20–1950

United States Court of Appeals
For the First Circuit

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

Plaintiff - Appellants

v.

HOPKINTON PUBLIC SCHOOLS,

Defendant – Appellee

CAROL CAVANAUGH, in her individual capacity 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

Brief of *Amici Curiae* National School Boards Association, Maine School Boards Association, Massachusetts Association of School Committees, New Hampshire School Boards Association, and Rhode Island Association of School Committees In Support of Defendant-Appellee and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the National School Boards Association, the Maine School Boards Association, the Massachusetts Association of School Committees, the New Hampshire School Boards Association, and the Rhode Island Association of School Committees make the following disclosures as *amici curiae*:

1. No amicus is a publicly held corporation or other publicly held entity.
2. No amicus has a parent corporation;
3. No amicus has 10% or more of its stock owned by a corporation.

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INTEREST OF *AMICI CURIAE*

Amicus curiae the National School Boards Association ("NSBA") was founded in 1940 and is a non-profit organization representing state associations of local school boards and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members governing nearly 14,000 local school districts serving approximately 51 million public school students. NSBA regularly represents its members' interests before Congress, federal courts, and state courts, and has participated as *amicus curiae* in numerous cases involving issues under the First Amendment's Free Speech Clause.

The Massachusetts Association of School Committees, Inc., ("MASC") is a Massachusetts corporation incorporated under G. L. chapter 180. MASC's members consist of the approximately 320 Massachusetts school committees in cities, towns, and regional school districts. MASC represents the interests of its members in supporting and enhancing public elementary and secondary education within the Commonwealth. MASC's general interest in this case is ensuring that the Massachusetts statute that bars cyberbullying of students is upheld and that the right of all students to a safe learning environment and a public education in Massachusetts is protected from interference by online and social media activities personally targeting them. The issue presented has substantial implications for

MASC's members who are charged with providing a full, effective public education and a safe learning environment to their residents.

The New Hampshire School Boards Association ("NHSBA") is a voluntary, non-profit association whose membership is comprised of approximately 160 of the 176 locally elected New Hampshire school boards. NHSBA represents the interests of local school boards by providing a variety of services designed to help school boards effectively perform their duties and obligations. As elected bodies entrusted by their respective towns and cities to direct and oversee the public schools, the school boards of New Hampshire are uniquely positioned to explain to the Court the importance of this case. NHSBA's interest is to ensure that the Court is aware of the significant impact its ruling will have on New Hampshire's 176 local school boards and the numerous decisions those local school boards are obligated to make.

The Rhode Island Association of School Committees ("RIASC") is a non-profit organization dedicated to developing the effectiveness of Rhode Island School Committee members in meeting their role and responsibilities in promoting student achievement in safe and challenging learning environments, while playing a leading role in shaping and advocating public education policy at the local, state, and national levels. RIASC, on behalf of its school committee members, is uniquely positioned to explain to this Court how its decision will affect public education in Rhode Island.

The Maine School Boards Association ("MSBA") is recognized as a non-profit educational advisory organization under Me. Rev. St. tit. 30-A § 5724(9). The members of MSBA are 221 of the 229, or 97%, of local district school boards representing the municipal and regional school administrative units in the State of Maine. The mission of MSBA is to enhance the education of all students in Maine's public schools by identifying the needs of local school boards through board development, information and support services, and by advocating for all Maine public schools at the state and national levels. MSBA offers its insights to the court to ensure it understands the impact its decision will have on school board policy in Maine.

FRAP 29(a)(2) STATEMENT

All parties have consented to the filing of this *amicus* brief.

FRAP 29 (a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund the preparation or submission of this brief; and (iii) no person other than *Amici Curiae* and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents a question that is of vital importance to NSBA and to its member state school board associations: whether public school officials acting to teach the art of civil discourse and to prevent the dire impacts of cyberbullying on students can protect the opportunity for an education and a safe learning environment promised to residents by their local school boards.

Amici urge this court to ensure – as the District Court has done – that school officials are able to intervene when a student is targeted for harassment so that they may protect not only that student's safety and emotional well-being but also the school's learning environment. No longer is there any reasonable doubt that online bullying via social media that personally targets individual students, and that goes unchecked, has pervasive and often life-changing consequences for its victims as well as for the others involved, and even for those who merely witness it. These impacts include academic failure in, and withdrawal from, school; emotional and physical harm, frequently severe; substance abuse; and suicide ideation that on occasion leads to actual suicide.[1] In fact, it was a bullied student's suicide in 2010

[1] Researchers including the Centers for Disease Control and Prevention have linked bullying and suicide in school-age children. CDC National Center for Injury Prevention and Control, Division of Violence Prevention, The Relationship Between Bullying and Suicide: What We Know and What It Means for Schools, https://tinyurl.com/26r88up6; StopBullying.gov,

that prompted the enactment of the Massachusetts Anti-Bullying Law, Mass. Gen. Laws ch. 71, § 370 (2021). Recognizing the harm caused by peer bullying to individuals and to the learning environment generally, every state in the nation has codified its schools' duty to prevent and address bullying. Indeed, the United States Department of Education has counseled schools to be aware of potential federal civil rights liability for bullying that amounts to prohibited harassment under federal law.

Like many state anti-bullying statutes in this circuit and throughout the nation, Massachusetts' law requires schools to bar cyberbullying and requires that local school committees adopt and enforce policies against it. All of the state anti-bullying statutes in this circuit are fully consistent with the careful balancing of First Amendment speech rights and of the opportunity for a public education unimpeded by bullying that is inherent in the "second prong" of the *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969) standard, which acknowledges that the First Amendment does not protect student conduct that "impinge[s] upon the rights of other students," *id*. at 509, or involves "invasion of the rights of others." *Id*. at 513. In fact, the statutes of all the jurisdictions in this circuit describe "bullying" with language that was explicitly used in *Tinker*.

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https://www.stopbullying.gov/resources/research-resources/consequences-of-bullying.

The student conduct at issue in this case clearly invoked the Massachusetts law and led to unacceptable consequences for the victim. A group cyberbullying effort targeting one student can be, and indeed was, terribly harmful to that student. It is just the sort of power imbalance anti-bullying statutes are intended to prevent. *Tinker's* "second prong," recognizing the damage words can do when used as weapons, rejects any notion that the First Amendment is a vehicle for converting school into the equivalent of a survivalist boot camp. Here, the defendant school district's response was in full compliance with *Tinker*'s "second prong" standard (*i.e*. protecting student "physical and psychological" wellbeing)[2], with this court's recent decision limning that standard, *Norris v. Cape Elizabeth School District*, 969 F.3d 12 (1st Cir. 2020), and with its responsibilities under the state anti-bullying law. In addition to these legal standards, the school district here fully complied with its educational duty to teach and uphold standards of civil discourse and to maintain a safe and supportive learning environment. Public school officials performing these essential tasks, in a fraught legal landscape, should not be held liable.

[2] *See* Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech after Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1230-1232 (2009).

Amici therefore urge this court to affirm the District Court's judgment and to hold that, in fealty to *Tinker*, school officials have authority to discipline students for cyberbullying when it affects the rights of a student or school operations.

ARGUMENT

I. PUBLIC SCHOOL OFFICIALS MAY ADDRESS CYBERBULLYING UNDER *TINKER*'S "RIGHTS OF OTHERS" PRONG AND DEFENDANTS PROPERLY DID SO HERE.

Plaintiff-appellants John Doe ("Doe") and Ben Bloggs ("Bloggs") (collectively "plaintiffs") have appealed the District Court's judgment holding that they were lawfully disciplined under the Massachusetts Anti-Bullying Law, Mass. Gen. Laws ch. 71, § 370 (2021), when they participated with their fellow high school students in demeaning a peer, Robert Roe ("Roe"), on Snapchat, a social media platform. While the activities of Doe and Bloggs were limited to derogatory posts, other members of their group engaged in additional bullying conduct during school activities. Plaintiffs claim that the discipline violated their First Amendment speech rights. The clear weight of authority in this circuit and others extending all the way back to *Tinker*, however, shows that the school officials here acted within the bounds of existing law. School officials' authority to respond in such circumstances must be upheld, so that they are able to fulfil the crucial mission of public schools to maintain safe learning environments.

More than half a century on, the familiar tenets of the 1969 ruling in *Tinker* are entrenched: students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District.* 393 U.S. 503, 506 (1969) *and* student speech therefore is insulated from restriction absent material and substantial disruption of the school. *Id*. at 511. *Tinker* involved classic viewpoint speech regarding the ongoing national debate about the war in Vietnam, in the form of a silent, armband-wearing protest by students. This was, as the Court saw things, "'[t]he classroom [as] peculiarly the 'marketplace of ideas.'" *Id*. at 512 [citation omitted]. The *Tinker* Court was prescient, however.

While deciding the case before it, in which the student speech was silent and victimless, the Court anticipated that there would be others in which student speech might be a harder fit with traditional First Amendment values and might inflict harm on individual students without significantly "disrupting" the school's operations. *Tinker* therefore made repeated reference to two independent standards for triggering permissible discipline of student speech – speech that would "materially and substantially disrupt the work and discipline of the school" (the "first prong"), *id.* at 513, and speech that "impinge[s] upon the rights of other students" (the "second prong"), *id*. at 509. That these are separate grounds for regulating student speech is compelled by the clear language in *Tinker*.

No fewer than six times did the Court's opinion expressly identify these two results as independent triggers for lawful discipline under the First Amendment. *See Tinker, supra*, 393 US at 508, separating "interference … with the schools' work" from "collision with the rights of others," and differentiating speech which intrudes on "the work of the schools" from that which intrudes on "the rights of other students;" at 509, distinguishing interference with "the work of the schools" from "impinge[ment] upon the rights of other students;" at 513, separating interference with "'operation of the school'" from "colli[sion]" "with the rights of others," and demarcating "disrupt[ion]" and "substantial disorder" from "invasion of the rights of others" [citation omitted]; at 514, differentiating intrusion "in school affairs" from intrusion in "the lives of others."

The distinction established by *Tinker* is essential in the balancing of a student's individual speech rights with the rights of other students in the school. When a student is prevented from getting an education by the "speech" of another, there may be little or no "disruption" of the school's operations, and for other students and for staff the learning/teaching process may move forward seamlessly. At the same time, the effects on the victim can be devastating, destroying any meaningful opportunity for an education and causing life-altering results. The Court recognized that these two types of harm may not, and often will not, occur in lockstep but that both equally warrant intervention by school authorities.

When *Tinker* was decided, cell phones, the internet, social media, and even the concept of bullying as a recognized problem for schools all lay decades in the future. But the consequences when others use modern technologies to target and harm individual students are especially well-suited to *Tinker*'s second prong. The professional literature shows why.

Numerous studies have established that cyberbullying victims are "more likely to lose trust in others, experience increased social anxiety, and decreased levels of self-esteem;" incur "increased depressive affect and suicidal behavior; and [are] more likely to use alcohol, drugs, and carry a weapon at school." Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 ADOLESCENT HEALTH, MEDICINE AND THERAPEUTICS 143, 145-146 (2014) and studies cited (2014). Suicidal behavior is strongly correlated to cyberbullying in targets and even in perpetrators. *Id.* at 145-146. Cyberbullying is associated in the literature with a litany of negative consequences: "sleeping problems …, bed-wetting, headaches …, abdominal pain and stomachaches … social anxiety, emotional disturbances, and peer problems, … and high levels of aggressiveness, powerlessness, sadness, and fear." M.A. Raza Talpur et al., *Effects of Cyber Bullying on Teenagers; A Short Review of Literature*, 1 OPEN ACCESS JOURNAL OF ADDICTION AND PSYCHOLOGY, Issue 3 at 3-4 (2018) and studies cited. Moreover, "cyberbullying is unique in that it reaches an unlimited audience with increased exposure across

time and space, preserves words and images in a more permanent state, and lacks supervision." Nixon*, supra,* at 143. And cyberbullying has become more common. A 2019 study found that one in three students experiences cyberbullying in middle or high school, almost double the rate found in 2007. Justin W. Patchin, *Summary of Our Cyberbullying Research* (2007-2019), Cyberbullying Research Center, https://tinyurl.com/4z9fbmcf, (last visited May 12, 2021).

When the cyberbullying is perpetrated by a group against an individual, common sense tells us that these grievous impacts are only exacerbated. Common sense also tells us that these impacts invariably and necessarily "impinge on the rights" of the victimized student, well within the meaning of *Tinker*'s second prong. The Court's carefully-chosen words, used by it repeatedly, must be treated as more than mere surplusage.

A. State and Federal Law Require Schools to Address Some Student Speech That Falls Within *Tinker*'s "Rights of Others" Prong.

The definition of bullying in the Massachusetts Anti-Bullying Law easily meets *Tinker*'s second prong standard because it incorporates the Court's express language. Mass. Gen. Laws c. 71, § 370(a) (2021) defines "bullying" to include "written, verbal or electronic expression … directed at a victim that … (iv) *infringes on the rights of the victim at school*" [emphasis added]. Section 370(b) therefore requires school districts to prohibit bullying that "infringes on the rights of the victim

at school."[3] *See Tinker, supra*, 393 US at 509, 513 (allowing schools to regulate speech that "impinge[s] upon the rights of other students" and that constitutes an "invasion of the rights of others.") Section 370(a) uses this definition of "bullying" to in turn define "[c]yber-bullying" as "bullying through the use of technology or any electronic communication."

The importance of this court's decision will not be confined to Massachusetts. The other jurisdictions in this Circuit also have enacted anti-bullying laws that regulate student speech that targets an individual student and that impairs his/her right to a meaningful opportunity for an education. Like § 37O, all these statutes prohibit bullying and cyberbullying in language expressly used by *Tinker*'s second prong. *See* R.I. Gen. Laws, §16-21-33(a)(1)(iv), (a)(2) ("infringes on the rights of the student to participate in school activities") and (b); N.H. Rev. Stat. Ann. § 193-F:3(I)(a)(3) (2021) ("[i]nterferes with a pupil's educational opportunities") and (II); Me. Rev. Stat. tit. 20-A, § 6554(2)(B)(2) (2021) ("[i]nterferes with the rights of a student") and (C); 2016 P.R. Laws 104, Art. 3(a) ("interfering with … school opportunities") and (b).

[3] The statute contains additional formulations in its definition of "bullying" that also fit *Tinker's* second prong. *See* § 370(a)(i) – "causes physical or emotional harm to the victim" – and §370(a)(iii) – "creates a hostile environment at school for the victim."

In fact, every state legislature in the country has codified schools' duty to prevent bullying. These state anti-bullying statutes generally require school districts to report, investigate, and punish bullying, and to formulate policies to that end. U.S. Dep't of Health & Human Servs., Common Components of State Anti-Bullying Laws and Regulations, by State, https://www.stopbullying.gov/sites/default/files/StopBullying-Law-Policies-Regulations.pdf (last visited May 12, 2021). And for years the Department of Education has instructed that student bullying can trigger school responsibilities under one or more of the federal antidiscrimination and education laws if it creates a hostile environment at school. U.S. Dep't of Educ. Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying 1 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf ("2010 Dear Colleague Letter") (explaining that a school insufficiently addressing student harassment based on a protected characteristic may violate Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, or Title II of the Americans with Disabilities Act); U.S. Dep't of Educ. Office for Civil Rights & Office of Special Educ. & Rehabilitative Servs., Dear Colleague Letter on Prohibited Disability Harassment 2, 4 (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html; see also U.S. Dep't of Health & Human Servs., Federal Laws, https://www.stopbullying.gov/resources/laws/federal (last updated Mar. 31, 2014).

B. This Court Has Held That *Tinker*'s "Rights of Others" Prong Applies to Speech That Constitutes Bullying.

There is no doubt that *Tinker*'s second prong covers bullying (and therefore "cyberbullying") in this circuit. In *Norris v. Cape Elizabeth School District,* 969 F.3d 12, 29 (1st Cir. 2020), this court squarely held 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*."[4] The *Norris* court therefore concluded that "schools may restrict such speech *even if it does not necessarily cause substantial disruption to the school community more broadly*." *Id.* [emphasis added]. Nothing about the compelling reasoning in *Norris* conflicts with *Tinker*. The ineluctable conclusion is that the Massachusetts Anti-Bullying Law passes constitutional muster under *Tinker*. The only remaining question is whether the District Court's ruling here – that this case involves speech that is outside *Tinker*'s protection – satisfies *Tinker*'s second prong and *Norris*. The answer clearly must be "yes."

While the court found the facts in *Norris* to be insufficient to find that the plaintiff student had engaged in bullying unprotected by *Tinker*, the facts here lie at the opposite pole and present circumstances that occur all too frequently in the digital

[4] In support, *Norris* cited *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 572 (4th Cir. 2011) and *C.R. v. Eugene School District* 4J, 835 F.3d 1142, 1152-53 (9th Cir. 2016).

age. The *Norris* plaintiff, acting alone, had anonymously posted a sticky note in the female bathroom stating "[t]here's a rapist in our school and you know who it is." The note stayed there for mere minutes and was seen by only two other students. It did not name the alleged target and was ambiguous in several other respects. The plaintiff was a sexual assault advocate and confidant of assault victims, and school officials conceded that the note at least partly targeted them for alleged mishandling of past assault claims. Previously, a video accusing the alleged target had circulated throughout the school. In addition to the alleged target, other students in the school were widely suspected of past assaults. *Id.* at 14-15, 31-33. For all these reasons, the court decided that there was an insufficient nexus between the note and any bullying of the target. *Id*. at 33. What this Court found missing in *Norris* is present in abundance here.

There was nothing ambiguous about the identity of the Snapchat group's subject or about the content of the postings. Neither Doe, Bloggs, or any others in the group were addressing a controversy in the school, nor were they targeting school officials. The content was plainly about Roe and was demeaning of him and of his family. The consequences of the group's activities for Roe were direct. In addition to experiencing emotional harm, Roe transferred out of a class he had selected; decided not to try out for a sport he liked; and, ultimately, left the school.

These are exactly the sorts of harms that school officials must minimize or prevent daily as part of their mission to maintain safe learning environments in compliance with their state's law. The school officials in this case acted well within their lawful "discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment." *Norris, supra*, 969 F.3d at 29 n.18. There can be no question that the school's "decision regarding [plaintiffs'] speech" must be given deference, because its "judgment [was] reasonable." *Id*. at 30. Under *Norris*, nothing more is needed to affirm.

C. The Massachusetts Student Speech Statute Incorporates *Tinker*'s Second Prong. The Discipline Imposed for Plaintiffs' Cyberbullying Therefore Was Equally Proper Under State Law.

Tinker's second prong also disposes of the claim by Doe and Bloggs that their discipline violated the Massachusetts student speech statute, Mass. Gen. Laws. ch. 71, § 82 (2021). The District Court ruled that because § 82 simply "codified the *Tinker* standard," the "invasion of [Roe's] rights clears the threshold required under Massachusetts law." *Doe v. Hopkinton Public Schools*, 490 F.Supp.3d 448, 470 (D. Mass. 2020). The court got it right.

In *Pyle v. School Committee of South Hadley*, 423 Mass. 283, 667 N.E.2d 869 (1996), the Supreme Judicial Court ("SJC") answered a question certified to it by this court (*see Pyle v. South Hadley School Committee*, 55 F.3d 20 (1st Cir. 1995)). That question asked whether § 82 protects speech by high school students that "may

reasonably be considered vulgar, but causes no disruption or disorder?" *Id*. at 22. The SJC answered the question "yes." *Pyle, supra*, 423 Mass. at 287, 667 N.E.2d 869. It rejected an argument that § 82 incorporated the decision in *Bethel School Dist. No. 403 v. Fraser*, 478 US 675 (1986), which held that school officials can regulate vulgar or lewd speech without regard to the standards in *Tinker*. *Pyle, supra*, 423 Mass. at 286-287; 667 N.E.2d at 869, Central to this case, however, is the *Pyle* court's unequivocal agreement with the parties that § 82 was "intended to codify the First Amendment protection discussed in *Tinker* …". *Id.* at 286. While the court focused on the "disruption/disorder" language in the statute, it gave no indication that Massachusetts had not adopted *both* prongs of *Tinker*. *Id.*

Were there any doubt, at least regarding the subject of bullying/cyberbullying, it was removed by the 2010 enactment of Mass Gen. Laws ch. 71, § 37O (2021). A venerable rule of statutory interpretation in Massachusetts "'assumes, as we must, that the Legislature was aware of the existing statutes in enacting the [subject] legislation, and that if possible a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law.'" *Plourde v. Police Dep't of Lawrence*, 85 Mass.App.Ct. 178, 184, 7 N.E.3rd 484 (2014) [citation omitted]. When the Legislature enacted the Anti-Bullying Law, it did so thirty-six years after § 82 was first adopted; twenty-two years after the statute had been amended solely so that it became mandatory rather than remaining a local acceptance law; and fourteen

years after the SJC issued its *Tinker*-based construction of § 82 in *Pyle*. And, as already noted, the Legislature used the same language in § 37O as the *Tinker* Court had employed for its second prong.

Amici urge this court to rule that when the Legislature passed § 370, it did so fully cognizant of § 82 and its judicial construction and found the statutes compatible. It therefore enacted a law that requires schools to proscribe bullying/cyberbullying by using language that is literally lifted from *Tinker*. In short, discipline for the Snapchat speech about Roe survives appellate challenge under § 82 because it does so under the second prong of *Tinker*.[5]

[5] This appeal is distinguishable from *Mahanoy Area School District v. B.L.,* No. 20-255, which is pending in the Supreme Court on certiorari. That case – the facts of which do not involve abusive speech targeting other students – presents the question whether *Tinker*'s first prong "disruption" standard applies to a social media post that occurred "off campus." The Third Circuit's opinion in the *Mahanoy* case attempted to limit its holding to activities other than those that fit *Tinker*'s second prong. *See B.L. v. Mahanoy Area School Dist.*, 964 F.3d 170 (3rd Cir. 2020), *petition for cert. granted*, 141 S.Ct. 976 (U.S. Jan. 8, 2021)(No. 20-255), stating "[w]e hold only that off-campus speech *not* implicating that class of interests lies beyond the school's regulatory authority" and excluding from its ruling speech that "harass[es] others," citing the bullying decision in *Kowalski, supra*, 652 F.3d at 572, and other decisions [emphasis in original]. In any event, the conduct against Roe by several members of the Snapchat group *did* also include activities within school programs, *i.e*., "on campus." *Doe v. Hopkinton Public Schools*, 490 F.Supp.3d 448, 463 (D. Mass. 2020). Where a component of the bullying conduct by a group involves "off campus" social media speech, it cannot and should not be arbitrarily segregated from the rest of the group's actions.

II. SCHOOL OFFICIALS MUST HAVE DISCRETION TO CONSIDER A STUDENT'S UNPROTECTED SPEECH IN CONTEXT AND TO APPLY APPROPRIATE CONSEQUENCES.

This court should also reject the argument that plaintiffs' limited involvement on the Snapchat cite means that discipline could not be imposed, applying either an "associational" theory or one requiring more in the way of "causation." The District Court expressly held that they were punished for being active on the site, however narrow their roles, and *not* simply for being passive members of the site. As the court put it, the school could not "ignore the group context in which Doe's and Bloggs' comments were made, …, because they did not merely 'associate' in the Snapchat but were active -- albeit minor -- participants in the group targeting of Roe." *Doe v. Hopkinton Public Schools,* 490 F.Supp.3d 448, 463 (D. Mass 2020). The court's holding is rooted in the common sense and universal social experience, which it summarized: "Children often bully as a group. The children who stand on the sidewalk and cheer as one of their friends shakes down a smaller student for his lunch money may not be as culpable, but they are not entirely blameless." *Id.* at 464.

Not surprisingly, science backs all this up. Bullying is a "'group process.'" Christina Salmivalli, Bullying and the Peer Group: A Review, 15 AGGRESSION AND VIOLENT BEHAVIOR 112 (2010) (Abstract). Four "participant roles" have been identified for children "in the bullying process, in addition to being bullies or victims: assistants of bullies, reinforcers of bullies, outsiders, and defenders of the

victim. Assistants are children who join the ringleader bullies, reinforcers provide positive feedback to bullies (e.g., by laughing or cheering), outsiders withdraw from bullying situations, and defenders take sides with the victims, comforting and supporting them." *Id*. at 114 and cited studies. "Having others join in the bullying or getting even subtle positive feedback by verbal or nonverbal cues (e.g. smiling, laughing) is probably rewarding for those who are doing the bullying," and "[i]t has been found that the more classmates tend to reinforce the bully, the more frequently bullying takes place in a school class." *Id*. and cited studies. In short, "if fewer children rewarded and reinforced the bully, and if the group refused to assign high status for those who bully, an important reward for bullying others would be lost." *Id*. at 117.

Even passive witnesses can enable bullying by giving positive peer status to those who actually engage in the conduct. Salmivalli, *supra*, at 115 and cited studies. But the school district was careful to limit discipline to those who took some *active* role in the group's actions regarding Roe and who by doing so also inevitably enabled and encouraged the conduct of each other. *Doe v. Hopkinton Public Schools,* 490 F.Supp.3d 448 at 464. The law routinely recognizes the culpability of, and imposes far harsher penalties on, participants who contribute to joint ventures, enterprises, and conspiracies that inflict damage, without artificially viewing their respective contributions in an isolated and immunizing bubble. So too here. Doe and

Bloggs took part in the activities of the Snapchat group which denigrated Roe and his family. They did not merely "belong" to the group or even simply post "like" emojis. The relative degree of their contributions does not insulate their speech from discipline. That, instead, is a fit subject for school officials to consider in exercising their considerable discretion regarding the penalties that should be imposed. Doe and Bloggs were disciplined for their conduct - not for being friends of the other group members or for merely belonging to the group.[6]

The well-known and oft-applied *Tinker* standard enables schools to determine the facts of a given situation and take action necessary to protect their core pedagogical function. It permits school officials to address student speech that targets others, to safeguard other students from harassment and bullying, and to instill important values of teamwork, sportsmanship, and mutual respect in extracurricular activities, by retaining the ability to reinforce those lessons with context-appropriate discipline. Indeed, for some, the lessons learned on the court or field or bus or stage are just as important —and lasting—as the lessons learned in a classroom.

[6] Under Massachusetts law, these are "short-term suspensions" because the students each were suspended only for three and five days. *See* 603 Mass. Code Regs. 53.02 (2021). *See also Goss v. Lopez,* 419 US 565 (1975), regarding the ten-day ceiling beyond which Fourteenth Amendment procedural due process rights are triggered.

Amici urge this Court to rule that *Norris*'s deference to school officials has meaning and cannot be circumvented by some contrived formula that purports to calibrate a participant's level of involvement.

CONCLUSION

It is vital that the local boards represented by *amici*, acting through their school administrators, are able to furnish a safe, effective education to their residents without unnecessary and destructive impediments. Bullying conduct directly interferes with that fundamental objective because it harms the victim, the perpetrators, and even those who do no more than witness it. *See* Salmivalli, *supra* at 113 – "peers merely witnessing the attacks can be negatively influenced." It is essential that these boards have the tools to prevent cyberbullying and to enforce discipline when it occurs so that the safe learning environment offered to all their residents is not an empty promise. School is challenging enough. *Tinker* wisely struck a balance regarding speech that clearly allows officials to enforce laws against bullying.

Affirmance of the District Court's judgment will accomplish that in full compliance with *Tinker* and its second prong. For the reasons set forth in this brief, *Amici* urge this court to affirm the District Court's judgment.

Respectfully submitted,

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Case Number 20-1950

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Dated: May 18, 2021

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I hereby certify that on May 27, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the document will be sent electronically to all registered participants identified in the Notice of Electronic Filing.

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