United States Court of Appeals

for the

First Circuit

Case No. 20-1950

JOHN DOE, by his Mother and Next Friend, JANE DOE;
B.B., by his Mother and Next Friend, JANE BLOGGS,

Plaintiffs-Appellants,

v.

HOPKINTON PUBLIC SCHOOLS,

Defendant-Appellee,

CAROL CAVANAUGH, in her individual and official capacity as Superintendent of the Hopkinton Public Schools; EVAN BISHOP, in his individual capacity and official capacity as Principal of Hopkinton High School,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON IN NO. 1:19-CV-11384-WGY, HONORABLE WILLIAM G. YOUNG, U.S. DISTRICT JUDGE

BRIEF OF AMICUS CURIAE *FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFFS-APPELLANTS*

William G. Creeley
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
510 Walnut Street, Suite 1250
Philadelphia, Pennsylvania 19106
will@thefire.org
(215) 717-3473

Seth B. Orkand
First Circuit Bar No. 1154643
ROBINSON & COLE LLP
One Boston Place, 26th Floor
Boston, MA 02108
sorkand@rc.com
(617) 557-5915

Counsel for Amicus Curiae
Foundation for Individual Rights in Education

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae*, Foundation for Individual Rights in Education, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

   None.

2) For non-governmental corporate parties please list all publicly held companies that own 10% or more of the party's stock:

   None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

   None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

   Not a Bankruptcy Proceeding.

/s/ Seth B. Orkand

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members. FIRE defends these rights at public and private institutions through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate student rights, like the one now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020) (citing with approval FIRE's *amicus curiae* brief in holding that a student's online speech was protected by the First Amendment), *cert. granted*, 208 L. Ed. 2d 509 (U.S. Jan. 8, 2021) (No. 20-255). Because today's high schoolers are tomorrow's college students, and because courts too often misapply K-12 precedent to uphold speech restrictions in cases involving college students,[2] FIRE believes that courts must ensure robust protection for student speech in our nation's public schools.

---

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

[2] *See, e.g., Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (applying K-12 precedents to graduate student's First Amendment claim).

SUMMARY OF ARGUMENT

More than fifty years after the Supreme Court's landmark ruling in *Tinker v. Des Moines Independent Community School District*, it is now axiomatic that public school students do not shed their First Amendment rights at the schoolhouse gate.[3] While students in 1967 likely said much the same things to one another as their contemporary counterparts, students today communicate in virtual spaces that *Tinker*'s analysis could not have anticipated. With the migration of student expression to social media, *Tinker*'s bright line has blurred. As the case before this Court illustrates, public school administrators now feel empowered to investigate and punish protected student speech when it occurs online. But students do not shed their First Amendment rights when they log on to their personal social media accounts, either.

This case concerns a public school's suspension of two students for telling jokes about a classmate in a private Snapchat discussion among a group of friends. Because the punishment violated the students' rights of freedom of expression and association, and because the anti-bullying statute at issue is vague and overbroad, this Court should reverse. Drawing on twenty years of experience defending

---

[3] 393 U.S. 503, 506 (1967). Indeed, *Tinker* recognized this principle as well-established in 1969, proclaiming it "the unmistakable holding of this Court for almost 50 years." *Id.*

student rights, *amicus* FIRE submits this brief to more fully discuss *Tinker*'s proper reach, to expound on the grave threat to student expressive and associational rights presented by the district court's reasoning, and to demonstrate the impermissible vagueness and overbreadth of the policy and statute at issue.

To ensure that students do not grow up under omnipresent state surveillance, and to restore the clarity of its bright line, *Tinker* should not reach this private, off-campus student expression. *See B.L.*, 964 F.3d at 189. But even under *Tinker*'s time-tested standard, the jokes, however juvenile, are protected by the First Amendment. *Tinker* allows for punishment of student speech when "(1) actual 'disturbances or disorders on the school premises in fact occur[]'; (2) 'the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities'; or (3) the speech invades the rights of others." *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) (quoting *Tinker*, 393 U.S. at 513–14). None of those exceptions are met here.

The two students' Snapchat jokes were "minimally-disruptive, untargeted speech." *Doe v. Hopkinton Pub. Schs.* (hereinafter, "*Hopkinton*"), No. 19-11384-WGY, 2020 U.S. Dist. LEXIS 173127, at *28 (D. Mass. Sep. 22, 2020). They did not cause and were not likely to cause any substantial disruption or material interference with school activities. Nor did the two students' jokes invade their

classmate's rights; indeed, the classmate was not even aware of them, and "had no problems" with either student. *Id.* at *9. Nevertheless, the public school suspended the two students for their private, protected speech. The First Amendment does not permit this result, and the unbounded jurisdiction that the district court's ruling confers to school authorities presents a dire threat to student expressive rights. This Court should reverse. Our public schools must not become panopticons.

The district court's decision also threatens another First Amendment liberty: freedom of association. In upholding Plaintiffs-Appellants' suspensions, the district court admitted that they were disciplined not for their own speech, but for the actions of *other* students in the group discussion. *Id.* at *23 ("The Students are correct that the comments by Doe and Bloggs cannot constitute bullying unless they are considered part of the collective action by the eight members . . . ."). The district court also recognized that the students' "punishment would not have been constitutional under the First Amendment if they were merely members of the Snapchat group." *Id.* at *32. But if Plaintiff-Appellants cannot be punished for their own comments, and cannot be punished for their association with the other students in the discussion, under what rationale may their suspensions be justified?

The district court's answer subverts the First Amendment rights at stake. Though the two students had sent only two "minor" comments to the chat, by so doing, the district court reasoned that they "signaled their approval and

encouragement of the bullying by the other hockey team[] members," and thus "could be permissibly disciplined for its results." *Id.* Fleeting jokes sent to friends in a private group chat, however, cannot credibly be characterized as active encouragement of misconduct, and the district court's acceptance of collective punishment cannot be squared with well-established First Amendment precedent. *See, e.g.*, *Healy v. James*, 408 U.S. 169, 185–86 (1972) ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization."). Permitting discipline on such an attenuated basis effectively sanctions guilt-by-association.

Finally, the district court erred in dismissing Plaintiffs-Appellants' facial challenge to the school's bullying policy and Massachusetts' anti-bullying statute, both of which define "bullying" in part as speech that causes "emotional harm" to another student. M.G.L. c. 71, § 37O. Because the experience of "emotional harm" is inherently subjective, the policy and the statute are impermissibly vague and overly broad. Because no objective showing of "emotional harm" is required, the expressive rights of Massachusetts students extend only as far as the sensibilities of their peers, no matter how unreasonable they may be. Likewise, because the potential for "emotional harm" necessarily varies with each individual student, both students and administrators seeking to comply with the statute are left to

guess at what speech may be punishable. The chilling effect engendered by the resulting uncertainty is anathema to the First Amendment. Moreover, a vast swath of protected speech may cause "emotional harm"—and while the district court acknowledged that the students had "made a colorable argument that some applications of [the statute], as written, could be unconstitutional," it nevertheless upheld it, failing to fully account for its plain potential to silence protected expression. *Hopkinton* at *38. However well-intentioned, this broad anti-bullying statute renders protected student speech subject to punishment.

If public schools are permitted to police and punish the private, protected speech of their students; if they may suspend students simply for associating with friends in an online discussion; and if they must punish students who cross an imperceptible, subjective boundary while expressing themselves, then a generation of students will be taught that the First Amendment is a dead letter. If schools are granted such broad power to censor, it will be abused to "suppress speech simply because it is unpopular with or critical of the school administrators." *Norris*, 969 F.3d at 26. To protect students' First Amendment rights, this Court should reverse.

ARGUMENT

Plaintiffs-Appellants Ben Bloggs and John Doe, two public high school students, were suspended by their school for telling jokes about another student ("Roe") in a private group discussion on Snapchat, a social media application. The district court recounted the entirety of the students' speech:

> Doe and Bloggs both discussed Roe in the Snapchat group, though to a lesser extent. Bloggs asked "Was Dylan's grandma in the third row," prompting M.B.'s response that "They tied her to the hood," and J.C.'s reply: "With bungee cord?" . . . Bloggs then says, "Are [Roe]'s parents ugly too [o]r did he just get bad genes," and after T.M. shares a photo of Mr. and Mrs. Roe, Bloggs responds with "A family of absolute beauties." . . . In a separate conversation, Doe says, "[A.W.] and [Roe] were made on the same day[.] [A.W.] was the starting product and [Roe] is what it turned into kinda like a game of telephone in 1st grade," to which Bloggs responds, "[Roe]'s leather shampoo makes up for the looks though." . . . The only other message in evidence from either of them is on a thread where Bloggs identifies one of Roe's online usernames.

Hopkinton at *8. By sanctioning the punishment of this private student expression and upholding the policy and statute under which the students were punished, the district court's ruling threatens freedom of expression and freedom of association.

I. THE DISTRICT COURT'S RULING THREATENS STUDENT FIRST AMENDMENT RIGHTS.

The students' speech was private, off-campus expression; there is no evidence in the record that the students told the jokes on school grounds or in any school-controlled context. Schools do not possess unlimited jurisdiction over students, and *Tinker* does not apply to this speech. Even under *Tinker*'s rule, the

jokes are protected by the First Amendment because they did not and were not likely to disrupt school operations, were not targeted at the other student, and did not interfere with his rights. *See Tinker*, 393 U.S. at 513–14. Even after acknowledging that the jokes could not lawfully be punished, the district court concluded that the students' fleeting comments rendered them liable for the actions of *other* students. This conclusion violates their right to freedom of association and cannot stand.

A. *Tinker* does not apply to the private, off-campus speech at issue here.

Students at our nation's public K-12 schools possess First Amendment rights. *Tinker*, 393 U.S. at 506. Public schools may only punish students for speech otherwise protected by the First Amendment when "(1) actual 'disturbances or disorders on the school premises in fact occur[]'; (2) 'the record . . . demonstrate[s] . . . facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities'; or (3) the speech invades the rights of others." *Norris*, 969 F.3d at 25 (quoting *Tinker*, 393 U.S. at 513–14). Schools may also regulate student expression in other limited circumstances, none of which are applicable here.[4]

---

[4] *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (permitting punishment of "vulgar and lewd speech" in school assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (permitting regulation of "student speech in

Public schools do not possess boundless jurisdiction over student speakers. A public school may regulate student speech under *Tinker* and its progeny only after a student crosses through *Tinker*'s "schoolhouse gate," at which point First Amendment rights are "applied in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506. On school premises, a public school may regulate certain student speech "even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist.*, 484 U.S. at 266. School administrators are granted this leeway within their walls because of their "custodial and tutelary responsibility" for students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). When students are participating in school activities, school administrators are "acting *in loco parentis*, to protect children," *Fraser*, 478 U.S. at 684, and facilitating "a supervised learning experience." *Hazelwood Sch. Dist.*, 484 U.S. at 270. Given these responsibilities, *Tinker* permits school administrators a freer hand to regulate otherwise protected speech that causes or is reasonably likely to cause "disturbances or disorders *on the school premises*." *Tinker*, 393 U.S. at 514 (emphasis added).

---

school-sponsored expressive activities" when "reasonably related to legitimate pedagogical concerns"); *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (permitting punishment of "speech that can reasonably be regarded as encouraging illegal drug use").

But just as the school day ends, so too must a school's jurisdiction over student speech. When students are off-campus and on their own time—when there is no lesson being taught, nor supervisory control being exercised—public schools do not possess the same justification for regulating student expression that they do when class is in session. In a recent ruling, the United States Court of Appeals for the Third Circuit recognized this jurisdictional limitation in holding that "*Tinker* does not apply to off-campus speech—that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." *B.L.*, 964 F.3d at 189.

The Third Circuit's holding restores *Tinker*'s bright line by rejecting the troubling willingness of other circuits to render off-campus, online student speech subject to punishment. *See, e.g.*, *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (rejecting high school student claim that *Tinker* does not apply to YouTube rap song recorded and posted "off-campus"); *Doninger v. Niehoff*, 527 F.3d 41, 53 (2d Cir. 2008) (student's off-campus blog post "created a foreseeable risk of substantial disruption" within school environment). By demarcating the boundaries of school authority, the Third Circuit recognizes that "*Tinker*'s focus on disruption makes sense when a student stands in the school context"—but not when she stands off-campus, where her speech's "effect on the school environment will depend on others' choices and reactions." *B.L.*, 964 F.3d at 189. This clear

delineation properly respects student rights and benefits students and administrators. "To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when not." *Id.*

This case illustrates the wisdom of the Third Circuit's approach. Nothing in the record indicates that Plaintiffs-Appellants' private speech originated on-campus or in a school-controlled context. Nevertheless, the district court proclaimed "that it does not matter whether any particular message was sent from an on-or off-campus location," because "[i]f the messages by Bloggs and Doe constituted bullying at all they did so because they contributed to the in-school bullying of Roe." *Hopkinton* at *28. This conclusion sweeps too broadly, deputizing school administrators to police any student expression that may "contribute" to *other* students' on-campus misconduct, no matter when and where it occurs.

Here, Plaintiffs-Appellants' speech "was sent to a third party and there is no indication they had knowledge or intent it would go beyond that third party." *Id.* at *29. Accordingly, the district court's ruling effectively imposes a form of strict liability on student speakers and "subverts the longstanding principle that heightened authority over student speech is the exception rather than the rule." *B.L.*, 964 F.3d at 187–88. By contrast, the Third Circuit's approach respects

student autonomy off-campus while permitting punishment of on-campus disruption. This clarity "benefits students, who can better understand their rights, but it also benefits school administrators, who can better understand the limits of their authority and channel their regulatory energies in productive but lawful ways." *Id.* at 190.

If allowed to stand, the district court's ruling will "distort *Tinker*'s narrow exception into a vast font of regulatory authority." *Id.* at 188–89. *Amicus* FIRE's experience fighting the censorship of online student speech in higher education demonstrates the danger inherent in this approach: Students have been expelled for Facebook posts that embarrassed university leadership,[5] investigated for political Instagram posts,[6] and suspended for copy-editing an ex-girlfriend's apology letter on Twitter.[7] These rights violations are depressingly common because colleges now routinely monitor student social media.[8]

---

[5] *Barnes v. Zaccari*, 592 Fed. App'x 859, 865 (11th Cir. 2015).
[6] Eugene Volokh, *Fordham University Disciplines Student (Austin Tong) for Political Instagram Posts*, REASON (July 24, 2020), https://reason.com/volokh/2020/07/24/fordham-university-disciplines-student-austin-tong-for-political-instagram-posts.
[7] Cora Lewis, *The Suspension Of A College Student For A Viral Tweet Has Been Lifted*, BUZZFEED NEWS (July 19, 2017), https://www.buzzfeednews.com/article/coralewis/college-student-suspeneded-viral-tweet#.tjyzZD2z.
[8] *See, e.g.*, Amy Rock, *Social Media Monitoring: Beneficial or Big Brother?*, CAMPUS SAFETY (Mar. 12, 2018), https://www.campussafetymagazine.com/university/social-media-monitoring.

This Court should instead follow the Third Circuit's approach by finding that *Tinker* does not apply to the private, off-campus student speech at issue here. But even under *Tinker*, the school's decision to suspend the two students violated their First Amendment rights.

B. Even under *Tinker*, the First Amendment does not permit students to be punished for non-disruptive speech that does not invade the rights of another student.

The school could not lawfully punish Plaintiff-Appellants' expression under *Tinker* because it did not cause a disturbance on school premises, could not have reasonably led school authorities to "forecast substantial disruption of or material interference with school activities," and did not "invade[] the rights of others." *Norris*, 969 F.3d at 25 (quoting *Tinker*, 393 U.S. at 513–14).

1. The students' speech did not cause a disturbance or disorder on school premises and could not reasonably have led school authorities to forecast substantial disruption or material interference with school activities.

Nothing in the record indicates that Plaintiff-Appellants' comments caused any disturbance on school premises. Plaintiffs-Appellants were "minor" participants in the private group Snapchat. *Hopkinton* at *29. The record contains only four comments by Bloggs and Doe, shared privately with friends. *Id.* at *8. There is no evidence in the record that Bloggs and Doe posted their comments while at school or in a school-controlled environment, and Roe complained about the conduct of *other* students, not Bloggs and Doe's speech. *Id.* at *9. Indeed, Roe

was unaware of Bloggs and Doe's messages until after the school investigated the other students' alleged misconduct. *Id.* Not only was Roe unaware (and thus unbothered) by Bloggs and Doe's speech, Roe was friendly with Bloggs outside of school: Roe "had no problems with Bloggs and Doe; for example he socialized with Bloggs outside of school and they played Xbox together." *Id.*

On these facts, there is no evidence that the students' speech caused any disruption, nor could school administrators have reasonably forecast such. Prior to investigating allegations of misconduct by other students, neither administrators nor Roe even knew the speech had occurred. As the district court properly found, the school "reckoned with minimally-disruptive, untargeted speech." *Id.* at *28.

2. Under this Court's precedent, the students' speech did not invade the rights of others.

Because "bullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*," this Court has held that public schools "may restrict such speech even if it does not necessarily cause substantial disruption to the school community more broadly." *Norris*, 969 F.3d 12 at 29. But this Court has clarified that in order to punish student speakers on this basis, administrators must have reasonably determined "*both* that the student speech targeted a specific student *and* that it invaded that student's rights." *Id.* (emphases added). Because Defendants-

Appellees could not have reasonably determined that Plaintiffs-Appellants targeted Roe and invaded his rights, their suspensions violated the First Amendment.

Both the school's Bullying Policy and Massachusetts state law define "bullying as speech or action 'directed at a target.'" *Hopkinton* at *23; *see also* M.G.L. c. 71, § 37O. As the district court correctly concluded, Bloggs and Doe's speech did not target Roe, and their comments "were not 'directed' at Roe":

> Doe's and Bloggs' words alone, directed entirely to a third party, cannot be said to have 'targeted' Roe. Even if Roe discovered that Doe and Bloggs had mocked him behind his back, unkind words <u>about</u> a target cannot constitute 'bullying' under Massachusetts law absent some action to <u>direct</u> them at the target.

Hopkinton at *24 (emphases in original).

Under *Norris*, this conclusion should have ended the district court's analysis. Without a finding that Bloggs and Doe targeted Roe, their comments cannot be lawfully punished as having invaded his rights. Outside of their pure speech, which properly lies beyond *Tinker*, no other permissible grounds for punishing Bloggs or Doe exist: The district court found "no evidence in the record of any non-speech conduct by Bloggs or Doe directed at Roe, except for their failure to intervene when other students mistreated him, which is certainly insufficient alone to constitute bullying." *Id.* at *23.

The students were suspended for a few jokes privately shared with others in a Snapchat group. Those jokes were protected by the First Amendment because, as

the district court itself found, they do not fall into any category of speech permissibly regulated under *Tinker* and do not constitute bullying under school policy, state law, or this Court's holding in *Norris*. There is nothing reasonable about suspending two students for non-disruptive, private speech of which the alleged "target" was not even aware, so this Court need not defer to the school's decision. *Norris*, 969 F.3d at 30. The district court erred by proceeding to find that "[a] reasonable official could have found that Roe did suffer from the speech and actions *of the members of the hockey team*, coordinated through the Snapchat group." *Hopkinton* at *24–25 (emphasis added). This is collective punishment, and it violates the First Amendment.

C. The First Amendment does not permit students to be found guilty by association.

The First Amendment protects not only students' right to freedom of expression, but also their right to freedom of association. *Healy*, 408 U.S. at 181. Just as the First Amendment prevents public schools from punishing student speakers like Doe and Bloggs "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech," *Tinker*, 393 U.S. at 511, "[t]he First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982). Students cannot be punished for the misconduct of their acquaintances simply by virtue of the fact

they have told jokes to one another. Freedom of association prohibits the imposition of collective liability on such an attenuated basis, and "'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Healy*, 408 U.S. at 186 (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)).

This Court has correctly concluded that "[i]n light of these constitutional concerns, it is particularly important" that government actors seeking to impose liability for collective action must "present sufficient evidence" of an individual's role and intent. *Libertad v. Welch*, 53 F.3d 428, 443 (1st Cir. 1995). "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Healy*, 408 U.S. at 186. In this case, Plaintiffs-Appellants' suspensions only pass constitutional muster if sufficient evidence shows that both the Snapchat group and their fleeting comments to it were specifically intended to "bully" Roe—that is, to target him and to invade his rights. *See Norris*, 969 F.3d at 29. Defendants-Appellees do not have such evidence. When Doe and Bloggs chatted with the group, "there is no indication they had knowledge or intent it would go beyond that third party." *Hopkinton* at *29. The district court erred by excusing Defendants-Appellees' failure to meet their evidentiary burden.

Cognizant of the constitutional constraints at play, the district court acknowledged that "the comments by Doe and Bloggs cannot constitute bullying unless they are considered part of the collective action by the eight members." *Id.* at *23. The district court also recognized that the students' "punishment would not have been constitutional under the First Amendment if they were merely members of the Snapchat group." *Id.* at *32. The district court understood that Doe and Bloggs could not be disciplined for their speech, nor could they be disciplined for their association with others.

To resolve this tension, and paper over Defendants-Appellees' failure to provide sufficient evidence, the district court converted Doe and Bloggs' fleeting jokes into something they were not. The students were not simply trading private jokes with friends; instead, the district court declared they were actually "signal[ing] their approval and encouragement of the bullying by the other hockey team[] members." *Id.* at *32. By "actively encouraging the group bullying," the district court found, Doe and Bloggs "could be permissibly disciplined for its results." *Id.* This characterization is simply not credible. By the district court's admission, the comments were "minor." *Id.* at *29. They were not directed at Roe. They do not mention or even allude to bullying conduct, let alone "approve" or "encourage" it. Instead, the comments are what they appear to be: jokes told to friends. They may be juvenile, mean-spirited, or even "derogatory." *Id.* at *32. But

they do not provide evidence of any specific intent to bully that the First Amendment's bar against guilt-by-association requires.[9]

Under the district court's lowered bar, everyday interactions between students outside of school may be policed and punished. Students who do nothing more than express their dislike of a peer may be punished for bullying committed *by others* if a school official concludes that their speech signaled approval and encouragement of *someone else's* eventual misconduct. Administrators may not engage in this kind of "contact tracing" amongst acquaintances; one student's misconduct does not justify the punishment of his or her friends. Such a result conflates one student's protected speech with another's prohibited action, and it is sharply at odds with longstanding precedent governing associational rights.

In *Healy*, for example, a public college president refused to recognize a proposed student chapter of Students for a Democratic Society (SDS) after concluding that the students "were affiliated with, or at least retained an affinity for," the national SDS organization, which he believed subscribed to "a philosophy of violence and disruption." *Healy*, 408 U.S. at 187. The president surely believed

---

[9] Whatever the district court meant by "active encouragement," the students' comments do not approach incitement. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (First Amendment does not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

that the students' desire to form an SDS chapter "signaled" their "approval and encouragement" of the national group's actions and provided sufficient evidence to justify the denial of recognition. But the Supreme Court held that the First Amendment required more. While actual disruption could be punished, drawing a "line between permissible speech and impermissible conduct" was a "constitutional requirement." *Id.* at 189. Denying the group recognition because of the students' "mere expression" of support for the national SDS without "substantial evidence" of any misconduct on their part violated the First Amendment. *Id.* at 187, 190. If the *Healy* students' First Amendment right to freedom of association could not be overcome by administrators conflating words with actions, neither may that of Plaintiffs-Appellants.

The First Amendment requires school officials to appreciate the constitutionally significant difference between private jokes told to friends and the targeted bullying of another student. The district court's error threatens not just Doe and Bloggs' rights, but those of all students. If allowed to stand, the district court's standard will effectively sanction guilt-by-association and deputize school officials to investigate and punish a wide range of protected student expression. This Court should reverse.

II. THE SCHOOL'S BULLYING POLICY AND MASSACHUSETTS' ANTI-BULLYING STATUTE ARE IMPERMISSIBLY VAGUE AND OVERLY BROAD.

Hopkinton Public Schools' bullying policy tracks Massachusetts' anti-bullying statute, which prohibits "bullying" defined as:

> the repeated use by one or more students . . . of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school.

M.G.L. c. 71, § 37O; *see also Hopkinton* at *10–11 (noting that school policy tracks state law). Both school policy and the state statute also prohibit "cyber-bullying," defined in relevant part as:

> the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.

M.G.L. c. 71, § 37O. As written, the policy and statute prohibit speech that causes a listener "emotional harm." The First Amendment does not permit such an uncertain and sweeping ban on pure expression. This Court should declare both the policy and the statute unconstitutional.

A. Prohibiting speech that causes a listener "emotional harm" is impermissibly vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "To satisfy due process," a statute must define an offense "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402–03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). A statute is "unconstitutionally vague only if it 'prohibits . . . an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.'" *United States v. Councilman*, 418 F.3d 67, 84 (1st Cir. 2005) (*en banc*) (quoting *United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003)).

While "school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions," *Hopkinton* at *43 (quoting *Fraser*, 478 U.S. at 686), whatever slight flexibility school officials possess must be tempered when regulating student speech, because "the Constitution requires a 'greater degree of specificity' in cases involving First Amendment rights." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011) (quoting *Buckley v. Valeo*, 424 U.S. 1, 77 (1976)). Vagueness in a restriction on speech "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521

U.S. 844, 871–72 (1997). The policy and statute directly regulate student expression, and precision is necessary.

Because the policy and statute prohibit speech that causes "emotional harm," an inherently subjective categorization, they require would-be speakers to guess at the individual sensibilities of their audience. As a result, they deny student speakers "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned*, 408 U.S. at 108. Students are at the mercy of the sensibilities of their peers, no matter how unreasonable or unpredictable their conception of "emotional harm" may be. While speech must be "repeated" and "directed" at a listener to fall under the policy's ambit, these slight requirements do not save the policy; they simply delay liability until the second time a student's speech crosses an imperceptible line. The chilling effect engendered by the resulting uncertainty contradicts the recognition that "the First Amendment needs breathing space." *Broadrick v. Okla.*, 413 U.S. 601, 611 (1973).

The statute is also "impermissibly vague" because "it fails to establish standards . . . sufficient to guard against the arbitrary deprivation of liberty interests." *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999). The policy and statute at issue invite arbitrary enforcement by administrators faced with the challenge of identifying "emotional harm." How may an administrator confirm a student has been emotionally harmed? How may the cause of such harm be established as

another student's speech? The statute and policy do not specify. In the absence of objective standards, administrators may be tempted to find "emotional harm" sufficient to justify punishing merely unpopular or dissenting student expression. "Any variation from the majority's opinion may inspire fear," as the *Tinker* Court cautioned. 393 U.S. at 508. Given the increasing rhetorical conflation of speech and violence by partisans across the political spectrum,[10] claims of protected political speech causing "emotional harm" are inevitable. *Amicus* FIRE regularly sees such claims made about core political speech on college campuses.[11] The policy and statute here allow these claims to compel punishment.

---

[10] *See*, *e.g.*, Suzanne Nossel, *No, hateful speech is not the same thing as 'violence'*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/outlook/no-hateful-speech-is-not-the-same-thing-as-violence/2017/06/22/63c2c07a-5137-11e7-be25-3a519335381c_story.html?utm_term=.3a396ce3995 (cataloguing examples). The district court itself indulged in this troubling conflation. *Hopkinton* at *45 ("a sufficiently hard shove can be hurtful, whether that shove is physical or emotional.").

[11] *See*, *e.g.*, Robby Soave, *Santa Clara University Student Government Won't Recognize YAF, Says Conservative Speakers Make Campus 'Unsafe'*, REASON (June 10, 2019), https://reason.com/2019/06/10/santa-clara-university-yaf-students (student government member argues that visit by commentator Ben Shapiro would cause "emotional harm"). Attributing emotional harm to non-political speech is also common on campus. *See*, *e.g.*, Layla Peykamian, *Column: Is your favorite sitcom problematic?*, DAILY TARHEEL (Oct. 27, 2020), https://www.dailytarheel.com/article/2020/10/opinion-problematic-sitcoms-1028 (arguing that sitcoms like "The Office" contain jokes that cause "emotional harm to those they target").

By rendering the prohibition of speech contingent on the subjective reaction of others, the policy and statute mirror the school district ban on written material that "creates ill will" struck down as unconstitutional in *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 265 (3d Cir. 2002). The Third Circuit deemed the policy unlawful in significant part because "[t]he focus of this phrase is entirely on the reaction of listeners"—just like the ban on "emotional harm" at issue here. *Id.* at 264. Because "disruption for purposes of *Tinker* must be more than 'the discomfort and unpleasantness that always accompany an unpopular viewpoint,'" conditioning a speaker's First Amendment rights solely on a listener's subjective reaction "expand[ed] the policy too far into the domain of protected expression." *Id.* at 265 (quoting *Tinker*, 393 U.S. at 509). "The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

B. Prohibiting speech that causes a listener "emotional harm" is overly broad.

"In the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552

U.S. 442, 449, n. 6 (2008)). Because the policy and statute prohibit expression that causes "emotional harm," they are overbroad.

The First Amendment protects a vast amount of speech that may cause "emotional harm." Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995); *see also Terminiello v. Chi.*, 337 U.S. 1, 4 (1949) (speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."). The reach of the policy and statute is more than substantial; it is virtually limitless, as speech affects listeners in complex, unpredictable ways. The statute's breadth is particularly sweeping because the showing of "emotional harm" requires nothing more than a subjective claim. The Third Circuit declared a similarly flawed harassment policy unconstitutional in *Saxe*: Because the policy did not "require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." 240 F.3d at 217.

Protecting speech that may cause some listeners "emotional harm" is particularly important when the speech addresses a matter of public concern. For example, in *Snyder v. Phelps*, the Supreme Court weighed the First Amendment's

protection of speech that plainly caused "emotional harm": the protest of a soldier's funeral. Indeed, the Court observed that "the applicable legal term—'emotional distress'—fails to capture fully the anguish [the Westboro Baptist Church]'s choice added to [the father of the soldier's] already incalculable grief." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). But while recognizing that speech "can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain," the Court concluded that "we cannot react to that pain by punishing the speaker. *Id.* at 460–61. Because the First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate," prohibiting speech that causes "emotional harm" miseducates students about their rights. *Id.* at 461.

Accordingly, a public school "is not permitted to punish a student merely because her speech causes argument on a controversial topic." *Norris*, 969 F.3d at 32 (1st Cir. 2020). But punishment of such speech is exactly what this policy and statute permit, as one student's stance on a controversial issue—Israeli-Palestinian relations,[12] for example—may provoke a claim of "emotional harm" by another. In *Gooding v. Wilson*, the Supreme Court struck down a Georgia statute that "makes

[12] Liam Stack, *Tweets About Israel Land New Jersey Student in Principal's Office*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/07/nyregion/anti-israel-tweets-land-new-jersey-student-in-principals-office.html.

it a 'breach of peace' merely to speak words offensive to some who hear them, and so sweeps too broadly." 405 U.S. 518, 527 (1972). The policy and statute at issue here have the same effect, rendering otherwise protected speech "bullying" based upon listeners' subjective reactions. They require the same judicial response.

CONCLUSION

"School officials do not possess absolute authority over their students." *Tinker*, 393 at 511. Allowing the school's suspension to stand would empower administrators to police private student speech and punish students for the conduct of others. Likewise, prohibiting speech that causes "emotional harm" requires students to self-censor out of fear of offending their peers, teaching students illiberal lessons about life in our pluralistic democracy. To protect students' expressive and associational rights, this Court should reverse.

Date: February 11, 2021

/s/ Seth B. Orkand

Seth B. Orkand
First Circuit Bar No. 1154643
ROBINSON & COLE LLP
One Boston Place, 26th Floor
Boston, MA 02108
sorkand@rc.com
Tel.: (617) 557-5915
Fax.: (617) 557-5999

Counsel for Amicus Curiae *Foundation for Individual Rights in Education*

Certificate of Compliance With Type-Volume Limit

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the word limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f): this document contains 6,498 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: February 11, 2021

/s/ Seth B. Orkand

Counsel for Amicus Curiae *Foundation for Individual Rights in Education*

CERTIFICATE OF FILING AND SERVICE

I, Seth B. Orkand, hereby certify pursuant to Fed. R. App. P. 25(d) that, on February 11, 2021, the foregoing Brief of Amicus Curiae Foundation for Individual Rights in Education in Support of Plaintiffs-Appellants was filed through the CM/ECF system and served electronically.

Upon acceptance by the Court of the e-filed document, nine paper copies will be filed with the Court within the time provided in the Court's rules via Express Mail.

/s/ Seth B. Orkand
Seth B. Orkand