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**In the Supreme Court of the United States**

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MAHANoy AREA SCHOOL DISTRICT,  
*Petitioner,*

v.

B.L., A MINOR, BY AND THROUGH HER FATHER  
LAWRENCE LEVY AND HER MOTHER BETTY LOU LEVY,  
*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT

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**BRIEF OF MASSACHUSETTS, THE DISTRICT OF  
COLUMBIA, CALIFORNIA, COLORADO,  
DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE,  
MARYLAND, MICHIGAN, MINNESOTA, NEVADA,  
NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO,  
NEW YORK, NORTH CAROLINA, OREGON,  
PENNSYLVANIA, RHODE ISLAND, VERMONT,  
WASHINGTON, AND THE WISCONSIN ATTORNEY  
GENERAL AS *AMICI CURIAE* IN SUPPORT OF  
NEITHER PARTY**

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**INTERESTS OF *AMICI CURIAE***<sup>1</sup>

As this Court has long recognized, “[t]he State has . . . a legitimate interest in facilitating education of the highest quality for all children within its boundaries.” *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (citation omitted). Unfortunately, for too many students, bullying poses a significant obstacle to their education and well-being. Millions of students across the country report being bullied either in person or online by classmates during their most formative years. When left unchecked, bullying harms students physically, mentally, and emotionally; interferes with their ability to obtain an education; and can substantially disrupt the safety and quality of the learning environment. Although the facts of this case do not involve bullying, the Court’s decision will have serious ramifications for States’ ability to address, in particular, online bullying or “cyberbullying.”

Massachusetts and the District of Columbia, together with California, Colorado, Delaware, Hawai‘i, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the Wisconsin Attorney General (the “*Amici States*”), share an interest in preserving schools’ ability to provide a safe learning setting for students by effectively addressing student bullying, while still

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<sup>1</sup> The parties have consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part. No person other than *amici* has made any monetary contributions intended to fund the preparation or submission of this brief.

allowing a robust exercise of student speech under the First Amendment. To that end, all 50 States and the District of Columbia address school bullying by law, and all but two expressly prohibit cyberbullying.<sup>2</sup> Moreover, 35 States and the District of Columbia acknowledge that bullying can substantially disrupt learning even when it originates off campus, and, thus, require or empower schools to address such bullying.

The novel rule adopted by the Third Circuit would upend these efforts to address bullying. State anti-bullying laws were built on the foundational understanding that, under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), schools may regulate student speech that “would substantially interfere with the work of the school or impinge upon the rights of other students.” *Id.* at 509. As noted, most States recognize that cyberbullying and in-person bullying, even when they occur off campus, can result in such interference or infringement of student rights. A categorical rule that the *Tinker* framework does not apply to off-campus speech would undermine state efforts to address all forms of bullying that substantially interfere with the

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<sup>2</sup> The statutes in Kentucky and Wisconsin do not expressly mention cyberbullying, although their language is broad enough to include it. *See* Ky. Rev. Stat. Ann. § 158.148(1); Wis. Stat. § 118.46. Their state education agencies have included cyberbullying in model anti-bullying policies for schools. *See* Ky. Dep’t of Educ., *Hazing/Bullying (A09.422)*, <https://tinyurl.com/6t2rc2st>; Wis. Dep’t of Pub. Instruction, *Model Bullying Policy*, <https://tinyurl.com/azrednt>.

work of the school or impinge upon other students' rights to be secure and to be let alone. *Id.* at 508.

*Amici* States urge the Court to preserve this Court's well-established student-speech doctrine in the context of off-campus bullying that materially and substantially interferes with the educational setting or impinges on the rights of other students to be secure and to be let alone. This framework has long struck the balance between empowering public schools to protect children's learning environments and protecting students' free speech rights.<sup>3</sup>

### SUMMARY OF THE ARGUMENT

Student bullying inflicts long-lasting harms on students who are targeted and can materially disrupt the school environment. Cyberbullying is particularly destructive, transcends physical boundaries in a way that blurs the line between school and home, and regularly causes serious harm to students at school.

Most States either require or permit schools to address cyberbullying that occurs off campus when it harms the learning environment at school, and most of these laws expressly incorporate *Tinker's* standard to determine the school's authority to act. A categorical rule, which prohibits public schools from addressing students' off-campus speech as "student speech," upends the framework on which these laws rely to address bullying that originates off campus and

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<sup>3</sup> We submit this brief on behalf of neither party because we take no position on whether the speech at issue in this case materially or substantially disrupted the work and discipline of the school.

materially and substantially interferes with the learning environment or interferes with students' rights to be secure at school.

*Tinker* has long provided States and their schools a measured approach—it allows schools to establish a safe and productive learning environment by responding to student bullying when necessary to prevent a material and substantial disruption of the learning environment or to protect other students' rights. Limiting *Tinker's* application by drawing a rigid distinction between on-campus and off-campus speech would threaten schools' efforts to address various forms of bullying that remain a persistent problem in schools across the country. And, contrary to the Third Circuit's suggestion, other First Amendment doctrines are not well-suited to ensuring that off-campus bullying, whether in-person or online, does not disrupt students' rights to learn in our classrooms.

## ARGUMENT

### I. **As the States Have Unanimously Recognized, Bullying Causes Serious Harm to Students and Significantly Disrupts the Learning Environment.**

Recognizing that student bullying causes serious harm to students and significantly disrupts the learning environment in schools, all 50 States and the District of Columbia have adopted laws to empower schools to address school bullying. These laws are vitally important to protect students' educational opportunities and wellbeing, especially where student

victimization rates are as high as 48% in some middle schools. The States' need to support schools as they continue to address rampant bullying among students has never been more vital, especially in this age of rapidly evolving technology that allows bullying to quickly transcend geographic boundaries.

**A. Bullying Has Long-Lasting Detrimental Effects on Students' Physical and Mental Health.**

Bullying is a distinct public health concern that has wide-ranging impacts on children's lives.<sup>4</sup> It involves "targeted intimidation or humiliation," typically through repeated, "aggressive behavior[]" perpetrated by a child who is perceived to be stronger or more socially prominent than the victim.<sup>5</sup> Some children who bully use physical violence, direct or indirect threats, offensive insults, and mocking epithets against their targets.<sup>6</sup> Others use "indirect aggression," such as spreading false or harmful

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<sup>4</sup> See R. Matthew Gladden et al., Nat'l Ctr. for Injury Prevention and Control, Ctrs. for Disease Control and Prevention & U.S. Dep't of Educ., *Bullying Surveillance Among Youths: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0* 4-6 (2014).

<sup>5</sup> Jaana Juvonen & Sandra Graham, *Bullying in Schools: The Power of Bullies and the Plight of Victims*, 65 Ann. Rev. Psych. 159, 161 (2014); see also Gladden et al., *supra* note 4, at 7.

<sup>6</sup> Gladden et al., *supra* note 4, at 7.

rumors about a victim or distributing embarrassing images of the target to their peers.<sup>7</sup>

Bullying affects millions of school children every year. In 2019, a nationally representative survey by the Centers for Disease Control and Prevention (CDC) found that nearly 20% of high school students reported being bullied at school that year.<sup>8</sup> Rates of middle school students reporting having ever been bullied at school range from 32-48% depending on the state or school district.<sup>9</sup>

Bullying has pervasive and long-lasting harmful effects on students' physical and mental health.<sup>10</sup> Children who are bullied exhibit higher levels of depressive symptoms and have worse physical and

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<sup>7</sup> *Id.*

<sup>8</sup> *2019 Youth Risk Behavior Surveillance System*, Ctrs. for Disease Control and Prevention, <https://tinyurl.com/53zs36vm>.

<sup>9</sup> *2019 Youth Risk Behavior Surveillance System*, Ctrs. for Disease Control and Prevention, <https://tinyurl.com/34xf7y8x>.

<sup>10</sup> See Laura M. Bogart et al., *Peer Victimization in Fifth Grade and Health in Tenth Grade*, 133 *Pediatrics* 440, 443-45 (2014) (longitudinal study of effects of bullying on health from middle school to high school finding that experiencing chronic bullying is associated with worse psychological and physical health); George Kritsotakis et al., *Associations of Bullying and Cyberbullying with Substance Use and Sexual Risk Taking in Young Adults*, 49 *J. Nursing Scholarship* 360, 363-67 (2017) (finding that victims and perpetrators of bullying in high school and cyberbullying in college tend to engage in increased gender-specific health risk behaviors as college students, including alcohol abuse, illegal drug use, failure to use condoms, and paying for sex).

mental health than their peers who are not bullied.<sup>11</sup> Longitudinal studies have found that children who were frequently bullied at age 13 are two to three times more likely to develop an anxiety disorder or clinical depression at age 18.<sup>12</sup> And, tragically, bullying and suicide-related behavior are “closely related.”<sup>13</sup>

Bullying occurs both during and outside of school hours, particularly now that students communicate so frequently via social media. *See infra*, Argument I.B. And regardless of when and where it occurs, bullying can create a school climate in which student victims

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<sup>11</sup> See Bogart et al., *supra* note 10; Mitch van Geel et al., *Relationship Between Peer Victimization, Cyberbullying, and Suicide in Children and Adolescents: A Meta-analysis*, 168 JAMA Pediatrics 435, 438, 440 (2014).

<sup>12</sup> See Lexine A. Stapinski et al., *Peer Victimization During Adolescence and Risk for Anxiety Disorders in Adulthood: A Prospective Cohort Study*, 31 Depression & Anxiety 574, 579 (2014); Lucy Bowes et al., *Peer Victimization During Adolescence and Its Impact on Depression in Early Adulthood: Prospective Cohort Study in the United Kingdom*, 350 Brit. Med. J., at 1, 4-6 (2015).

<sup>13</sup> Ctrs. for Disease Control and Prevention, *The Relationship Between Bullying and Suicide: What We Know and What it Means for Schools* 3 (2014), <https://tinyurl.com/ygpbcnv> (“[Y]outh who report any involvement with bullying behavior are more likely to report high levels of suicide-related behavior than youth who do not report any involvement with bullying behavior.”); *accord* van Geel et al., *supra* note 11 (reporting results of meta-analysis “confirm[ing] that [bullying] is an important risk factor for adolescent suicide”).

feel unsafe and unable to engage in learning.<sup>14</sup> For example, children who are cyberbullied are more likely to report missing school because they feel unsafe at school or when travelling to or from school.<sup>15</sup> And bullying significantly interferes with victims' educational progress, lowering their short- and long-term academic performance.<sup>16</sup> One study found "robust direct associations" between higher levels of student victimization and poor academic performance, measured by both lower grade point averages and lower teacher-rated academic engagement.<sup>17</sup> The magnitude of this association is substantial: bullying "can account for up to an average of [a] 1.5 letter grade decrease in one academic subject . . . across the 3 years of middle school."<sup>18</sup>

Bullying does not only impact the victims. Children who bully their classmates are, among other things, more likely to show "poorer school adjustment,

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<sup>14</sup> See Erin Grinshteyn & Y. Tony Yang, *The Association Between Electronic Bullying and School Absenteeism Among High School Students in the United States*, 87 J. Sch. Health 142, 143-47 (2017).

<sup>15</sup> See *id.* at 143-45.

<sup>16</sup> Guadalupe Espinoza et al., *Daily School Peer Victimization Experiences Among Mexican-American Adolescents: Associations with Psychosocial, Physical and School Adjustment*, 42 J. Youth Adolescence 1775, 1784 (2013); Jaana Juvonen et al., *Bullying Experiences and Compromised Academic Performance Across Middle School Grades*, 31 J. Early Adolescence 152, 165-67 (2011).

<sup>17</sup> Juvonen et al., *supra* note 16, at 167.

<sup>18</sup> *Id.*

both in terms of academic achievement and perceived school climate.”<sup>19</sup> As adults, childhood bullies are significantly more likely to commit crimes.<sup>20</sup> And too often, the bullied themselves become perpetrators. In 2002, the United States Secret Service and the Department of Education (“DOE”) released results of interviews with forty-one student perpetrators involved in thirty-seven incidents of targeted school violence using a lethal weapon, establishing that almost three-quarters of the perpetrators “felt persecuted, bullied, threatened, attacked or injured by others prior to the incident[,]” and that the “experience of being bullied seemed to have a significant impact on the attacker and appeared to have been a factor in his decision to mount an attack at the school.”<sup>21</sup> As research shows time and again, “school bullying has life-changing effects on everyone involved.”<sup>22</sup>

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<sup>19</sup> Tonja R. Nansel et al., *Bullying Behaviors Among U.S. Youth: Prevalence and Association with Psychological Adjustment*, 285 JAMA 2094, 2099 (2001).

<sup>20</sup> See Maria M. Ttofi et al., *The Predictive Efficiency of School Bullying Versus Later Offending: A Systematic/Meta-Analytic Review of Longitudinal Studies*, 21 *Crim. Behav. & Mental Health* 80, 83, 86 (2011).

<sup>21</sup> Bryan Vossekuil et al., U.S. Secret Serv. & U.S. Dep’t of Educ., *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* 24-25 (May 2002).

<sup>22</sup> Kathleen Conn, *Best Practices in Bullying Prevention: One Size Does Not Fit All*, 22 *Temp. Pol. & Civ. Rts. L. Rev.* 393, 395 (2013).

**B. Cyberbullying Is Pervasive, Harmful to School Children, and Can Substantially Disrupt the School Environment.**

Cyberbullying—bullying through the use of electronic devices or media—presents a distinct challenge for schools because of the ubiquity of electronic communications in a student’s daily life. Technology provides “new forms of bullying” and “has paved the way for greater blurring of boundaries for the engagement of bullying across settings such as school, home, and cyberspaces.”<sup>23</sup> While a child’s home may have once served as a “protective space from which to escape school bullying,” “cyberspace transcends these geographical demarcations.”<sup>24</sup>

Indeed, a growing number of school-aged children report being bullied by other students online, on their cell phones, or on other electronic media.<sup>25</sup> Such

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<sup>23</sup> Rachel E. Maunder & Sarah Crafter, *School Bullying From a Sociocultural Perspective*, 38 *Aggression & Violent Behav.* 13, 15 (2018).

<sup>24</sup> *Id.*

<sup>25</sup> See *What is Cyberbullying?*, Cyberbullying Res. Ctr., <https://tinyurl.com/ynsv5e3k>; *Information and Resources to Curb the Growing Problem of Cyberbullying*, Nat’l Crime Prevention Council, <https://tinyurl.com/ol5y35b1>; Sameer Hinduja & Justin W. Patchin, Cyberbullying Res. Ctr., *Cyberbullying: Identification, Prevention, and Response 2* (2021), <https://tinyurl.com/i8sdex6o> (In recent years, “most youth [are] drawn to social media (such as Instagram, Snapchat, TikTok, and Twitter), voice/text chat in popular games (Roblox, PUBG, Overwatch, Call of Duty Black Ops, Fortnite, God of War) and

cyberbullying is sadly pervasive among middle and high school students. One recent survey found that 59% of teenagers in the United States have personally experienced cyberbullying at some point in their lives.<sup>26</sup> In a 2019 nationally representative survey by the CDC, 15.7% of high school students reported being bullied by another student through texting, Instagram, Facebook, or other social media during the past year.<sup>27</sup> In state and local surveys, anywhere from 13-28% of middle school students also reported having been bullied electronically at some point.<sup>28</sup>

Cyberbullying can be “even more devastating” than “traditional” bullying because bullies can instantaneously spread messages targeting their victims to large audiences; they can cloak their identities “using anonymous accounts and pseudonymous screennames”; and adults may not witness or know how to detect these attacks.<sup>29</sup> Because the Internet provides a “distancing effect,” it often leads cyberbullies to “say and do crueler things”

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videosharing, streaming, and community sites (such as YouTube, Discord, and Twitch).”).

<sup>26</sup> See Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, Pew Res. Ctr. (Sept. 27, 2018), <https://tinyurl.com/1xxa7zxu>.

<sup>27</sup> *2019 Youth Risk Behavior Surveillance System*, Ctrs. for Disease Control and Prevention, <https://tinyurl.com/375uj2u8>.

<sup>28</sup> *2019 Youth Risk Behavior Surveillance System*, Ctrs. for Disease Control and Prevention, <https://tinyurl.com/1ukvb1ht>.

<sup>29</sup> Hinduja & Patchin, *supra* note 25, at 3.

than a schoolyard bully.<sup>30</sup> From websites mocking a student's alleged sexually transmitted disease, see *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011) (MySpace page dedicated to humiliating other student for allegedly having herpes), to social media posts denigrating classmates and teachers on account of their race, see *Shen v. Albany Unified Sch. Dist.*, No. 3:17-CV-02478-JD, 2017 WL 5890089, at \*2 (N.D. Cal. Nov. 29, 2017) (among other racist posts, one Instagram picture of Black classmate and basketball coach with nooses drawn around their necks, and another of Black student's hair with the caption, "Fucking nappy ass piece of shit"), student cyberbullies appear emboldened by the distance and anonymity provided by the Internet. And the effects of this conduct can be tragic, as cyberbullying victims are almost twice as likely to have attempted suicide compared to their peers who are not bullies or victims.<sup>31</sup>

Although cyberbullying often occurs outside of school hours,<sup>32</sup> its in-school consequences can be

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<sup>30</sup> See Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law, Prevention and Analysis*, 3 *Elon J. Undergraduate Res. Commc'ns.* 33, 34 (2012).

<sup>31</sup> Sameer Hinduja & Justin W. Patchin, *Bullying, Cyberbullying, and Suicide*, 14 *Archives Suicide Res.* 206, 216 (2010); see also *id.* (finding as well that both "bullying and cyberbullying victims and offenders were almost twice as likely to have reported that they attempted suicide as youth who were not victims or bullies") (emphasis added).

<sup>32</sup> See Patricia W. Agatston, Robin Kowalski, & Susan Limber, *Students' Perspectives on Cyber Bullying*, 41 *J. Adolescent Health* S59, S60 (2007).

severe and are not dependent on the time at which the bully acted. In the most recent school safety survey published by the U.S. DOE, principals at roughly one in five public middle and high schools reported that the school environment “was [negatively] affected by cyberbullying” at least once a week, and similar percentages reported that school staff resources were used to address cyberbullying at least once a week.<sup>33</sup>

These harmful effects can substantially interfere with students’ learning and work. In a recent case, after a student’s racist Instagram posts targeting his classmates with references to lynching and nooses were distributed throughout the school, students were “too upset to go to class,” “crying hysterically and talking loudly about the posts.” *Shen*, 2017 WL 5890089, at \*8. The school had to call in “mental health counselors to help calm down the students.” *Id.* One of the targeted students “missed multiple days of school and tests out of embarrassment and fear,” while another “had a hard time in school ever since [the incident] because she feels ‘paranoid about classmates taking photographs of me and using them in the most offensive ways.’” *Id.* It is, then, not surprising that a recent study found that “students who experienced cyberbullying (both those who were targets and those who admitted to cyberbullying others) perceived a poorer climate at their school than those who had not experienced cyberbullying.”<sup>34</sup>

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<sup>33</sup> Ke Wang et al., U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *Indicators of School Crime and Safety: 2019* 51-52 (2020).

<sup>34</sup> Hinduja & Patchin, *supra* note 25, at 7.

The shift to remote learning during the COVID-19 pandemic has brought the classroom, school activities, and many student-to-student interactions directly into the homes of students. “When children are using educational platforms that demand interactions through posts and comments and they are more connected with peers online, the opportunity for cyberbullying and other forms of online violence increases.”<sup>35</sup> During the pandemic, the combination of students spending far more time learning and interacting using online platforms, their “feelings of loneliness[,]” and a “lack of mental health counseling and mentoring from teachers” has likely increased the impact that cyberbullying has on students and the overall rate of cyberbullying.<sup>36</sup> The grim COVID-19 situation thus highlights how critical effective cyberbullying interventions are to student well-being and learning.

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<sup>35</sup> See Pouria Babvey et al., *Using Social Media Data for Assessing Children’s Exposure to Violence During the COVID-19 Pandemic*, *Child Abuse & Neglect*, at 2 (Sep. 2020) (in press), <https://tinyurl.com/1g8vkn64>.

<sup>36</sup> See Sarah Darmanjian, *Organizations Say Rise in Cyberbullying Likely During COVID-19 Isolation*, *News10* (Apr. 8, 2020), <https://tinyurl.com/6b3joh6c>.

**II. The Court Should Not Remove States' Authority to Address Off-Campus Bullying, Whether In-Person or Online, That Materially and Substantially Disrupts School.**

**A. By Law, Every State Addresses Bullying, and Many Require Schools to Address Disruptive Bullying Even If It Originates Off Campus.**

In 1999, in the aftermath of the Columbine High School massacre and in response to a bullying-related student suicide, Georgia enacted the first legislation to prohibit school bullying.<sup>37</sup> By 2015, all 50 States and the District of Columbia had enacted anti-bullying laws of their own, many in response to similar tragedies caused by bullying.<sup>38</sup> The Appendix to this

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<sup>37</sup> See Victoria Stuart-Cassel et al., U.S. Dep't of Educ., *Analysis of State Bullying Laws and Policies* xi (2011), <https://tinyurl.com/43uguebs>.

<sup>38</sup> See, e.g., Noah Bierman, *Grieving Family by His Side, Governor Signs Legislation*, Bos. Globe (May 4, 2010), <https://tinyurl.com/pp9c6p4x> (Massachusetts' anti-bullying law prompted by suicides of two students who were bullied); Krista Johnson, *[J.W.'s] Mom Shares Importance of Anti-bullying Training Following Son's Death*, Montgomery Advertiser (Sept. 22, 2019), <https://tinyurl.com/49nnfneb> (Alabama's recent anti-bullying law named after 10-year-old who committed suicide after being bullied, at least in part, online); see also Lisa Baumann, *Gov. Bullock Signs Montana Anti-Bullying Bill Into Law*, Great Falls Trib. (Apr. 21, 2015),

brief collects citations to the current versions of these laws and implementing regulations. Many of the laws are threatened by the Third Circuit's rule below, because that rule would not permit schools to address cyberbullying that, while meeting *Tinker's* standard for substantial impact on the educational environment or fellow students' rights, occurs off campus.

Every State's anti-bullying law "focus[es] on the responsibilities of schools [and school districts] to address bullying," directing them to develop and implement comprehensive policies to respond to bullying.<sup>39</sup> These laws and policies generally define the specific behaviors that constitute prohibited bullying and the scope of a school's jurisdiction to address it; mandate that school districts develop and implement anti-bullying policies and hold preventative trainings; and establish procedures for investigating, reporting, disciplining, and counseling students involved.<sup>40</sup> In these laws, States aim at the

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<https://tinyurl.com/3f5e4epx> (reporting that, with Montana's 2015 enactment, all 50 States had passed anti-bullying laws).

<sup>39</sup> Conn, *supra* note 22, at 419 (citation omitted); see Appendix (collecting anti-bullying laws from each State and the District of Columbia).

<sup>40</sup> See Stuart-Cassel et al., *supra* note 37, at xii. The state laws that most effectively protect youth against bullying and are "consistently associated with decreased odds of [student] exposure to both bullying and cyberbullying" include a statement of scope (including whether the school's policy extends off campus), a clear definition of what constitutes bullying, and lay out what school districts must include in their local policies. Mark L. Hatzenbuehler et al., *Associations Between Antibullying*

same limited set of harmful behaviors identified in the academic literature on bullying, typically focusing on conduct that repeatedly targets specific victims, and that causes them physical or emotional harm, destroys their property, or substantially interferes with their ability to participate in school programs.<sup>41</sup> And the vast majority of state laws expressly incorporate the *Tinker* standard to determine whether a student may be disciplined for bullying.<sup>42</sup>

All 50 States' laws authorize schools to develop policies to address bullying and cyberbullying that occurs on campus. *See* Appendix. In addition, the laws of 30 States and the District of Columbia require schools to regulate cyberbullying that occurs off campus, on non-school devices, and on non-school online platforms. *See id.*<sup>43</sup> Five more States have laws that expressly permit (but do not require) school policies to address a broader scope of bullying, including off-campus cyberbullying. *Id.*<sup>44</sup> Of these laws, the vast majority (33 of 36) expressly frame the

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*Policies and Bullying in 25 States*, 169 JAMA Pediatrics, at 1, 1, 5 (2015).

<sup>41</sup> *See* Appendix; *cf.* Juvonen & Graham, *supra* note 5 (social science definition of bullying); Gladden et al., *supra* note 4, at 7 (CDC definition of bullying).

<sup>42</sup> *See* Appendix; *see also* Conn, *supra* note 22, at 419.

<sup>43</sup> Nearly two-thirds of these laws also require schools to address off-campus bullying that does not involve electronic devices. *See* Appendix.

<sup>44</sup> Three of these laws similarly permit, but do not require, schools to address off-campus bullying that does not involve electronic devices. *See* Appendix.

school's authority to address cyberbullying by reference to the substantial effects on the school environment and on the separate right of students' to be secure and to be let alone articulated in *Tinker*. *Id.*; *see* 393 U.S. at 509, 513.<sup>45</sup>

Together, these laws reflect States' collective understanding of the importance of addressing bullying among students, while also respecting students' right to free speech that does not have the material negative impacts required by *Tinker*. And most States—recognizing that a vital aspect of effectively protecting students' health and ability to learn in school means addressing bullying—specifically address off-campus bullying when it has damaging effects on a student's ability to be secure in school and participate in educational activities.

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<sup>45</sup> Texas' anti-bullying statute is an example of a state law that prohibits off-campus cyberbullying that "interferes with a student's educational opportunities" or "substantially disrupts the orderly operation of a classroom, school, or school-sponsored or school-related activity." Tex. Educ. Code Ann. § 37.0832(a-1)(3). Florida's is another: it prohibits off-campus cyberbullying that "substantially interferes with or limits the victim's ability to participate in or benefit from the services, activities, or opportunities offered by a school or substantially disrupts the education process or orderly operation of a school." Fla. Stat. Ann. § 1006.147(2)(d). Massachusetts and New Hampshire have similar requirements. *See* Mass. Gen. Laws ch. 71, § 37O(b)(ii); N.H. Rev. Stat. Ann. § 193-F:4.

**B. The Student-Speech Doctrine Is Well-Suited to Address Bullying That Disrupts the School Environment but Originates Off Campus.**

State anti-bullying laws reflect the foundational understanding that, under *Tinker*, schools may regulate student speech that “would substantially interfere with the work of the school or impinge upon the rights of other students.” 393 U.S. at 509. As noted, States across the country have followed *Tinker* in crafting carefully tailored laws that prohibit in-person and online bullying that occurs off campus. This Court’s longstanding student-speech framework, while it may far predate the likes of Facebook and Twitter, is an appropriate standard in these contexts too.

*Tinker*’s balanced, practical standard—protecting both the school environment and “the rights of other students to be secure and be let alone,” *id.* at 508-09—readily applies in the context of school programs that address off-campus bullying. Indeed, off-campus bullying, including cyberbullying, is a harmful and often confrontational activity that is precisely the sort of student behavior that can materially and substantially disrupt the school environment and interfere with the student victims’ rights to be secure and let alone at school. *Id.* at 508-09, 513; *accord Kowalski*, 652 F.3d at 572.<sup>46</sup> Off-campus bullying, particularly when carried out online, can create a

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<sup>46</sup> See, e.g., Wang et al., *supra* note 33; Hinduja & Patchin, *supra* note 25, at 2, 7.

“platform for [students] . . . to direct verbal attacks towards classmate[s]” in school. *Kowalski*, 652 F.3d at 572-73. No less than in-school bullying, it causes mental and emotional harm that interferes with learning; forces victims to miss school to avoid further abuse; and creates the potential for continuing abuse (both in school and out) unless the school intervenes. *Id.* at 572-74; *see supra*, Argument I.A.-B.<sup>47</sup> Accordingly, States should be left, at least, to use *Tinker*’s framework to provide direction to their school districts to help them maintain a safe, healthy, and effective learning environment and protect students from abuse, a duty this Court has often recognized. *See Ginsburg v. New York*, 390 U.S. 629, 640 (1968) (recognizing State’s “independent interest in the well-being of its youth”).

Even the Third Circuit has previously recognized that “[t]here is no constitutional right to be a bully.” *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002). It follows that, no matter where one student’s bullying of another occurs, school administrators should be able to intervene when bullying targets a classmate and foreseeably causes substantial disruption in school or interferes with the

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<sup>47</sup> *See also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1152-53 (9th Cir. 2016) (student sexually harassed by classmates off campus reasonably expected “to feel less secure in school, affecting her ability to perform as a student and engage appropriately with her peers”); *cf. Doe v. Valencia Coll.*, 903 F.3d 1220, 1230-31 (11th Cir. 2018) (repeated, profane, unwelcome text messages sent to classmate off campus made her “concerned about attending school during the fall term because she was scheduled to be in class with” the harassing student).

victim's classwork or ability to be secure at school. By contrast, the Third Circuit's bright-line test insulates bullies from facing consequences for the school-based effects of their off-campus conduct and disables schools from preventing those harms, even if the bullies' conduct clearly, foreseeably, and even intentionally disrupts the school or interferes with the rights of students to be secure and let alone at school.<sup>48</sup> Moreover, such a rule focused exclusively on the physical location of the perpetrator and the school's ownership over the communication "channel," Pet. App. 31a, could even call into question state anti-bullying laws that cover off-campus speech that is

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<sup>48</sup> See also, e.g., *Doninger v. Niehoff*, 527 F.3d 41, 48-49 (2d Cir. 2008) (recognizing that "territoriality" not "a useful concept" for determining bounds of school administrators' authority, especially in context of modern communications) (quoting *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1058 n.13 (2d Cir. 1979) (Newman, J., concurring in the result)); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 395-96 (5th Cir. 2015) (en banc) (similarly noting that physical boundaries test unhelpful because "pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction"). One reason courts have rejected a strict territoriality approach is the need to consider that an off-campus speaker may intentionally direct the speech into the school environment. See *Bell*, 799 F.3d at 393 (focusing holding on "threats, intimidation, and harassment intentionally directed at the school community"); *Doninger*, 527 F.3d at 50 (student's intent that her off-campus speech "come onto the campus" influenced reasonable foreseeability analysis) (quoting *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216 (D. Conn. 2007)). The Third Circuit's rule, by contrast, would place no weight on the student's intent if bullying occurred off campus, even if the bully was intentionally directing the speech into the school environment to target a classmate.

“received” by the targeted student on campus, *see, e.g.*, Wyo. Stat. Ann. § 21-4-312.

Rejecting the Third Circuit’s categorical limitation of *Tinker* will not endanger students’ free speech. Only speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others” is subject to regulation by the school under *Tinker*. 393 U.S. at 513. And, to be sure, school officials may not restrict speech based on “undifferentiated fear or apprehension of disturbance” or a “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Id.* at 508-09.

Because school officials’ authority to regulate speech under *Tinker* is circumscribed, students have maintained robust exercise of their First Amendment rights in jurisdictions where courts have applied *Tinker* to some off-campus speech.<sup>49</sup> Indeed, the

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<sup>49</sup> Courts applying *Tinker* have not hesitated to enjoin school discipline of off-campus student speech where it failed to cause a reasonable fear of substantial disruption in the school. *See, e.g., Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1177, 1180, 1182 (E.D. Mo. 1998) (enjoining discipline for student’s personal webpage critical of school administration); *Klein v. Smith*, 635 F. Supp. 1440, 1441-42 & n.4 (D. Me. 1986) (permanently enjoining school suspension for student giving teacher the middle finger off campus). Other courts have protected students’ First Amendment rights in cases where the off-campus speech did not have a sufficient connection to the school environment. *See, e.g., Thomas*, 607 F.2d at 1050, 1052 n.17 (declining to apply *Tinker* to underground newspaper where students took steps to publish and distribute it off campus, but distinguishing “a case in which a group of students incites substantial disruption within the school from some remote

district court in this case applied *Tinker* and found that the discipline imposed was not justified by a reasonable fear of substantial disruption. Pet. App. 73a-75a; *accord* Pet. App. 45a-46a & n.1 (Ambro, J., concurring in the judgment). And, before this case, the Third Circuit had relied on *Tinker* to protect students' First Amendment rights in their off-campus speech in other cases, *see J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 931 (3d Cir. 2011) (en banc) (finding discipline for students' creation of parody MySpace profile of teacher unjustified under *Tinker*), as had district courts in that circuit, *see Dwyer ex rel. Dwyer v. Oceanport Sch. Dist.*, No. CV 03-6005, 2005 WL 8176151, at \*10 (D.N.J. Mar. 31, 2005) (same for student's comments on personal website); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (same for parody of school athletic director produced by student off campus).

The Third Circuit's novel rule upends the student-speech doctrine's reasonable framework with no regard for the harm that off-campus bullying and cyberbullying cause to our students' educations and lives. This is a harm that a majority of the States have sought to address by adopting anti-bullying laws that reach off-campus speech when bullying's foreseeable effects occur in school. In a world where student behavior on the internet permeates schools, *see* Pet. App. 28a-29a, these States have reasonably concluded that it is essential to focus on whether the speech substantially interferes with the educational

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locale"); *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (declining to apply *Tinker* to student drawing made at home and brought to school two years later by student's brother).

environment or students' abilities to be secure and learn in school, not the location where the student was standing when she pressed "send" or whether she was using a family-owned laptop rather than one provided by the school directly. The Court should reject the Third Circuit's approach and reaffirm the ability of schools to address off-campus bullying under the well-established student-speech framework.

**C. Other First Amendment Doctrines Do Not Adequately Preserve Schools' Ability to Address Bullying.**

The Third Circuit was correct in recognizing that "off-campus student speech . . . reasonably understood as . . . harassment targeted at specific students" "raise[s] different concerns" than those at issue on the facts of this case. Pet. App. 34a. But the Third Circuit's suggestion that schools may respond to this class of damaging student behavior by relying on the "true threat" doctrine and other narrow First Amendment exceptions, *see* Pet. App. 35a, is inadequate to meet the serious and pervasive problem of student bullying. Nor are these doctrines responsive to *Tinker's* essential insight that, in order to maintain a safe school environment where students can learn, schools must have the authority to address conduct that substantially disrupts the school environment or interferes with the rights of students to be secure and let alone at school.

Bullying does not always come in the form of one of the "well-defined and narrowly limited classes of speech" that traditionally fall outside the First

Amendment's protection, such as obscenity, defamation, fraud, fighting words, incitement of imminent violence, *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)), and "true threat[s]," *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (internal quotation marks omitted). Such doctrines are narrowly drawn to safeguard the "breathing space" that "First Amendment freedoms" need "to survive." *Gooding v. Wilson*, 405 U.S. 518, 522 (1972); see also *Watts*, 394 U.S. at 708 (because "debate on public issues should be uninhibited, robust, and wide-open" even "vituperative" or "abusive" speech may not rise to the level of a "true 'threat'"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982) (boycott organizer's "'threats' of vilification or social ostracism" constitutionally protected). For example, defamation requires "publication" to a person other than the person defamed. Restatement (Second) of Torts § 577 (1977). But students who bully their classmates off campus, whether in-person or online, can still derail their targets' ability to learn in school when they direct their verbal abuse solely to their victims without "publishing" their slurs to others.<sup>50</sup> And "fighting words" generally must be uttered "face-to-face," *Chaplinsky*, 315 U.S. at 573,

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<sup>50</sup> Cf. Charisse L. Nixon, *Current Perspectives: The Impact of Cyberbullying on Adolescent Health*, 5 *Adolescent Health, Med. & Therapeutics* 143, 143, 144-47 (2014) (noting that cyberbullying includes "sending harassing messages (via text or Internet)," and describing serious psychological impacts of cyberbullying on victims); *Doe*, 903 F.3d at 1225-27, 1230 (student's barrage of sexually harassing text messages sent directly to classmate made her "concerned about attending school" because they were scheduled to be in the same class).

and so would not include most online bullying, even if it were likely to lead to violent conflict later in the school. *Cf. Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 602 (W.D. Pa. 2007) (“A ‘MySpace’ internet page is not outside of the protections of the First Amendment under the fighting words doctrine because there is simply no in-person confrontation in cyberspace such that physical violence is likely to be instigated.”), *aff’d in part on other grounds*, 650 F.3d 205 (3d Cir. 2011) (en banc).<sup>51</sup>

Moreover, these limited doctrines fail to take into account the “special characteristics of the school environment,” *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (quoting *Tinker*, 393 U.S. at 506), that necessitate a wider range of tools for schools to protect their students’ well-being and ability to learn. In schools, due in part to compulsory attendance laws in most states, students are required to continue attending classes with classmates who may be

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<sup>51</sup> The Third Circuit’s suggestions that off-campus student speech that harasses other students might also be disciplined under programs that meet either strict scrutiny or an entirely new First Amendment exception based on some unspecified but “sufficiently weighty interest on the part of educators,” Pet. App. 35a, would be poor substitutes for *Tinker*’s familiar tests when applied to student bullying. The courts have applied *Tinker* for the past 50 years, and neither of the Third Circuit’s suggested approaches would currently provide clear guidance to school administrators or state policymakers about how they should shape their anti-bullying policies to make them constitutional, while still being able to effectively respond to bullying that occurs off-campus or online and substantially disrupts the school or a student’s ability to be secure and learn in school. Far from providing “up-front clarity,” Pet. App. 33a, the Third Circuit’s categorical rule would severely limit schools’ ability to rely on decades of court decisions applying *Tinker* to student speech.

bullying them online or when they step off campus. *See id.* at 424 (Alito, J., concurring) (students at school may be “at close quarters with other students who may do them harm”). Because of this “special characteristic of the school setting[,] . . . school officials must have greater authority to intervene before speech leads to violence,” *id.* at 424-25, or other harmful effects on students’ physical and mental health and ability to learn. *Tinker’s* reasonable standards maintain students’ free speech rights generally, yet “permit[] school officials to step in before actual violence erupts,” *id.* at 425, and lasting harm is done to students.

In sum, *Tinker* wisely permits schools to focus on their core mission—providing a safe and productive learning environment—by allowing them to respond to student speech that interferes with the ability of other students to learn. The Court should decline to adopt an unwieldy and damaging geographic limitation on *Tinker’s* application and should instead ensure that schools may continue to respond when students use technology or step off campus to bully their classmates, infringing their classmates’ rights to be secure and learn in our schools.

## CONCLUSION

The Court should reject the holding of the court of appeals that *Tinker* categorically does not apply to off-campus speech.

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**APPENDIX TABLE OF CONTENTS**

Appendix: State Anti-Bullying Laws..... 1a

**APPENDIX: STATE ANTI-BULLYING LAWS**

The following table contains a list of selected laws and implementing regulations of all 50 States and the District of Columbia addressing bullying in the school context. Every State's law addresses bullying, including cyberbullying, that occurs at school. As displayed in the table, the laws of 30 States and the District of Columbia also require schools to address cyberbullying that occurs "off campus." The laws of 5 more States require schools to address cyberbullying on campus, and expressly permit school districts to adopt policies that have a broader scope, including addressing cyberbullying that occurs off campus.

Similarly, the table lists those state laws that *require* schools to address some non-cyberbullying that occurs off campus, and those that expressly *permit* schools to adopt policies with a more expansive scope, including some non-cyberbullying that occurs off campus.

Finally, 39 States' laws (and those of the District of Columbia) incorporate *Tinker's* standard to determine whether a student may be disciplined for bullying, authorizing schools to address bullying behavior that foreseeably creates a material or substantial disruption to the school environment, or interferes with students' rights to learn at school.

## 2a

	<b>Expressly Require or Permit Schools Address Off- Campus Cyber</b>	<b>Expressly Require or Permit Schools Address Off- Campus Non-Cyber</b>	<b>Based on Tinker Standard</b>	<b>Provisions</b>
<b>AL</b>	Require	Require	Yes	Ala. Code §§ 16-28B-3(1), -4
<b>AK</b>	No	No	Yes	Alaska Stat. §§ 14.33.200, .250
<b>AZ</b>	No	No	No	Ariz. Rev. Stat. Ann. § 15-341(A)(36)
<b>AR</b>	Require	No	Yes	Ark. Code Ann. § 6-18-514(b)(2)-(3), (f)
<b>CA</b>	Require	Require	Yes	Cal. Educ. Code §§ 48900(r), (s), 48900.2-48900.4
<b>CO</b>	No	No	No	Colo. Rev. Stat. §§ 22-32-109.1(1)(b), (2)(a)(I)(K), (2)(c)(I)(C), -93-101 to -93-106
<b>CT</b>	Require	Require	Yes	Conn. Gen. Stat. § 10-222d(a)(1), (b)
<b>DE</b>	Require	No	No	Del. Code Ann. tit. 14, §§ 4161(1), 4164; 14 Del. Admin. Code § 624
<b>DC</b>	Require	No	Yes	D.C. Code §§ 2-1535.01(2)(A), -1535.03(a)
<b>FL</b>	Require	No	Yes	Fla. Stat. § 1006.147
<b>GA</b>	Require	No	Yes	Ga. Code Ann. § 20-2-751.4
<b>HI</b>	No	No	No	Haw. Code R. §§ 8-19-2, -6
<b>ID</b>	No	No	No	Idaho Code § 18-917A
<b>IL</b>	Require	No	Yes	105 Ill. Comp. Stat. 5/27-23.7
<b>IN</b>	Require	Require	Yes	Ind. Code §20-33-8-13.5
<b>IA</b>	No	No	Yes	Iowa Code § 280.28(2)(a)-(b)
<b>KS</b>	No	No	No	Kan. Stat. Ann. § 72-6147
<b>KY</b>	Require	Require	Yes	Ky. Rev. Stat. Ann. § 158.148
<b>LA</b>	Require	Require	Yes	La. Stat. Ann. § 17:416.13(B)-(C)
<b>ME</b>	Require	Require	Yes	Me. Stat. tit. 20-A, § 6554
<b>MD</b>	Require	Require	Yes	Md. Code Ann., Educ. §§ 7-424(a)(1)-(3), -424.1, -424.3

	<b>Expressly Require or Permit Schools Address Off- Campus Cyber</b>	<b>Expressly Require or Permit Schools Address Off- Campus Non-Cyber</b>	<b>Based on Tinker Standard</b>	<b>Provisions</b>
<b>MA</b>	Require	Require	Yes	Mass. Gen. Laws. ch. 71, § 370(a)-(d)
<b>MI</b>	No	No	Yes	Mich. Comp. Laws § 380.1310b(1), (10)(a)-(c)
<b>MN</b>	Require	No	Yes	Minn. Stat. § 121A.031, subds. 1(a), 2(e)-(f), 3
<b>MS</b>	No	No	Yes	Miss. Code Ann. § 37-11-67
<b>MO</b>	Permit	No	Yes	Mo. Rev. Stat. § 160.775
<b>MT</b>	Require	No	Yes	Mont. Code Ann. §§ 20-5-208, -209; Mont. Admin. R. 10.55.719(1), (4)(c)
<b>NE</b>	No	No	No	Neb. Rev. Stat. § 79-2,137
<b>NV</b>	No	No	Yes	Nev. Rev. Stat. §§ 388.122, 123, 135
<b>NH</b>	Require	Require	Yes	N.H. Rev. Stat. Ann. §§ 193- F:3, 4
<b>NJ</b>	Require	Require	Yes	N.J. Stat. Ann. §§ 18A:37-14, -15.3
<b>NM</b>	Require	No	Yes	N.M. Stat. Ann. § 22-35-2(A)- (C), -35-3(A)
<b>NY</b>	Require	Require	Yes	N.Y. Educ. Law §§ 11(7)-(8), 13
<b>NC</b>	Permit	Permit	Yes	N.C. Gen. Stat. §§ 115C- 390.2(c), -407.15, .16
<b>ND</b>	Require	Require	Yes	N.D. Cent. Code §§ 15.1-19-17, -18, -20
<b>OH</b>	No	No	No	Ohio Rev. Code Ann. § 3313.666(A)-(B)
<b>OK</b>	Require	No	No	Okla. Stat. tit. 70, §§ 24- 100.3(A)(1), (3), 24-100.4(A)
<b>OR</b>	Require	Require	Yes	Or. Rev. Stat. §§ 339.351, .356
<b>PA</b>	Permit	Permit	Yes	24 Pa. Cons. Stat § 13-1303.1- A

## 4a

	<b>Expressly Require or Permit Schools Address Off- Campus Cyber</b>	<b>Expressly Require or Permit Schools Address Off- Campus Non-Cyber</b>	<b>Based on Tinker Standard</b>	<b>Provisions</b>
<b>RI</b>	Require	Require	Yes	R.I. Gen. Laws §§ 16-21-33, -34
<b>SC</b>	No	No	Yes	S.C. Code Ann. §§ 59-63-120, -140
<b>SD</b>	Permit	No	Yes	S.D. Codified Laws §§ 13-32-14 to -16, -18, -19
<b>TN</b>	Require	Require	Yes	Tenn. Code Ann. §§ 49-6-4502, -4503(a), (b)
<b>TX</b>	Require	No	Yes	Tex. Educ. Code Ann. § 37.0832
<b>UT</b>	Require	Require	Yes	Utah Code Ann. §§ 53G-9- 601(2)-(4), -602
<b>VT</b>	Require	Require	Yes	Vt. Stat. Ann. tit. 16, §§ 11(32), 570(b)
<b>VA</b>	Require	Require	Yes	Va. Code Ann. §§ 22.1- 276.01(A), -279.6; Va. Bd. of Educ., <i>Model Policy to Address Bullying in Virginia's Public Schools</i> 4 (2013), <a href="https://tinyurl.com/4xcjtpxz">https://tinyurl.com/4xcjtpxz</a>
<b>WA</b>	No	No	Yes	Wash. Rev. Code § 28A.600.477(1), (3), (5)
<b>WV</b>	Permit	Permit	No	W. Va. Code §§ 18-2C-2, -2C- 3(a), (b)
<b>WI</b>	No	No	No	Wis. Stat. § 118.46
<b>WY</b>	Require	Require	Yes	Wyo. Stat. Ann. §§ 21-4- 312(a)(i), -313, -314(a), (b)