Case No. 19-2167

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiff-Appellee

-against-

CAPE ELIZABETH SCHOOL DISTRICT; DONNA WOLFROM, Superintendent of Cape Elizabeth Schools; JEFFERY SHED, 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

CORRECTED BRIEF OF *AMICUS CURIAE* MAINE PRESS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT
AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the Maine Press Association ("MPA"), the statewide trade association for daily and weekly newspapers representing more than fifty Maine news publications. Its mission, in part, is to improve the conditions of journalism and journalists by promoting and protecting the principles of freedom of speech and of the press and the public's right to know.

Amicus curiae files this brief in support of Plaintiff-Appellee Shael Norris, on behalf of A.M. As an association representing dozens of news organizations, the MPA maintains a significant interest in the outcome of this case because this case implicates the critical First Amendment rights of students to speak to the press on matters of public concern.

SOURCE OF AUTHORITY TO FILE

Amicus curiae files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(3). All parties have consented to the filing of this *amicus* brief.

FED. R. APP. P. 29(a)(4)(E) STATEMENT

Amicus curiae declares that:

1. no party's counsel authored this brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparation or submission of this brief; and
3. no person, other than *amicus*, contributed money intended to fund preparation or submission of this brief.

INTRODUCTION AND ARGUMENT SUMMARY

This case involves a critical right that strikes at the heart of the First Amendment: the right of a student to speak to the news media on a matter of public concern. In light of binding jurisprudence on student speech, this Court should affirm the district court and should find that off-campus speech to the press receives full protection under the First Amendment.

The Supreme Court established the substantial disruption test for on-campus student speech more than fifty years ago in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Since then, the Supreme Court has carved out three exceptions to the substantial disruption test: (1) for indecent student speech on-campus, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); (2) student speech bearing the "imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); and (3) speech advocating illegal drug use at a school-sponsored event, *Morse v. Frederick*, 551 U.S. 393 (2007). None of these exceptions apply here, and this case involves student discipline based in part on off-campus statements to the press on a matter of public concern. This Court should affirm that a student's off-campus speech to the press receives full protection under the First Amendment, and cannot be the basis for school discipline.

On September 17, 2019, a reporter for the *Portland Press Herald* reached out to A.M. to ask her about the notes she had posted regarding alleged sexual assault at Cape Elizabeth High School. J.A. 90. The reporter also contacted the superintendent of Cape Elizabeth School District (the "School District") for comment on the incident. J.A. 17. The *Portland Press Herald* published a story on the incident on October 4, 2019, which included A.M.'s on-the-record criticism of the School District's handling of sexual assault allegations. J.A. 18. That same day, A.M. was suspended from school for three days. *Id*. A.M.'s suspension was longer than the other students allegedly involved in the incident, none of whom had spoken to the press. *Id.*

To the extent that A.M. was disciplined for speaking to the press on a matter of public concern off campus, the suspension violated the First Amendment for two reasons. First, A.M.'s statements are fully protected by the First Amendment because *Tinker's* substantial disruption test should only apply to on-campus speech. This holding is particularly important when it comes to statements made to the press on matters of public concern. Second, even if *Tinker* does apply to A.M.'s off-campus speech, her speech was not substantially disruptive. Indeed, *Tinker* itself establishes that speech can be controversial and elicit hostile reactions without rising to the level of substantial disruption. Applying the substantial

disruption test, or any of its exceptions, to statements a student makes to the press while off campus would impair newsgathering and threaten robust public debate.

ARGUMENT

I. *Tinker* should not apply to off-campus speech, especially when that speech is about a matter of public concern to the press.

The Supreme Court clearly intended for *Tinker* to be limited to on-campus speech; as a result, A.M.'s off-campus statements to the press are fully protected by the First Amendment. Further, because A.M. spoke to the press about a matter of public concern, her speech is entitled to special protection. Punishing A.M. for this speech would not only infringe upon her First Amendment rights, but also the rights of the press and the community.

A. *Tinker* should not apply to off-campus speech.

The Court in *Tinker* famously proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The Supreme Court nevertheless stated that when otherwise protected speech materially or substantially disrupts classwork, it is not immunized by the First Amendment. *Id.* at 513. Crucially, the Supreme Court based this holding on the "special characteristics of the school environment" and the need for school officials "to prescribe and control conduct in schools." *Id.* at 506–07; *see also Morse*, 551 U.S. at 397 (quoting *Hazelwood*, 484 U.S. at 266)

("[T]he rights of students 'must be applied in light of the special characteristics of the school environment.'").

"Courts agree that *Fraser, Kuhlmeier,* and *Morse* apply solely to on-campus speech," *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (en banc) (Smith, J., concurring), and these cases emphasize that *Tinker* is confined to speech behind the schoolhouse gate. In *Fraser,* the Court spoke exclusively of the rights of students while in school, 478 U.S. at 682–83, and was not understood as referring to any speech occurring outside of that environment, *id.* at 688 (Brennan, J., concurring) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]"); *see also id.* at 688 n.1 (noting that the majority opinion in *Fraser* does not "refer to the government's authority generally to regulate the language used in public debate outside of the school environment"); *Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."). In *Hazelwood*, the Court found that a school is not required to tolerate speech contrary to its educational mission, but clarified that "the government could not censor similar speech outside the school." 484 U.S. at 266. And finally, in *Morse*, the Court rested the school's ability to control speech promoting illegal drug use on the fact that it took place at a school-time activity.

551 U.S. at 400–01. The Court stressed that the speech "occurred during normal school hours" at an event approved by the principal as a "social event or class trip," and that "[t]eachers and administrators were interspersed among the students and charged with supervising" while the "high school band and cheerleaders performed." *Id.* at 400–01.

In his controlling concurrence in *Morse*, Justice Alito explained that the Court's opinion defined the outer limits of the school's power to control speech, stating, "the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Id.* at 423. Further, the Court held that any additional restrictions to free speech in the public school context must "be based on some special characteristic in the school setting." *Id.* at 424. According to Justice Alito, threats to students' physical safety from speech "advocating illegal drug use" at a school event presented such a "special characteristic." *Id.* Importantly, this justification turned on the fact that, during school hours, students are not protected by their parents and cannot choose with whom they spend their time. *Id.* This rationale is not applicable outside the school context, where students "may be able to avoid threatening individuals and situations." *Id.*; *see also Fraser*, 478 U.S. at 684 (recognizing that because students are a captive audience in school, the school is justified in protecting them from "exposure to sexually explicit, indecent, or lewd speech").

While the First Circuit has not considered whether *Tinker* applies to off-campus speech, other circuits have held that it does not. For example, the Second Circuit found that high school students who published an underground newspaper were not subject to *Tinker*. *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979). The students took steps to sever all connections between their publication and the school, including putting a disclaimer on the front page and printing and distributing the paper off campus. *Id.* at 1045. As a result, the Second Circuit determined that the speech had occurred off campus and was therefore factually distinct from the Supreme Court's school speech cases. *Id.* at 1050. "[B]ecause school officials [] ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.*

Other circuits have followed the reasoning in *Thomas*. In an en banc opinion from the Third Circuit, five concurring judges agreed *Tinker* does not apply to off-campus speech. *J.S.*, 650 F.3d at 936. Instead, "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* The Fifth Circuit also declined to apply *Tinker* to an off-campus drawing, even though the drawing depicted violence at the student's school, because the record showed that the student never

intended for the drawing to be brought to campus. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 620 (5th Cir. 2004).

Determining whether speech takes place on or off campus may be difficult in some cases. *See J.S.*, 650 F.3d at 940. However, this is not such a case—A.M.'s statements to the press clearly occurred off campus. Her statements were given to and printed in a newspaper that was completely unconnected to the school, and there is no evidence in the record that reporters even made their way on campus. These facts alone make it clear that this was off-campus speech. *See Thomas*, 607 F.2d at 1050 (determining that because a newspaper was printed outside of school and no copies were sold on campus, it was off-campus speech).

It is true that A.M. criticized the school's handling of sexual assault allegations. J.A. 18. But it cannot be the case that schools may regulate student speech any time it relates to matters at school, especially when that speech is made to the press. *See Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (en banc) (finding that although a student created a fake MySpace page "aimed at the School District community and the Principal," *Tinker* was inapplicable). Instead, "[w]here . . . school officials bring their punitive power to bear on the publication and distribution of a newspaper off the school grounds, that power must be cabined within the rigorous confines of the First Amendment, the ultimate safeguard of popular democracy." *Thomas,* 607 F.2d at 1045. This

Court should hold that *Tinker* does not apply to A.M.'s off-campus speech to the press.

B. It is particularly important that *Tinker* not apply to off-campus speech when that speech is about a matter of public concern conveyed to the press.

At a minimum, this Court should decline to apply *Tinker* to A.M.'s off-campus speech to the press on a matter of public concern. For one thing, "[s]peech on matters of public concern . . . is at the heart of the First Amendment[]" and therefore receives "special protection." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (internal quotations omitted). Further, the press plays a crucial role in the discussion of these matters. *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Thus, permitting school officials to punish students for speaking to the press on important issues is flatly inconsistent with the foregoing fundamental principles. On the contrary, A.M.'s statements concerning the School District's handling of sexual assault allegations require the full protection of the First Amendment.

Speech about how schools handle sexual assault allegations is undoubtedly speech on a matter of public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." *Snyder*, 562 U.S. at 453 (internal citations and quotations omitted). Courts look to the "content, form, and context" of speech to determine whether it

involves a matter of public concern, *id.*, and have concluded that speech on topics similar to that at issue here involves matters of public concern. *See Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) ("[I]t is undoubtedly true that incidences of sexual harassment in a public school district are inherently matters of public concern[.]"); *see also The Florida Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989) (stating that a news article about a sexual assault—a violent crime—clearly involved a "matter of paramount public import").

And, as previously noted, speech on matters of public concern receives "special protection" throughout First Amendment jurisprudence. *See Snyder*, 562 U.S. at 458 (picketing on matter of public concern receives "special protection"); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 751 (1985) (recognizing prior holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that "the First Amendment restrict[s] the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern"); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 571–72 (1968) (finding public school teacher's letter on misuse of school funds was matter of public concern requiring protection).

A.M. spoke on a matter of public concern based on the content, form, and context of her statements. A.M.'s speech focused on Cape Elizabeth High School's treatment of sexual assault allegations, a concerning issue in the

community. J.A. 15. The statements were published as part of a larger story about sexual assault on campus. J.A. 18. Finally, their publication in the newspaper confirms its newsworthiness. A.M.'s statements to the press, which were then communicated to the public through a newspaper exercising its editorial control, therefore receive this special protection.

Moreover, other courts have found that the First Amendment fully protects off-campus statements with much less social or political value than the speech at issue here. *See J.S.*, 650 F.3d at 939–40 (Smith, J., concurring) (stating that although a social media page mocking the principal was "mean-spirited," "worthless," and lacked any social or political value, it was fully protected by the First Amendment); *see also Porter*, 393 F.3d at 611, 615 (finding a sketch depicting violence and containing obscenities and racial epithets was protected under the First Amendment and not subject to *Tinker*). In *Layshock*, where there was no indication that the student was speaking on a matter of public concern, the court nonetheless stated, "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions . . . ." 650 F.3d at 216. Here, given that A.M.'s "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," *Snyder*, 562 U.S. at 452 (quoting

Connick v. Myers, 461 U.S. 138, 145 (1983)), it would be even more dangerous to allow the school to suppress or punish such speech under *Tinker*.

If *Tinker* applied off campus, the school would be authorized to suppress even core political speech. *J.S.*, 650 F.3d at 939 (Smith, J., concurring). For example, a student who wrote a blog post after school defending marriage equality could be punished if it was discovered by his peers and caused a significant disturbance at school. *Id*. But this "cannot be, nor is it, the law." *Id*. Indeed, it would radically undermine students' First Amendment rights to find that A.M. could be punished for raising awareness on the pervasive issue of sexual assault and harassment within schools.

Additionally, A.M.'s statements require protection because she shared them with the press for communication to the public at large. The press has a special duty to "inform[] and educat[e] the public, offer[] criticism, and provid[e] a forum for discussion and debate." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978). In particular, "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." *Mills*, 384 U.S. at 219. In this way the press acts as a necessary check on governmental power, *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring), and is "the means by which the people receive that free flow of information and ideas essential to intelligent self-government," *Saxbe v. Washington Post Co.*, 417 U.S.

843, 863 (1974) (Powell, J., dissenting). Because courts have an obligation to ensure that ideas can be freely expressed, they must vigilantly protect the press's ability to report without limitation, especially on matters of public concern.

Authorizing schools to control off-campus speech under *Tinker* would give officials an unconstitutional level of control to the detriment of students, the press, and the public. Students who are subject to punishment for speaking to the press would no longer act as sources, thereby preventing the press from covering important stories about public schools. Suppressing the press's ability to perform the necessary role of informing the public would "muzzle[] one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills*, 384 U.S. at 219.

The government has never been allowed to "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Cohen v. California*, 403 U.S. 15, 26 (1971). This is especially relevant in schools because officials are susceptible to community pressure and prejudices when determining whether to punish student speech. *See Thomas*, 607 F.2d at 1051. Indeed, as the Supreme Court recognized in the context of the Fourth Amendment, "the long struggle between Crown and press and desiring to curb unjustified official intrusions" requires that a neutral magistrate issue a search warrant before the government may search a newsroom. *Zurcher v. Stanford*

Daily, 436 U.S. 547, 565 (1978). Similarly, in the context of the First Amendment, schools should not have the power to unilaterally determine whether and when students may exercise their First Amendment rights to speak to the press.

Indeed, the First Amendment affirmatively requires that students be able to speak to the press free from the risk of punishment. This holding is particularly important because other avenues of on-campus expression may not always be available to students. For instance, the Supreme Court has held that schools have the power to regulate student newspapers, absent evidence that they have been established as public forums for student expression. *Hazelwood*, 484 U.S. at 273. This even allows school officials to censor and delete entire articles from publication. *Id.* at 274. Students are therefore sometimes subject to censorship when publishing articles critical of the school. *See* Tyler J. Buller, *The State Response to* Hazelwood v. Kuhlmeier, 66 Me. L. Rev. 89, 97 (2013) (describing the role of student journalists in "sounding the alarm on misdeeds by school officials or exposing facts about the school environment that would otherwise go ignored"). Given possible restrictions on student journalism, the non-student press may be the only way students can inform the community about matters of public concern. This Court should therefore affirm that students are protected—without fear of punishment—particularly when they speak to the non-student press on matters of public concern.

Further, the First Amendment protects not only the right of the press to disseminate information, but also the public's right to receive it. *See, e.g.*, *Bellotti*, 435 U.S. at 783 (describing "the role of the First Amendment . . . in affording the public access to discussion, debate, and the dissemination of information and ideas."); *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) ("The First Amendment . . . protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas."). Because the press is the primary means by which the public receives information, chilling that speech affects the First Amendment rights of the public.

Therefore, allowing the school to control a student's off-campus speech under *Tinker* hinders the First Amendment rights of students, the press, and the public at large. This point is especially salient when the speech involves matters of public concern that are important to the community, such as allegations of sexual assault on the local high school campus and how the school responded to those allegations.

II. Even if *Tinker* does apply, off-campus speech to the press is not disruptive.

Even if *Tinker* applies, which it does not, off-campus speech to the press does not meet its substantial disruption test for two reasons. First, student speech to the press is not disruptive, as all of the Supreme Court's student speech cases

make clear. And second, student speech to the press is categorically different from cases applying *Tinker* to off-campus speech when that speech seriously threatens or harasses other members of the school.

A. Speech to the press is not disruptive.

Speech to the press on a matter of public concern is not disruptive under *Tinker*. First, the facts of *Tinker* itself establish that substantial disruption requires more than speech which sparks controversy. Second, other Supreme Court cases on student speech confirm that there is a high bar for off-campus speech causing disruption. Finally, a school's initiation of an official investigation is not sufficient to cause disruption.

While *Tinker* held that on-campus speech is constitutionally protected unless it "materially and substantially disrupt[s] the work and discipline of the school," 393 U.S. at 513, the student speech at issue in *Tinker* was not substantially disruptive, *id.* at 514. The students' black armbands themselves were "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.* at 508. However, the display happened in the midst of "vehement" controversy over the war in Vietnam, *id.* at 510 n.4, and therefore elicited "hostile remarks to the children wearing armbands," *id.* at 508. Nevertheless, there was "no indication that the work of the schools or any class was disrupted." *Id.* Indeed, the Court reiterated that contentious speech, although

it may "start an argument or cause a disturbance," is "the basis of our national strength[.]" *Id.* at 508–09. The students' display was therefore constitutionally protected.

Tinker thus establishes that student speech is not substantially disruptive even if it is controversial and causes negative reactions among the student body. Student speech to the press, such as the speech at issue in this case, is similarly nondisruptive. Sometimes speech to the press "start[s] an argument or cause[s] a disturbance[.]" *Id.* at 508. Such speech may be controversial and may spark outrage amongst other students. As the Supreme Court held in *Tinker*, however, even these risks do not justify punishment. *Id.* Speech to the press does not rise to the level of substantial disruption under *Tinker* and is therefore constitutionally protected.

Indeed, in the only circuit court case *amicus* is aware of that considers this specific issue, *Karp v. Becken*, 477 F.2d 171 (9th Cir. 1973), the court concluded that a student speaking to the press did *not* warrant punishment. There, school officials suspended a student who had spoken to news media off campus about on-campus protests he helped plan. *Id.* at 173. After the student and several others held the protest and displayed protest signs, the student was sent to the vice principal's office. *Id.* While he was in the office, protesters and counter-protesters got in a fight. *Id.* The student received a five-day suspension, *id.* at 174, which

was invalidated by the Ninth Circuit. The court observed that the school was justified in taking the students' protest signs because officials feared violence. *Id.* at 176. However, the court held that the school failed to demonstrate adequate justification for the subsequent suspension, concluding that, "[a]bsent justification, such as a violation of a statute or a school rule, they cannot discipline a student for exercising [First Amendment] rights." *Id.* at 176. Thus, even where a school curtails some speech to prevent violence, it may not subsequently punish a student for speaking to the press and exercising her First Amendment rights.

The Supreme Court's later student speech cases support the conclusion that off-campus speech to the press requires protection. As discussed above, none of the three *Tinker* "exceptions"—*Fraser*, *Hazelwood*, and *Morse*—apply here because they only apply to on-campus speech. The Court in *Morse*, however, discussed its holding in *Fraser* and observed that off-campus student speech receives protection: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." 551 U.S. at 405. Thus, even though the student's speech in *Fraser* was inappropriate and contained an "elaborate, graphic, and explicit sexual metaphor," 478 U.S. at 678, it nevertheless would have received constitutional protection if it had been delivered off campus. Given that the Constitution protects such coarse speech, it certainly protects a student's speech to the press regarding matters of school administration.

Finally, the fact that a school opened an investigation into the "sticky note" incident is not enough to satisfy the substantial disruption inquiry. If such investigations could cause a substantial disruption under *Tinker*, then a school could punish any speech of which it disapproved simply by opening an investigation, thereby causing a disruption sufficient to regulate the speech. Indeed, in cases where schools did initiate an investigation, that fact played no role in the court's analysis of whether the student's speech caused substantial disruption. *See, e.g.*, *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1151 (9th Cir. 2016); *Wisniewski v. Bd. of Educ. Of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 36, 40 (2d Cir. 2007) (police investigation and superintendent hearing involving legal counsel did not factor into substantial disruption analysis). The fact that a school opens an investigation into student speech, therefore, has no bearing on whether the speech itself was disruptive. Thus, although the School District opened an investigation in this case, that fact does not impact the question of whether A.M.'s off-campus speech to the press was disruptive.

B. Student speech to the press on matters of public concern is categorically different from the threatening off-campus speech some courts have found substantially disruptive.

Student speech to the press on matters of public concern is fundamentally different from other cases where off-campus speech was found to have caused a substantial disruption. In these latter cases, the speech directly threatened or

harassed other members of the school community, and was not made to the press. In contrast, student speech to the press, particularly when the press has exercised its editorial control in determining how to report it to the public, cannot be disruptive. *Tinker*'s substantial disruption test therefore does not apply when students speak to the press on matters of public concern.

Some circuit courts have decided that threatening or harassing speech can be disruptive under *Tinker* even when it occurs off campus. For instance, courts have held that off-campus student speech may be disruptive "when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher[.]" *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015). This speech may take the form of specific, violent death threats, *see id.* at 399; distributing a drawing which suggests that a teacher should be shot, *see Wisniewski*, 494 F.3d at 38–39; creating a "hate website" intended to defame and bully another student, *see Kowalski v. Berkeley Cty. Schs.*, 652 F.3d 565, 568, 574 (4th Cir. 2011); or sexually harassing young students with disabilities on their way home from school, *C.R.*, 835 F.3d at 1151.

In reaching their conclusions, however, these courts emphasize the limited nature of each holding. For example, in *Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 269 (5th Cir. 2019), the Fifth Circuit explicitly stated that the school had no control over non-threatening off-campus speech. The

court also stressed that "'a broad swath of off-campus student expression' remains fully protected by the First Amendment." *Id.* at 270 (quoting *Bell*, 799 F.3d at 404 (Elrod and Jones, JJ., concurring)). This is because courts recognize that schools can regulate threats of violence more forcefully than speech that does not physically threaten the community. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013).

By contrast, off-campus speech to the press on matters of public concern does not involve threats or harassment. It is true that a student speaking to the press may "intentionally direct[their speech] at the school community." *Bell*, 799 F.3d at 396. Indeed, in speaking to the press about a school's administration, a student necessarily intends to bring attention to the issue at her school. But such speech is a far cry from the off-campus death threats, sexual harassment, and bullying that other courts have found disruptive under *Tinker*. Although the speech may "cause[] discussion outside of the classroom," it causes "no interference with work and no disorder." *Tinker*, 393 U.S. at 514. A student's off-campus speech to the press on matters of public concern therefore cannot be substantially disruptive under *Tinker* and retains full protection under the First Amendment.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks that the Court affirm the decision below.

Dated: March 25, 2020

Respectfully submitted,

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[1] Counsel wish to thank law students Eliza Edlich and William Hupp for their invaluable contributions to this brief. The brief does not purport to express the School's institutional views, if any.

CERTIFICATE OF COMPLIANCE

I, James Haddow, certify that the foregoing brief of *amicus curiae*: 1) complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the arts of this document excepted by Fed. R. App. P. 32(f), it contains 5,018 words; and 2) complies with the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ James B. Haddow
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CERTIFICATE OF SERVICE

I, James Haddow, certify that I have filed the foregoing corrected brief of *amicus curiae* electronically with the Clerk of the Court for the United States Circuit Court for the First Circuit using the appellate CM/ECF system on March 25, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, via electronic notice to:

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