished. Instead of encouraging students to talk about difficult issues of sexual violence, the School sought to stifle discussion on the topic altogether. The principal even sent multiple letters to the Cape Elizabeth High School community condemning A.M.'s speech. The School's actions overstepped the bounds of the First Amendment, and they will likely chill further student speech regarding sexual assault. As victims already drastically underreport sexual assault, this chill is likely to be particularly significant.

Correctly recognizing these constitutional problems, the district court granted A.M. a preliminary injunction, staying her suspension. Disturbing the district court's order would suggest to public secondary-school administrators that the First Amendment does not extend to student speech even on matters of the gravest legitimate concern to those students. *Amici* urge this Court to uphold the district court's decision.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The First Amendment Clinic at Duke Law ("the Clinic") has a public mission to protect and advance the freedoms of speech, press, assembly, and petition. The Clinic represents clients with First Amendment claims and provides public commentary and

legal analysis on freedom of expression issues. The Clinic also works with the Time's Up Legal Defense Fund to help survivors of sexual assault and sexual harassment speak openly about their experiences while shielding against defamation claims. In light of the Clinic's activities and given that it is situated in an academic setting, the Clinic has a strong interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the freedom of expression, especially on a school campus.

Ana Goble is a young New Hampshire woman who, as a middle schooler, spoke out about an inappropriate relationship between her teacher and a fellow student. Rather than investigate her concerns, the school suspended her. Years later, the teacher was arrested and charged with raping the very student Ms. Goble had tried to protect, bringing the truth and gravity of Ms. Goble's speech to light. Ms. Goble has an interest in ensuring the First Amendment's protections of student speech are preserved.

III. STATEMENT OF THE CASE[1]

A.M., a Cape Elizabeth High School student, is well-known among her peers as an advocate for victims and survivors of sexual assault. J.A. 12. She maintains leadership roles in student and national organizations dedicated to addressing sexual violence in middle schools and high schools. *Id.* Many of A.M.'s classmates have confided in her about their personal experiences of sexual violence. J.A. 12, 15.

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

On September 16, 2019, A.M. wrote and posted a sticky note in a women's bathroom that stated, "There's a rapist in our school and you know who it is." J.A. 13–14. Two other classmates posted similar notes in other locations. J.A. 15. Within minutes of A.M. placing her message, another student entered the bathroom, removed the note, and took it to school administrators. J.A. 14. Word of the sticky note quickly spread; photos of the note were shared across the school and, as a result, students began actively discussing the topic of sexual assault on campus. J.A. 14–15. After an investigation by school administrators, A.M. admitted to posting the note. J.A. 95.

On October 4, 2019, the *Portland Press Herald* published an article criticizing the School's handling of the sexual assault allegations, and additional media attention, much of it also critical, eventually followed. J.A. 18, 20–21. The same day, Principal Shedd suspended A.M. for three days, *id.*, a punishment which the School admits it "rarely assigns." J.A. 35. Superintendent Wolfrom upheld Shedd's decision, J.A 21-22, and A.M. filed this action. On October 24, 2019, the U.S. District Court for the District of Maine issued a preliminary injunction, and the School appealed.

IV. ARGUMENT

A. The First Amendment Protects the Core Political Speech of Students at School,[2] and A.M.'s Sticky Note Was Core Political Speech because It Addressed Sexual Assault and School Safety.

"[S]peech on public issues occupies the 'highest rung of the hierarchy of First

[2] *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969) ("[N]either

Amendment values,' and it is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citation omitted). Speech is on a matter of public concern if the speaker's "expression can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (quoting *Connick*, 461 U.S. at 146). That the immediate community A.M. addressed was her high school is of no moment; and, in fact, questions about school safety policies are of grave concern generally. *See Levinsky's, Inc. v. Walmart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir. 1997) (recognizing that "the relevant community need not be very large"). Political speech—including speech protesting government action (here, the School's actions)—is "core First Amendment speech," and "'rest[s] on the highest rung of First Amendment values.'" *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (1st Cir. 2009) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980) (alteration in original)).

Sexual misconduct allegations, and how those in authority handle them, are matters of public concern. Courts within this circuit have consistently held similar speech to be on a matter of public concern. *See, e.g.*, *Watkins v. City of Malden*, Civ. A. No. 08-10640-NMG, 2008 WL 11389568, at *4 (D. Mass. Nov. 25, 2008) ("[T]he existence of an investigation into charges that a police officer has committed sexual assaults . . . is undoubtedly a matter of public concern."); *Doe v. Word of Life Fellowship,*

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students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

Inc., No. 11-40077-TSH, 2011 WL 2968912, at *2 (D. Mass. July 18, 2011) ("[A]llegations of sexual assault of a minor [are] of public interest."). Sister circuits have also held allegations of sexual assault to constitute a matter of public concern. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 164 (2d Cir. 2006) (recognizing "sexual assault of a student on school property" is "of obvious concern to the public"); *Bowley v. City of Uniontown Police Dep't*, 404 F.3d 783, 788 (3d Cir. 2005) (stating that "public concern regarding the rape of a minor cannot seriously be doubted"); *Bonnell v. Lorenzo*, 241 F.3d 800, 812 (6th Cir. 2001) (recognizing that "it is well-settled that allegations of sexual harassment . . . are matters of public concern").

These holdings recognize that sexual assault is clearly an issue of political and social concern to the community. Sexual assault is one of the most pressing issues of modern times, akin to the Vietnam War at the time of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, after acknowledging that the conflict in Vietnam was a "controversial subject[]," the Court held that high school students' decision to wear "a band of black cloth, not more than two inches wide" was done "to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.* at 513–14. The controversial issue of sexual assault has garnered similar political attention. The #MeToo and Time's Up movements illustrate how speaking out against sexual assault has become an organized effort. Like the efforts in *Tinker* to support a truce by wearing black armbands and fasting during the holidays, there have been public

protests, demonstrations,[3] and even sartorial statements intended to raise awareness of sexual assault.[4]

Furthermore, the fact that A.M. was *advocating* action on behalf of others shows the political nature of her speech. A.M. called for change in the School, a government entity. By stating, "you know who it is," A.M. spoke directly to the School itself, criticizing it for a lack of action. J.A. 14, 19. The speech of other students makes clear that A.M. was participating in a larger effort to criticize the administration, as other student notes implored the School to "kick out the rapist" and asserted that the administration "is protecting him." J.A. 36. The School's own response revealed that administrators recognized A.M.'s sticky note was a criticism: In his first e-mail to the school community, Principal Shedd wrote that, "The messages claimed adults in the school knew [about the sexual violence] and implied that we would be indifferent." J.A. 29. While the School did not agree that there was, in fact, a rapist, J.A. 30, 33, *Tinker* teaches that the School's disciplinarians "cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Tinker*, 393 U.S. at 511 (citation omitted). The record makes clear that A.M. believed that there was a rapist in the school, that the

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[3] *See, e.g.*, Martin Pengelly, *#MeToo: Thousands March in LA as Sexual Misconduct Allegations Continue*, THE GUARDIAN (Nov. 12, 2017), https://www.theguardian.com/world/2017/nov/12/metoo-march-hollywood-sexual-assault-harassment (describing organized protest in Los Angeles).

[4] *See* Emily Reynolds, *How Men Can Show Solidarity with the #MeToo Movement*, THE GUARDIAN (Feb. 23, 2018), https://www.theguardian.com/commentisfree/2018/feb/23/men-show-solidarity-metoo-movement-advice (describing past efforts to wear black, emeralds, and white rose pins).

School did not adequately respond, and that the student body needed to be aware of it.

The Appellants mention that A.M. twice falsely denied that she wrote and posted the sticky note, arguing that this should be taken as incontrovertible evidence that she did not intend for the sticky note to be a political message. Appellant's Br. 12. This reasoning fails. The test for public concern is objective, identifying any speech that "could plausibly be interpreted as political or social commentary." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 306 (3d Cir. 2013). A.M.'s choice to conceal her name is irrelevant to that inquiry. If anything, the fact that she posted the note anonymously underscores the parallels between her expression and that of other social activists, such as Mary Harris Jones (under the pseudonym "Mother Jones"), Stokley Carmichael (under "Kwame Ture"), and, more recently, Michelle Taylor (under "Feminista Jones"). As the School's reaction to A.M. demonstrates, speech on important topics carries the risk of retaliation that can make anonymity simple prudence.

B. The School's Actions Did Not Further Any Educational Goal, as Punishing A.M.'s Speech Did Not Combat Bullying.

Although students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, because schools are entrusted with the wellbeing of minors, they are able to restrict student speech in certain limited ways. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (holding "constitutional rights of students in public school are not automatically coextensive

with the rights of adults in other settings"). These exceptions are "narrower rules" compared to the "speech-permissive standard of *Tinker*." *Norris v. Cape Elizabeth Sch. Dist.*, No. 2:19-cv-00466-LEW, 2019 WL 5457999, at *4 (D. Me. Oct. 24, 2019). Specifically, the Supreme Court has recognized three categorical exemptions—which the Appellants caption the "*Fraser-Kuhlmeier-Morse* Framework"—under which the school may presumptively restrict student speech. Appellant's Br. 17. The School's actions are not protected by any of these narrow exemptions.

Constitutionally valid reasons for regulating speech include restricting speech that "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "inva[de] the right of others." *Tinker*, 393 U.S. at 509, 513 (citation omitted). The issue of whether A.M.'s speech implicated these rules is well briefed by the Appellee—it did not. *See* Appellee's Br. 47–55.

Additionally, this Court has more broadly stated that student speech can be restricted to further educational goals. *See Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[I]t is well-settled that public schools may limit classroom speech to promote educational goals"); *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 23 (1st Cir. 1999) ("[T]he relevant legal framework strives to balance the need for faculty and students to retain expressive rights against the need for school officials to maintain an appropriate educational environment."). Here, the School argues that it was entitled to punish A.M.'s speech to further the educational goal of combatting bullying. But the School's arguments are unpersuasive. While schools have discretion to prohibit and punish

speech that amounts to bullying,[5] when a school seeks to use anti-bullying policies to prohibit and punish political speech, it must meet the burden set in *Tinker* to show a constitutionally valid reason for the prohibition. 393 U.S. at 511.

A.M.'s silent protest against sexual assault did not constitute bullying; rather it is a modern equivalent of the silent protest in *Tinker*. A.M. posted a small sticky note in a girls' bathroom. A.M. did not name or otherwise identify any student in the note.[6] A.M. did not confront Student 1, as the note was posted in a place he could not access. She did not direct others to take any action of any kind against Student 1. Under these facts, it clear that A.M.'s undirected and general speech did not constitute bullying. Instead, A.M. posted the note to "foster awareness of the serious problems of sexual assault in [Cape Elizabeth High School], and in most high schools across America." J.A. 88.

The School places significant weight on the fact that other students independently identified the supposed assailant. This has no bearing on the protection of A.M.'s speech. If anything, this is evidence that a large segment of the student body viewed sexual assault to be a major area of concern, and already suspected Student 1 of misconduct prior to the posting of A.M.'s note. Indeed, the School itself found that Student 1 had engaged in unwanted sexual touching, *see* J.A. 37, 47, but ultimately concluded that students like A.M. had misinterpreted the conduct. J.A. 33. Under the

[5] In Maine, schools *must* prohibit bullying. Me. Rev. Stat. Ann. tit. 20-A, § 6554 (2012).
[6] Although A.M. did report Student 1 and another to administrators, J.A. 16, the School learned of the supposed identity of the individual rapist from other students, J.A. 39, 42–48, 50, 52.

School's logic, any student speaking about sexual misconduct at all—even if only relaying general statistics—could be considered a bully. Any such speech could call attention to an issue and motivate students to act against a suspected perpetrator. The School cannot use anti-bullying rhetoric to disguise a policy that punishes an advocate's protected political speech.

C. Punishing A.M. Undercut the School's Educational Goal of Civic Development.

Not only did the School's actions not further any legitimate aims, they actually undermined one of the foundational goals of our educational system: civic development. The "adequate preparation for discharging the duties and responsibilities of citizenship" is an essential purpose of the education system. Mortimer J. Adler, *The Paideia Proposal* 17 (1982). This is because "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *See also Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (Schools must provide students with "wide exposure to that robust exchange of ideas [protected by the First Amendment] which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.") (internal quotations omitted). This preparation is essential because "public discussion is a political duty" and "a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927).

Here, A.M. had a grievance: an unsafe school environment. J.A. 80–81, 89. She

exercised her right to air her grievance with other young women by posting a note in a restroom. Through these actions, A.M. engaged in a public political discussion consistent with her civic duty. It is the responsibility of the School to prepare its students to bear the responsibilities of citizenship. By prohibiting and punishing A.M.'s speech on sexual assault in her community, the School violated A.M.'s First Amendment rights and undermined this responsibility—depriving *all* students of a valuable opportunity to have an important and relevant conversation on sexual assault.

D. The School's Actions Have and Will Silence Victims of Sexual Assault from Coming Forward and Advocates from Speaking Up on Their Behalf.

Allowing A.M.'s suspension will have a disastrous chilling effect by discouraging sexual assault victims and advocates from coming forward and speaking up. High school students are especially likely to experience sexual violence, often at the hands of their classmates. Nationally, 9.7% of high schoolers, including 15.2% of young women, have been the victims of sexual violence.[7] Among victims of intimate partner violence, 25.8% of women and 14.6% of men were near A.M.'s age—seventeen or younger—the first time they were attacked.[8] Many young victims tend to suppress or trivialize what has happened to them; some students blame themselves or view their assaults as

[7] Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance – United States, 2017* 21 (2018), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf.

[8] Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief – Updated Release* 10 (Nov. 2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.

normal or unimportant behavior.[9] To address this issue, schools have taken an active role in educating students about sexual assault prevention and reporting. Indeed, the School has itself instituted the SAAFE (Sexual Assault Awareness for Everyone) program to foster conversations about sexual violence. J.A. 92. Programs like this are intended to alleviate the problem of sexual assault by normalizing dialogue about the topic. The School's actions in this case have entirely undermined its own goal. Punishing a student for speaking out will only create further stigma surround sexual assault and dissuade others from speaking on the topic.

Encouraging discussion of sexual assault on campus is especially important because schools often become places of victimization and secrecy.[10] For example, after telling school officials she was raped in the band room, a Texas high school student was kicked out and shipped off to an alternative school.[11] And in Georgia, a female high school student was suspended after reporting to her school that she was coerced to perform oral sex.[12] During the investigation of this incident, the victim was required to reenact the assault and was asked invasive questions like why she did not bite her

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[9] Karen G. Weiss, *"You Just Don't Report That Kind of Stuff": Investigating Teens' Ambivalence Toward Peer-Perpetrated, Unwanted Sexual Incidents*, 28 Violence and Victims 288, 299–300 (2013), https://www.ncbi.nlm.nih.gov/pubmed/23763113.

[10] *See, e.g.*, Cindy Long, *The Secret of Sexual Assault in Schools*, NEA Today (Dec. 4, 2017), http://neatoday.org/2017/12/04/sexual-assault-in-schools/.

[11] Mark Keierleiber, *The Younger Victims of Sexual Violence in School*, THE ATLANTIC (Aug. 10, 2017), https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/.

[12] *Id.*

assailant's penis or scream louder.[13] The prevalence of assaults on school grounds, coupled with the frequently dismissive or hostile reaction from schools, often makes reporting sexual assaults a daunting prospect for students. The School's conduct here only further exacerbates this problem.

Sexual assaults are already vastly underreported, and further chill of speech on sexual assault would be particularly damaging. The Department of Justice found that only 24.9% of sexual assaults are reported to police.[14] According to studies on college sexual assault, one of the most important factors positively associated with reporting an assault to school officials is "trust in university officials."[15] This finding translates to the high school context. When students trust the administration, they will be more likely to come forward with reports of assault. Allowing the School to retaliate against A.M.'s speech sends a clear message to her and other potential victims of sexual misconduct: do not speak up. *See Powell v. Alexander*, 391 F.3d 1, 16–17 (1st Cir. 2004) ("[R]etaliatory actions may tend to chill individuals' exercise of constitutional rights." (quoting *ACLU of Md., Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993)). Students who see a classmate suspended for reporting sexual assault will be less likely to report for fear of

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[13] Erica L. Green, *"It's Like the Wild West": Sexual Assault Victims Struggle in K-12 Schools*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/us/politics/sexual-assault-school.html.

[14] Rachel E. Morgan & Barbara A. Oudekerk, U.S. Department of Justice, *Criminal Victimization* 8 (Sep. 2019), https://www.bjs.gov/content/pub/pdf/cv18.pdf.

[15] Brianna M. Moore & Thomas Baker, *An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials*, 33 J. INTERPERSONAL VIOLENCE 3419, 3428 (2018).

suffering the same punishment. The chill resulting from such retaliation is likely to undermine the atmosphere of trust that makes it possible to combat sexual assault in schools.

V. CONCLUSION

For the foregoing reasons, this Court should determine that A.M.'s speech was core political speech given its importance to the school educational environment, and affirm the judgment below.

Respectfully submitted,

Dated: March 20, 2020

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CERTIFCATE OF COMPLIANCE

According to the word-processing system used to prepare the foregoing brief (Microsoft Word v. 16), the brief complies with the Federal Rules of Appellate Procedure because it contains 3,516 words, excluding portions exempted by Federal Rule of Appellate Procure 32(f).

/s/ Scott H. Harris
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CERTIFICATE OF SERVICE

On March 20, 2020, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Scott H. Harris
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