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' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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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.

FIRE has a direct interest in this case because protected student expression posted on social media is routinely censored by administrators at both the K-12 and collegiate level. Every day, FIRE defends students facing life-altering discipline for their protected but dissenting, unpopular, or merely offensive online speech. Students have been expelled for Facebook posts that embarrassed university leadership,[2] investigated for political Instagram posts,[3] and suspended for posting

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[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. This *amicus curiae* brief is submitted with an accompanying motion for leave.

[2] *Barnes v. Zaccari*, 592 Fed. App'x 859, 865 (11th Cir. 2015).

[3] 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 [https://perma.cc/A7ZA-VHCE].

on Twitter a satirical response to an ex-girlfriend's apology.[4] These rights violations are increasingly and dishearteningly common as colleges now routinely monitor student social media.[5] Because courts often misapply K-12 precedent to uphold speech restrictions in matters involving college students,[6] the resolution of this case will resonate on campuses across the country for years to come.

SUMMARY OF ARGUMENT

This case concerns a public school's suspension of two students for making mean-spirited comments about a classmate in a private Snapchat discussion. However juvenile the comments, the First Amendment protects them under long-standing precedent from both the Supreme Court and this Court. Nevertheless, both the district court and the panel justified the suspension by holding Appellants responsible for the misconduct of *other* students—recording, photographing, and generally excluding a classmate—based solely on Appellants' brief comments in a

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[4] 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 [https://perma.cc/RQE3-FD68].

[5] *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 [https://perma.cc/J36U-MMA7].

[6] *See, e.g.*, *Doe v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211–12 (11th Cir. 2016) (applying K-12 precedents to First Amendment claim involving college student speech); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (same); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (same).

group chat. Indeed, the district court acknowledged that "[t]he Students are correct that the[ir] comments [] cannot constitute bullying unless they are considered part of the collective action by the eight members. . ."). *Doe v. Hopkinton Pub. Schs.*, No. 19-11384-WGY, 2020 U.S. Dist. LEXIS 173127, at *23 (D. Mass. Sept. 22, 2020) ("*Doe I*"). The panel solved this problem by minting an amorphous new exception to student speech rights, declaring that public schools may punish speech the school believes "emboldened" or "encouraged" others to bully. *Doe v. Hopkinton Pub. Schs.*, No. 20-1950, 2021 U.S. App. LEXIS 35377, at *26 (1st Cir. Nov. 19, 2021) ("*Doe II*"). But this kind of "contact tracing" amongst acquaintances is anathema to the First Amendment, which permits neither such attenuated liability nor guilt-by-association.

If allowed to stand, the panel's ruling would render a vast amount of private, protected student speech subject to investigation and discipline, even if the alleged "target" of the speech was unaware of its existence. If public schools are permitted to police private, protected student speech based upon the actions of others, and to suspend students simply for associating with friends online, a generation of students will be taught the First Amendment is a dead letter. To protect students' constitutional rights, this Court should grant rehearing *en banc*.

ARGUMENT

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

> 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.

Doe I at *8 (brackets in original). By sanctioning punishment of private student expression because of others' actions, the panel's ruling cannot be squared with the First Amendment's guarantees of free expression and association.

I. The Panel's Ruling Threatens Students' First Amendment Right to Freedom of Expression.

Students at our nation's public K-12 schools possess First Amendment rights. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Under the Supreme Court's time-tested *Tinker* standard, public schools may punish students only 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 v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) (quoting *Tinker*, 393 U.S. at 513–14).[7] The Snapchat posts here, however sophomoric, receive First Amendment protection because none of the above exceptions apply.

Nothing in the record indicates the students' comments caused any disturbance on school premises. The students were "minor" participants in the private group Snapchat. *Doe I* at *29. The record contains only four comments by Bloggs and Doe, shared privately with friends. *Id.* at *8. There is no evidence that Bloggs and Doe posted their comments while at school or in a school-controlled environment, and Roe complained about *other* students' actions, 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 of (and thus unbothered by) Bloggs and Doe's speech, Roe

[7] Schools may also regulate student expression in other limited circumstances, none of which apply here. *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 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").

"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 the students' speech caused any disruption, nor could school administrators have reasonably forecast such. As the district court found, the school "reckoned with minimally-disruptive, untargeted speech." *Id.* at *28.

However, finding that "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 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 also clarified that, to punish student speakers on this basis, administrators must reasonably determine "*both* that the student speech targeted a specific student *and* that it invaded that student's rights." *Id.* (emphases added). Because Appellees could not have reasonably determined Doe and Bloggs 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.'" *Doe I* at *23; *see also* M.G.L. c. 71, § 37O. As the district court correctly concluded:

> 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 direct them at the target.

Doe I at *24. Under *Norris*, this conclusion should end the analysis. Without a finding that Bloggs and Doe targeted Roe, their comments cannot lawfully be punished as having invaded his rights. Outside of their pure speech, which properly lies beyond *Tinker*, no 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.

To resolve this tension, both the district court and the panel converted Doe and Bloggs' fleeting comments into something they were not. The students were not, the panel declared, simply trading private jokes with friends, but rather were "foster[ing] an environment that emboldened the bullies and encouraged others in the invasion of Roe's rights." *Doe II* at *26. The students did not simply speak unkindly about a peer behind his back; they "actively and extensively encouraged bullying." *Id*. Beyond the doctrinal problems presented by this new, ill-defined *Tinker* exception, this characterization is simply not supported by evidence. By the district court's admission, the comments were "minor." *Doe I* at *29. They were not directed at Roe. Nor do they mention or even allude to bullying conduct, let alone actively encourage it. Instead, the comments are no more than what they

appear: jokes told to friends. They may be immature, mean-spirited, or even "derogatory." *Id.* at *32. But they are not evidence of targeted invasion of rights required under *Norris* or by the First Amendment. 969 F.3d 12 at 29. There is nothing "reasonable" about suspending two students for non-disruptive, private speech of which the alleged "target" was not even aware, and this Court need not defer to the school's decision. *Norris*, 969 F.3d at 30.

The panel breaks dangerous new ground in declaring that "speech that actively encourages such direct or face-to-face bullying conduct is not constitutionally protected." *Doe II* at *27. "Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2057 (2021) (Alito, J., concurring). The panel's broad ban on "encouraging" bullying only exacerbates this First Amendment difficulty.

As a practical matter, under the panel's newly minted *Tinker* exception, school administrators may punish any student expression that may "encourage" *other* students' on-campus misconduct, no matter when and where it occurs. 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 their speech signaled "encouragement" of *someone else's* eventual misconduct. Here, for example, the students' speech "was sent to a third party and there is no indication

they had knowledge or intent it would go beyond that third party." *Doe I* at *23. The panel's ruling effectively imposes a form of strict liability on student speakers.

The First Amendment does not allow such culpability: "The school may suppress the disruption, but it may not punish the off-campus speech that prompted other students to engage in misconduct." *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2056 (Alito, J., concurring). Administrators may not engage in this kind of "contact tracing" amongst acquaintances; one student's misconduct does not justify the punishment of their friends. Such a result conflates one student's protected speech with another's prohibited action.

II. The Panel's Ruling Threatens Students' First Amendment Right to Freedom of Association.

The First Amendment also protects students' right to freedom of association. *Healy v. James*, 408 U.S. 169, 181 (1972). 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 having told one another jokes. Freedom of association prohibits 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)).

In *Healy*, for example, a public college president refused to recognize a proposed student chapter of Students for a Democratic Society (SDS) after concluding its members "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 the students' desire to form an SDS chapter indicated their "encouragement" of the national group's actions, and thought this connection provided sufficient evidence to justify a denial of recognition. But the Supreme Court held the First Amendment required more. While actual disruption could be punished, a "line between permissible speech and impermissible conduct" is a "constitutional requirement." *Id.* at 189. Denying the group recognition because of the students' "mere expression" of support for national SDS, without "substantial evidence" of misconduct, 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.

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). 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." *Doe I* at *23. The panel's acceptance of collective punishment cannot be squared with well-established First Amendment precedent.

CONCLUSION

The First Amendment requires school officials to appreciate the constitutionally significant difference between comments to friends and targeted bullying of another student. Allowing the panel's broad new ban on "encouraging" bullying to stand would empower administrators to police private speech and punish students for conduct of others. To address the threat to student rights presented by the panel's ruling, this Court should grant rehearing *en banc*.

Date: December 27, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 27, 2021, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the CM/ECF system. The undersigned also certifies all parties in this case are represented by counsel who are registered CM/ECF users and that service of the Amicus Brief will be accomplished by the CM/ECF system.

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