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2 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 2 MAP 2021

J.S., a minor by his parents, M.S. and D.S.,

Appellees,

v.

Manheim Township School District,

Appellant.

BRIEF OF *AMICI CURIAE*, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA and EDUCATION LAW CENTER In Support of Appellees

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Appeal from the Order of the Commonwealth Court dated May 13, 2020, Commonwealth Court Docket No. 341 CD 2019, affirming the Order of the Court of Common Pleas of Lancaster County dated February 25, 2019, at Docket No. CI-18-04246

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STATEMENT OF INTEREST OF AMICI CURIAE

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization dedicated to preserving and defending the principles of liberty and equality embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Pennsylvania is one of its state affiliates. The ACLU and ACLU of Pennsylvania have appeared many times as both counsel and *amicus curiae* in federal and state courts at all levels in cases involving due process, free speech, and students' freedom of expression. The proper resolution of this case is thus a matter of substantial importance to the ACLU and its members.

The **Education Law Center-PA** (ELC) is a statewide nonprofit legal advocacy organization dedicated to ensuring that all Pennsylvania's children have access to a quality public education, beginning in early childhood. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC works to eliminate systemic inequities that lead to disparate educational outcomes based on race, gender, gender identity/expression, sexual orientation, nationality, and disability status. Our priority areas include dismantling the school-to-prison pipeline and ensuring that all students have access to the affirming supports and services they need to thrive in school.

No one other than *amici* or its counsel paid for the preparation of this brief or authored it, in whole or in part.

SUMMARY OF ARGUMENT

The fundamental duty of public schools in this Commonwealth to comply with constitutional principles of due process and free speech is at its zenith when schools seek to expel a student. Students have a due process right to cross-examine witnesses against them, and state law, if interpreted to deprive them of that right, must be held unconstitutional.

Students also have the right to express themselves under the First Amendment to the U.S. Constitution and Article I, Section 7 of the Pennsylvania Constitution, a right that is coextensive with that of adults when young people are outside the school environment. Accordingly, schools cannot punish students for their off-campus speech unless they can prove that it falls outside constitutional protection. That is a high bar and one that the school failed to meet here. Although *amici* urge this Court to extend its ruling in *Commonwealth v. Knox* to require alleged threats to be analyzed under a subjective, speaker-based test in school disciplinary hearings, the test applied does not matter in this case, as Appellant failed to prove that Appellee J.S.'s speech constituted a true threat under either a subjective or objective test.

Appellant attempts to justify the expulsion under *Tinker v. Des Moines Independent School District*, but even if the expulsion were permissible under the First Amendment, punishing students for constitutionally protected, off-campus speech based on its disruptive effects on the school would violate Article I, Section

7 of the Pennsylvania Constitution and exacerbate harms students already experience from discriminatory school discipline practices.

I. DUE PROCESS REQUIRES THAT J.S. AND ALL STUDENTS HAVE THE RIGHT TO CROSS EXAMINE WITNESSES.

Students' due process rights in formal expulsion hearings are well established and encompass the right to cross-examine witnesses. This critical protection is important in the school discipline context because deprivation of education has lifelong consequences, discipline procedures heavily favor schools,[1] and school disciplinary decisions disproportionately impact Black students and other marginalized students.

A. A Student's Right to Due Process Prior to Expulsion Is Foundational and Longstanding.

In Pennsylvania, a student's unequivocal right to an expulsion hearing dates to the Common School Laws of 1854, Act of May 8, 1854, P.L. 617, No. 610, § 23. As stated in subsequently adopted implementing regulations: "Education is a statutory right, and students *shall* be afforded due process if they are to be excluded from school." 22 Pa. Code § 12.8(a) (emphasis added). As the U.S. Supreme Court has consistently made clear, the fundamental purpose of due process is to secure individuals against arbitrary action by government and place them under the

[1] "Schools" encompasses school entities defined by 22 Pa. Code § 4.3 as including a public school district, charter school, cyber charter school, AVTS, or intermediate unit.

protection of the law. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).

The right to confront witnesses in this context is similarly well established. "[Students in 'school hearings'] are entitled to know what testimony had been given against him and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony." *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. C.C. 77 (1887); *see also Geiger v. Milford Indep. Sch. Dist.*, 51 Pa. D. & C. 647, 652 (Pike Co. C.P. 1944) ("A proper hearing can only be one held after an accused has … [an] opportunity to face his accusers, to hear their testimony, examine any and all witnesses testifying against him.").

In *Goss v. Lopez*, 419 U.S. 565 (1975), the U.S. Supreme Court recognized that procedural due process must be afforded to students facing school suspension even when it is of limited duration (*i.e.*, up to ten days). Pennsylvania regulations implementing this seminal case extend additional due process protections to students beyond those set forth in *Goss*. *See* Pa. Code §§ 12.6(b)(2) , 12.8(b). The hearing protections adopted by state law align with the fundamental requirement that due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

B. The Right to Cross Examine Witnesses Is Required to Prevent Students from Being Unlawfully Denied Their Right to an Education.

The Pennsylvania Code enumerates three interconnected rights involving witnesses that apply to all students in formal hearings:

> (5) The student has the right to be presented with the names of witnesses against the student, and copies of statements and affidavits of those witnesses.
>
> (6) The student has the right to request that the witnesses appear in person and answer questions or be cross-examined.
>
> (7) The student has the right to testify and present witnesses on his own behalf.

22 Pa. Code §12.8(b)(5)–(7).

Collectively, these provisions are intended to provide due process and prevent a student from being unlawfully denied their right to an education. If a school relies on a witness to meet its burden of proof, due process requires that students have a right to question the witnesses against them. That is because "[o]ne of the basic and fundamental reasons for a formal hearing and the procedure of cross-examination and the presentation of witnesses is to arrive at the truth." *Oravetz v. W. Allegheny Sch. Dist.*, 74 Pa. D. & C.2d 733, 743 (Pa. Com. Pl. 1975).

As the Pennsylvania School Boards Association notes, governing boards' ability to compel the attendance of witnesses is an essential part of carrying out their statutorily mandated duties to provide due process—and is an authority they already

possess. *See* Brief of *Amicus Curiae* Pennsylvania School Boards Ass'n ("PSBA") at 8. We agree. Governing boards have an obligation to act in response to a request for a witness and at minimum are authorized to compel any witnesses relied on by the school.

This aligns with the core principles of due process, which require, among other things, an opportunity to hear the evidence adduced by the opposing party, cross-examine witnesses, and introduce evidence on one's behalf. *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712 (Pa. Commw. Ct. 2010). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses," and this holds true even when "administrative . . . actions were under scrutiny." *Goldberg v. Kelly*, 397 U.S. 254, 269–70 (1970); *see also Hammad v. Bureau of Prof'l & Occupational Affairs, State Bd. of Veterinary Med.*, 124 A.3d 374, 381 (Pa. Commw. Ct. 2015).

Students' enumerated right to cross examine witnesses against them cannot simply be read to be no right at all. If the Court concludes that 22 Pa. Code §12. p8 does not provide governing bodies with the authority to compel witnesses, due process requires that schools be prohibited from relying on witnesses' prior statements until this error is corrected by the Pennsylvania General Assembly.

C. Requiring Strict Adherence to Students' Due Process Protections Is Necessary Given the Advantages Schools Possess In Expulsion Hearings.

Schools possess a number of inherent advantages when moving to expel a student. Schools are highly experienced in the expulsion process and procedure; they typically employ key witnesses; and they have preexisting relationships with the governing board that controls the process. In other words, schools have the home-court advantage. The unequal knowledge and lack of familiarity with the process, as well as the absence of legal counsel in many cases, increase the likelihood that students will be expelled. These disparities also make it difficult for parents to identify and object to violations of due process, necessary for timely and successful appeals. For these reasons, the Court should vigilantly enforce the due process protections enumerated in 22 Pa. Code § 12.8 to ensure that students' right to attend school is not arbitrarily or illegally denied.

School advantages include:

Notice & Opportunity to Prepare: Students are entitled to a minimum of only three days' notice prior to the formal hearing. 22 Pa. Code § 12.8(b)(2). Schools, however, regularly begin planning to expel a student well before. Schools often first suspend a student, buying additional time to prepare. Unlike the numerous protections afforded in a formal expulsion hearing, a suspension of 1-10 days triggers more limited due process. 22 Pa. Code §§ 12.6(c); 12.8(c).

Access & Control of Records: Schools also have access to the relevant records, and typically employ and control the personnel who create, inform, and manage those records. This can include incident reports, video footage, witness statements, and other documentation about the actions being charged. Equally important, schools hold students' broader education records—which are needed if a parent is to object to their child's discipline as a violation of federal civil rights laws.[2] While parents have the right to inspect and review their child's education records under the Family Educational Rights and Privacy Act, schools can take up to 45 days to fulfill that request. 20 U.S.C. § 1232g; 34 C.F.R. §99.10(b). On the other hand, schools have these records at their fingertips.

Legal Representation: Schools in Pennsylvania are represented by legal counsel prior to and throughout the expulsion process yet parents are rarely represented.[3] While some attorneys practice student-side special education law, few attorneys handle school discipline cases, especially outside of Allegheny and Philadelphia counties. *See* Kevin Hoagland-Hanson, *Getting Their Due (Process):*

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[2] For example, a proposed expulsion may violate the rights of a student with disabilities who is entitled to a manifestation determination within ten days of the decision to change the student's placement to ensure that the child is not unlawfully excluded due to disability. 34 C.F.R. § 300.530(e). Limited English proficient parents and students must receive appropriate interpretation and translation services in discipline matters. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 200d, 34 C.F.R., Part 100. All students must be free from discrimination on the basis of their race, disability, sex, etc. *See* Title VI, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990.

[3] While J.S. continues to have the benefit of counsel in this matter, he is not representative of the students who are at the greatest risk of exclusionary discipline. *See* Section IIID, *infra*.

Parents and Lawyers in Special Education Due Process Hearings in Pennsylvania, 163 U. Pa. L. Rev. 1805, 1823 (2015) (noting lack of pro bono and legal services attorneys in state's education bar).

Deferential Adjudicator: Schools also have the benefit of an adjudicator who is highly deferential to the school's position. An expulsion hearing is an administrative proceeding before the school's own governing board, committee of the board, or a hearing officer delegated by the board. 24 P.S. § 13-1318. The distinction between the school (the 'prosecutor') and its governing board (the 'judge') is often nebulous at best— and from a student and parent perspective, practically nonexistent. ELC regularly hears from families who echo the same message Manheim Township School District ("MTSD") communicated to J.S.'s parents: "the board never—never goes away from our recommendation." (R. 110a). This statement is likely true. The decisions of governing boards are often not impartial, but instead routinely defer to the actions and recommendations of their school's own administrators. *See* Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 Minn. L. Rev. 823, 855–56 (2015).

Against this backdrop, it is well documented that Pennsylvania's system of school discipline disproportionately excludes and harms students of color, students with disabilities, and LGBTQ+-identifying students. *See* Section IIID, *infra*. For all these reasons, it is critical for this Court to maintain and protect the important due

process protections to which students are entitled in formal expulsion hearings and hold that denying students the right to cross-examine witnesses against them is an unconstitutional violation of their due process rights.

II. THIS COURT SHOULD ADOPT A SUBJECTIVE, SPEAKER-BASED STANDARD FOR DETERMINING WHETHER A STATEMENT CONSTITUTES A TRUE THREAT.

Unless speech falls outside the protection of the First Amendment—*e.g.*, because it is a true threat or obscene—the Constitution forbids the government to punish the speaker. *See Virginia v. Black*, 538 U.S. 343, 358–59 (2003). When a school imposes discipline on students for their speech, it must prove that the speech violated school policy ***and*** is not entitled to constitutional protection. *Amici* agree with Appellee J.S. that MTSD has failed to meet its burden of showing that J.S. violated the "terroristic threats" policy or that J.S.'s Snaps were "true threats" under either an objective, listener-based standard or a subjective, speaker-based standard.

In *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018), this Court held that "an objective, reasonable listener-based standard such as that used in *J.S.* is no longer viable for purposes of a criminal prosecution pursuant to a general anti-threat enactment." *Id.* at 1156–57. Instead, the government must prove that the speaker acted with an intent to terrorize or intimidate. *Id.* at 1158. The Court has not said whether an objective, reasonable listener-based standard can still be applied in other contexts, such as school expulsion hearings. This Court should make clear that

subjective intent to threaten is an essential element of any constitutionally proscribable true threat to avoid the risk that protected speech will be unduly chilled, especially when the speaker is a child.

Under the purely objective standard for evaluating true threats, a speaker may be "subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention." *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J., concurring). In other words, it is essentially a "negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners." *Id.* Standing alone, this objective analysis "asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way." *United States v. Jeffries*, 692 F.3d 473, 484–85 (6th Cir. 2012) (Sutton, J., concurring *dubitante*).

The objective standard conflicts with First Amendment principles that have long required the government to prove a speaker's subjective intent. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (limiting "incitement" to speech directed to causing imminent lawless action); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 283 (1964) (requiring "actual malice" to limit libel of public figures); *Scales v. United States*, 367 U.S. 203, 221 (1961) (adopting

"specific intent" standard to protect right of association). These principles are important to protecting the "breathing space" this nation's commitment to free speech requires.

First, allowing punishment of speech without regard to the speaker's intended meaning runs the risk of punishing protected expression simply because it is crudely or zealously expressed. As any secondary school teacher or parent of a teenager can attest, such speech is a hallmark of adolescence. Moreover, where the line between protected and unprotected speech is unclear, speakers may engage in self-censorship to avoid potentially serious consequences of misjudging how their words will be received. Sometimes there will be sufficient contextual detail to make it clear whether the speaker communicated a true threat or was engaged in some form of protected First Amendment expression. But many times—and particularly in the case of adolescents' online speech—the context surrounding a particular expression and the facts surrounding its communication may be thin or difficult to ascertain.

Second, requiring subjective intent protects against the risk that a speaker will be punished for words that are taken out of context. In this day and age, a speaker who creates an expression purely for himself, or for only one or several other recipients, may very well find the expression transmitted to a forum he never intended, communicated in a way he never imagined, and published to individuals in a wider audience that he never contemplated would see and/or hear it. Actions

taken by others, completely beyond the purview of the speaker, place the speaker's statements in front of audiences that the speaker had no expectation or purpose to reach. *See, e.g.*, Danah Boyd, *It's Complicated: The Social Lives of Networked Teens*, 31–32 (2014).

Online communications can easily become decontextualized by third parties with whom the speaker has no connection. Online communication fora often reflect their own conventions of language and expression. Statements made to a close-knit community are open to misinterpretation when taken out of context or heard or read by a newcomer who is not familiar with the conventions or practices of that community. Applying an objective, listener-based standard would chill constitutionally protected speech, as speakers would bear the burden of accurately anticipating whether their expressions could be taken as threats by unfamiliar listeners or readers.

This case illustrates the point. J.S. and Student One exchanged messages and images via Snapchat over a series of ten days. *J.S. v. Manheim Twp. Sch. Dist.*, 231 A.3d 1044, 1045 (Pa. Commw. Ct. 2020). Their communications only came to the attention of school officials because Student One posted one of J.S.'s messages to his Snapchat story, making it visible to others. *Id.* at 1046. The Snap featured a photo of Student Two singing into a microphone with the caption "I'm shooting up the school this week. I can't take it anymore I'm done!" with a photo-shopped image

of J.S. wearing "Elton John" glasses, apparently watching Student Two's performance. *Id.* Student One did not obtain J.S.'s permission to publicize the private Snap, and J.S. asked him to remove it immediately. *Id.* By that point, the damage had been done. Approximately 20-40 students viewed the Snap and one reported it to his father who worked at the school. *Id.* When viewed in context, it is obvious that J.S. did not intend to threaten Student One or the school and only intended the Snaps as a (poorly conceived) joke, suggesting that Student Two fit the profile of a school shooter. But taken out of context, the Snaps caused fear and alarm, a reaction J.S. never intended and did not foresee.

Finally, a subjective test also advances what many consider the First Amendment's important function as a safety valve and a vehicle for cathartic release. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies"). It provides "breathing space" for people to express their frustrations and fears. This freedom is especially important to young people who, from a developmental perspective, are less emotionally equipped than adults to express themselves in a socially acceptable manner.

Indeed, for students like J.S., a requirement that the school prove an intent to threaten provides the space they need to process their fears about school shootings. J.S.'s creation of a meme in which he joked about another student fitting the profile

of a school shooter allowed him to take a very frightening event—one that occurs with such frequency in our nation's schools that students must be trained about what to do in "active shooter" situations—and poke fun at it. This is a common way for adolescents to process their fears about school shootings.[4] While it would be appropriate for J.S.'s parents and school officials to explain to him that the Snaps were distasteful and could create fear in others, expelling J.S. for the Snaps only teaches him and other students that it is impermissible to express their feelings about school shootings, depriving both students and the adults who care for them of the opportunity to discuss those fears.[5]

Requiring the government to prove that a speaker intended to threaten is thus no less important to protecting free speech in non-criminal, school discipline cases than it is in criminal cases, and this Court should require a subjective, speaker-based standard to be applied in all cases in which the government justifies restrictions on speech due to its threatening content.[6]

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[4] *See* A.J. Willingham, *The teens of TikTok are taking on school shootings*, CNN, Oct. 2, 2019, 6:33 A.M., https://www.cnn.com/2019/10/02/business/tiktok-school-shootings-trnd/index.html.

[5] *See* Nikki Grant, *A majority of U.S. teens fear a shooting could happen at their school, and most parents share their concern*, Pew Research Center, April 18, 2018, https://www.pewresearch.org/fact-tank/2018/04/18/a-majority-of-u-s-teens-fear-a-shooting-could-happen-at-their-school-and-most-parents-share-their-concern.

[6] *Knox* left open whether the government must prove that a defendant facing criminal charges for a "true threat" acted with specific intent to threaten or with reckless disregard. 190 A.3d at 1162 (Wecht, J., concurring and dissenting). The Court need not reach that decision here because MTSD has failed to prove that J.S. acted with the requisite intent under either standard.

III. STUDENTS IN PENNSYLVANIA ENJOY FULL FREE-SPEECH RIGHTS WHEN THEY ARE OUTSIDE THE SCHOOL ENVIRONMENT.

Outside of school, government may not penalize speech because listeners find it offensive or disagreeable. That principle, and the related prohibitions on content and viewpoint discrimination, apply equally where young people are involved. Inside school, however, under the U.S. Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), authorities may punish any student speech that leads to, or might lead to, "substantial disruption"—even if the disruption is caused by others who find the idea expressed offensive or disagreeable. *Tinker* is thus a stark exception to the First Amendment's most fundamental rule, and one carefully confined to the "school environment"—namely, where schools exercise supervisory responsibility, in school, at school-sponsored or -supervised events, and when students are traveling between school and home.

The U.S. Court of Appeals for the Third Circuit recognized the importance of this in-school vs. out-of-school distinction when it held that public schools cannot punish students' off-campus expression under *Tinker*. *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 189 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976

(2021).[7] Although schools can restrict speech *in school* that conflicts with the special needs of the school environment, "'the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.'" *Id.* (quoting *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring)). The Third Circuit's rule "is true to the spirit of *Tinker*, respects students' rights, and provides much-needed clarity to students and officials alike." *Id.*

That rule is also consistent with Article I, Section 7 of the Pennsylvania Constitution, Pennsylvania statutory law, and this Court's precedent. And it protects students of color and other marginalized students from being disproportionately targeted for school discipline as a result of their off-campus speech. Accordingly, regardless of how the High Court rules in *B.L.*, the law of this Commonwealth provides an independent basis for according full protection to student expression that occurs outside the school environment.

[7] The U.S. Supreme Court granted the school district's petition for certiorari on January 8, 2021, and oral argument is scheduled for April 28, 2021. A decision in *B.L.* is expected by the end of the Court's 2020-21 term. Sara Rose, counsel for *amici* in this case, is also counsel for B.L. *Amici* agree with the suggestion of *Amicus* PSBA (at 17) that, if the question of what standard governs students' off-campus speech is dispositive, the Court should consider delaying oral argument until *B.L.* is decided and provide the parties and *amici* with an opportunity to file supplementary briefs.

A. Article I, Section 7 Protects Young People from Content-Based Restrictions on Their Speech When They Are Outside the School Environment.

This Court has long recognized that Article I, Section 7 provides more protection for speech than the First Amendment to the U.S. Constitution. *See Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 193 (Pa. 2003) ("Article I, [Section 7] has been recognized as providing broader freedom of expression than the federal constitution."); *Melvin v. Doe*, 836 A.2d 42, 47 n.9 (Pa. 2003) (This Court "has repeatedly determined that Article I, section 7 affords greater protections to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment."); *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002) (Article I, Section 7 "is an ancestor, not a stepchild of the First Amendment."). Article I, Section 7 "was 'designed to prohibit the imposition of prior restraints upon the communication of thoughts and opinions.'" *Commonwealth v. Tate*, 432 A.2d 1382, 1388 (Pa. 1981) (quoting *William Goldman Theatres, Inc. v. Dana*, 173 A.2d 59, 62 (Pa. 1961)). It "specifically affirms the 'invaluable right' to the free communication of thoughts and opinions, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. *Pap's A.M.*, 812 A.2d at 603 (quoting Pa. Const. art. I, § 7). And it subjects content-based restrictions on expression to the highest level of scrutiny. *Id.* at 612. Allowing schools to punish students for speech

outside the school environment based on its potential to cause a disruption at school would contradict these protections.

First, allowing schools to punish young people for communicating their thoughts and opinions outside the school environment based on the potential disruptive effect on their school would essentially impose a prior restraint on the speech of young people 24 hours a day, 365 days a year. *See Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 46 (10th Cir. 2013) ("[I]n *Tinker* itself, the action under review was a form of prior restraint."). Before engaging in any speech, whether it be at church, at the dinner table, at a protest, or on social media, young people who attend public school in the Commonwealth would have to determine first whether their speech could create a risk of disruption to their school. Such a risk depends on many factors, not least of which is other students' reaction to the speech.[8] The only way to avoid punishment for potentially disruptive speech would be to have it pre-approved by school officials first or to censor oneself, the very definition of prior restraint.

Second, allowing public schools to punish students for off-campus speech would violate young people's right to "speak freely" when they are outside of school.

[8] For instance, federal courts have permitted schools to prohibit students from wearing clothing bearing expressive messages due to the risk that other students will react disruptively to the speech. *See, e.g., Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 778 (9th Cir. 2014) (upholding school's ban on clothing bearing U.S. flag on Cinco de Mayo due to concerns that other students would react violently to the message expressed).

When untethered to the school environment and applied to speech in the outside world, the *Tinker* standard is inescapably vague. Neither of *Tinker*'s prongs—"substantial disruption" or "interference with the rights of others"—provide sufficient guidance for what speech is allowed outside school. Were a town to enact an ordinance prohibiting speech that "leads to substantial disruption or interferes with the rights of others," it would be unconstitutionally vague. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (prohibition that turns on a listener's reaction is "vague . . . in the sense that no standard of conduct is specified at all").

Third, allowing public schools to punish students for off-campus speech under *Tinker* would impose content-based restrictions on young people's expression.[9] "As a general rule, the First Amendment prohibits content-based restraints." *Knox*, 190 A.3d at 1164 (Wecht., J., concurring and dissenting). This principle applies to "content-based regulation[s] . . . [of] speech directed at children," "[e]ven where the protection of children is the object." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 794, 804–05 (2011) (invalidating regulation of violent video games for minors). *Tinker* established a narrow exception to the First Amendment's prohibition on

[9] In *S.B. v. S.S.*, 243 A.3d 90, 112–13 (Pa. 2020), the Court declined to separately analyze a content-neutral restriction on a parent's free speech rights under Article I, Section 7. Because *Tinker* allows schools to restrict speech based on its content, heightened scrutiny is required. *See, e.g., Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745 (5th Cir. 2009) ("when a school imposes content or viewpoint based restrictions the court will apply *Tinker*").

content discrimination. *Tinker* allows schools to punish speech for its content when "the school authorities ha[ve] reason to anticipate that the [speech] would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 506, 509. Punishing young people's expression under *Tinker* when they are outside the school environment would conflict with this Court's interpretation of Article I, Section 7 to mandate the highest level of scrutiny for content-based restrictions on speech. *See Pap's A.M.*, 812 A.2d at 612. A rule that allows schools to prohibit any speech outside the school environment if it creates a risk of substantial disruption to the school environment cannot withstand strict scrutiny.

There is precedent for this Court according greater rights to students under the Pennsylvania Constitution than those to which they are entitled under the federal Constitution. *See Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d 76, 88 (2003) ("Article I, Section 8 mandates greater scrutiny in the school environment.") (cleaned up). This Court should not hesitate to do the same here should the High Court reduce young people's free-speech rights everywhere to the diminished protections that apply in school. When their expression occurs outside the school environment, students are entitled to the same protection as any other speaker under Article I, Section 7.

B. Pennsylvania Schools Lack Statutory Authority to Punish Students for Off-Campus Speech.

In addition to the protections afforded by constitutional law, the authority of schools to discipline students is also limited by state statute. *See* 24 P.S. § 5-510; § 13-1317. State law limits school officials' power to discipline students to when students are "under the district's supervision at the time of the incident," including in school, on the way to school, and during school-sponsored activities. *See Hoke ex rel. Reidenbach v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 313 (Pa. Commw. Ct. 2003) (citing § 5-510; § 13-1317). As discussed above, J.S sent the memes to Student One via Snapchat, on his personal device, after school hours. His conduct falls well outside of the parameters the school's reach under Pennsylvania law. As the lower courts noted in overturning the school's cyberbullying charge, all communications "occurred in their homes on their own time." *J.S. v. Manheim Twp. Sch. Dist.*, No. CM 8-04246, 2019 Pa. Dist. & Cnty. Dec. LEXIS 2346, at *56 (C.C.P. Lancaster Cty. Feb. 25, 2019). Accordingly, MTSD was without authority to discipline J.S., not only as a matter of constitutional law, but also as a matter of Pennsylvania statutory law.

C. This Court's Precedent Recognizes the Limits of School Authority to Punish Off-Campus Speech.

In *J.S. ex rel. H.S. v. Bethlehem Area School District*, 807 A.2d 847, 864 (Pa. 2002), this Court explained that, when determining whether a student's speech is constitutionally protected, "a threshold issue regarding the 'location' of the speech must be resolved to determine if the unique concerns regarding the school environment are even implicated, i.e., is it on campus speech or purely off-campus speech?" That is because "purely off-campus speech . . . would arguably be subject to some higher level of First Amendment protection than on-campus speech." *Id.*

The Court did not reach the question of what First Amendment standard applies to purely off-campus speech in *Bethlehem* because the student in that case "facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site." *Id.* at 865. But the Court's inquiry into the "nexus between the web site and the school campus" demonstrates the importance of these factors to determining whether the speech was constitutionally protected. *Id.*

Here, J.S. did not take any action to bring or access the Snaps "on campus." While juvenile and in bad taste, simply making a joke about a school shooting in a private message to another student outside the school environment should not convert off-campus speech into on-campus speech. A decision that schools cannot

punish purely off-campus speech due to its potential or actual disruptive effects on the school would be consistent with this Court's recognition in *Bethlehem* that the location of the speech matters.

D. Expanding Tinker to Off-Campus Speech Will Exacerbate Racial and Other Disparities in School Discipline for Subjective Infractions.

The effort to expand schools' policing of off-campus speech mirrors broader trends in school discipline. Schools have increasingly used harsh and exclusionary discipline to address vague and subjective offenses and minor misbehavior—and have done so in a racially disproportionate manner. *See generally* Craig J. Forsyth et al., *The Punishment Gap: Racial/Ethnic Comparisons in School Infractions by Objective and Subjective Definitions*, 36 Deviant Behav. 276 (2015). Extending schools' power to discipline off-campus speech will only exacerbate the disproportionately high rates at which students from the most marginalized groups are subjected to suspensions, expulsions, and other forms of discipline.

1. Harsh and Exclusionary Discipline Disproportionately Targets Students of Color and Other Marginalized Student Populations.

Schools rely heavily on exclusionary discipline. More than a third of all students are suspended at least once throughout their K-12 career. Janet E. Rosenbaum, *Educational and Criminal Justice Outcomes 12 Years After School Suspension*, 52 Youth & Soc'y 515 (2020). Nationwide, more than 2.7 million K-

12 public school students received one or more out-of-school suspensions in the 2015-2016 school year, and students collectively lost over 11 million days of instruction. Daniel J. Losen & Paul Martinez, The C.R. Project at UCLA, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn* 6 (2020), https://archive.is/QHwVt.

The U.S. Government Accountability Office has reported that Black students in K-12 public schools are disproportionately disciplined and removed from the classroom in comparison to their white counterparts. *See generally* U.S. Gov't Accountability Off., GAO-18-258, *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities* (2018), https://tinyurl.com/esfanfkm. Because of disparate discipline practices, Black students lose 103 days of instruction per 100 students enrolled, compared to the 21 days their white peers lose due to out-of-school suspensions. Losen & Martinez, *supra*, at 6. In Pennsylvania, Black students are five times more likely and Latinx students are three times more likely to be suspended than white students. ACLU of Pa., *Beyond Zero Tolerance: Discipline and Policing in Pennsylvania Schools* 12 (2015), www.endzerotolerance.org/beyond-zero-tolerance.

Moreover, while earlier research focused on disparate discipline against Black boys, more recent data analysis and several high-profile cases have exposed similar experiences among Black girls as well. Subini Ancy Annamma et al., *Black Girls*

and School Discipline: The Complexities of Being Overrepresented and Understudied, 54 Urb. Educ. 211 (2019), https://archive.is/JFRrS. Both nationally and in Pennsylvania, Black girls are disciplined at a rate six times higher than white girls. U.S. Dep't of Educ., Off. for Civil Rights, *Civil Rights Data Collection Data Snapshot: School Discipline* (2014), https://ocrdata.ed.gov/assets/downloads/CRDC-School-Discipline-Snapshot.pdf. Significantly, "[t]hese trends do not appear to be the result of more serious offending patterns among Black girls," but instead illustrate how the subjective enforcement of school codes drives racial disparities in school discipline. Subini Ancy Annamma et al., *supra*, at 214.

The disparities in discipline extend to other marginalized student populations as well. Students with disabilities are often disproportionately and inaccurately labeled as "bad" or problematic and harshly disciplined for minor incidents, such as raising their voices to school officials or not sitting still in class. J. Guillermo Villalobos & Theresa L. Bohannan, Nat'l Council of Juv. & Family Ct. Judges, *The Intersection of Juvenile Courts and Exclusionary School Discipline* 5 (2017), https://tinyurl.com/yehvjztc. Disparities in discipline of students with disabilities reflect similar racial disparities. Data from the 2014-2015 and 2015-2016 school years show Black students with disabilities in grades K-12 lost an average of 77 days more of instruction due to exclusionary discipline than did white students with

disabilities. Daniel J. Losen, The C.R. Project at UCLA, *Disabling Punishment: The Need for Remedies to the Disparate Loss of Instruction Experienced by Black Students with Disabilities*, 2 (2018), https://tinyurl.com/yjp4hb98. In Pennsylvania, students with disabilities are twice as likely to receive out-of-school suspensions than other students, while Black students with disabilities receive out-of-school suspensions at the highest rate of any other student group in the state. ACLU of Pa., *supra*, at 12.

Likewise, LGBTQ+-identifying students face disproportionate school discipline. Two in five LGBTQ+-identifying students reported receiving detention, in-school suspension, out-of-school suspension, or expulsion. GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline Among LGBTQ Youth* 11 (2016), https://tinyurl.com/26dyhyhe. LGBTQ+-identifying students of color overwhelmingly report increased surveillance, policing in school, harsher discipline, and biased application of school policies. GSA Network, *LGBTQ Youth of Color: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline* 4 (2018), https://tinyurl.com/suk6nkn4.

These disparities in exclusionary discipline not only have lasting implications for students, including decreased student engagement, lower academic performance, and higher dropout rates, but also negatively impact Pennsylvania's social, governmental, and economic future. PA Advisory Comm. to U.S. Comm'n on Civil

Rights, *Disparate and Punitive Impact of Exclusionary Practices on Students of Color, Students with Disabilities, and LGBTQ Students in Pennsylvania Public Schools* 12–16 (2021), https://www.usccr.gov/files/2021/04-09-Pennsylvania-Public-Schools.pdf.

2. Substantial Disparities in School Discipline Are Directly Tied to the Application of Subjective Criteria

Most discipline stems from subjective and discretionary assessments of nonviolent student behavior. "Nationwide, as many as 95 percent of out-of-school suspensions are for nonviolent misbehavior—like being disruptive, acting disrespectfully, tardiness, profanity, and dress-code violations." Arne Duncan, former U.S. Sec'y of Educ., Remarks at the Release of the Joint DOJ-ED School Discipline Guidance Package (Jan. 8, 2014), https://archive.is/Qh5wA. Subjective criteria allow for racial, gender, and other biases to influence school officials. Janel A. George, *Stereotype and School Pushout: Race, Gender, and Discipline Disparities*, 68 Ark. L. Rev. 101, 102–03 (2015); *see also* NAACP Legal Def. & Educ. Fund, *Locked Out of the Classroom: How Implicit Bias Contributes to Disparities in School Discipline* 4 (2017), https://tinyurl.com/45km47cm.

Black girls in particular are disproportionately singled out for subjective offenses. Teachers are more likely to interpret Black girls' behavior as loud and overbearing, which leads to increased discipline under subjective schemes. Edward W. Morris & Brea L. Perry, *Girls Behaving Badly? Race, Gender, and Subjective*

Evaluation in the Discipline of African American Girls, 90 Socio. Educ. 127, 129 (2017). Similarly, LGBTQ+-identifying students also experience discipline disparities because of "frequent and/or harsher punishment for the same or similar infraction" compared to their peers. GSA Network, *supra*, at 12. Students with disabilities also bear the brunt of schools' subjective decision-making regarding discipline, which puts students at risk for being disproportionately disciplined for actions that may be manifestations of their disability. Jackie Mader & Sarah Butrymowicz, *Pipeline to Prison: Special education too often leads to jail for thousands of American children*, Hechinger Rep. (Oct. 26, 2014), https://tinyurl.com/7pxktb4z.

3. Schools Discipline Off-Campus Speech in the Same Discriminatory Fashion as On-Campus Conduct.

Given these patterns of disproportionate discipline, expanding school authority to off-campus speech risks exacerbating these trends. Schools already appear to be using their presumed authority over off-campus speech to discipline students in a racially disparate manner. *See Longoria ex rel. M.L. v. San Benito Indep. Consol. Sch. Dist.*, 942 F.3d 258, 262–263 (5th Cir. 2019) (Latinx student disciplined for social media posts perceived as containing "profanity and sexual innuendo"); Rebecca Klein, *Wesley Teague, Kansas Student, Suspended After Tweeting About High School's Sports Program*, Huffington Post (May 9, 2013, 8:27 P.M.), https://archive.is/qBea2 (school suspended and canceled Black high school

senior's convocation speech for tweet school perceived as jab at athletic program). In a recent *amicus* brief from the Advancement Project and Juvenile Law Center to the U.S. Supreme Court in *B.L.*, *amici* highlight additional examples and further illustrate these disparities and their implications for off-campus speech. *See* Brief for Advancement Project et al. as *Amici Curiae* Supporting Respondents, *Mahanoy Area School District v. B.L. ex rel. Levy*, No. 20-255 (U.S. cert. granted Jan. 8, 2021).

Based on school officials' documented overuse of exclusionary discipline and discriminatory enforcement of subjective school conduct codes, extending schools' authority to off-campus speech will only amplify discriminatory practices, and exacerbate the harm experienced by students of color, students with disabilities, and LGBTQ+-identifying students. The real-life consequences of harsh and exclusionary discipline call for limitation, rather than expansion, of school authority over students' off-campus expression.

CONCLUSION

The judgment of the Commonwealth Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the length of the foregoing brief complies with the 7,000-word limit set forth in Pa.R.A.P. 531(b)(3) for an amicus curiae brief and the typeface requirements of Pa.R.A.P. 124(a)(4). This certificate is based on the word count of the word processing system used to prepare the brief.

I further certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Date: April 19, 2021

s/ Sara J. Rose
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CERTIFICATE OF SERVICE

I, Sara Rose, hereby certify that I caused the foregoing Brief of ACLU of Pennsylvania and Education Law Center as *Amici Curiae* to be served upon the following counsel of record via the Court's electronic filing system.

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