

No. 20-255

IN THE
Supreme Court of the United States

MAHANoy AREA SCHOOL DISTRICT,

PETITIONER,

v.

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

RESPONDENTS.

*On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit*

**AMICUS CURIAE BRIEF OF
THE LIBERTY JUSTICE CENTER
AND FIREARMS POLICY COALITION
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Whether the court of appeals correctly held that a public high school violated the First Amendment when it punished a student for her colorful expression of frustration, made in an ephemeral Snapchat on her personal social media, on a weekend, off campus, containing no threat or harassment or mention of her school, and that did not cause or threaten any disruption of her school.

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INTEREST OF THE *AMICI CURIAE*¹

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

The Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope.

This case interests *amici* because they believe in a robust right of free speech, and are concerned that this right is being eroded on school campuses across the country as part of a spreading cancel culture.

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. All parties received timely notice of *amici*'s intent to file and consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

“Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

This principle of neutrality, so fundamental to our schools and our Constitution, is in danger of slipping away: throughout the country, the institutions that we depend on to educate future generations increasingly seek to proscribe new orthodoxies, and to take sides where they should make space for debate. *Amici* submit this brief to emphasize that Justice Jackson’s ideal came with a warning: that we will enter a dangerous new phase where parties and ideologies war over our public schools if they get into the business of “imposing any ideological discipline” on our children. *Id.* Ideological discipline is already tragically the *modus operandi* of many educational institutions today. In this context, the Court should reject the metastasis of administrative control, and draw the most basic line: that when students speak off campus, on their own time, amongst themselves and in their communities, it’s not the school’s business.

Amici have seen the hostility to speech in their own work: educators suspended for suggesting their charges care about a marketplace of ideas; students suspended for championing the protections of the Bill of Rights. And new incidents arise anytime one sifts through the daily news: whether at K-12 schools, or at

universities, there is a rising hostility to dissent, to debate, or even to the mildest personal expression. In this context, to expand the power of school administrators to off-campus activity would be disastrous for free inquiry.

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This evident truth implies a predicate: that students and teachers had those rights to shed before they stepped onto campus. This Court should affirm the decision below, and find that school administrators have no power to censor students or teachers speaking outside the context of the school. To do otherwise would license the bad actors described herein to exercise panoptic control over their charges, wherever they may wander.

ARGUMENT

Campus Authorities Increasingly Seek To Impose Ideological Conformity And Restrict Free Expression

It feels like the stories arrive daily: a student suspended, a teacher put on leave, a mandatory school program taking ideological and political sides. Yet each story invokes a common theme: school officials seeking to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642. From t-shirts, to Facebook posts, to parties, no aspect of school life now

escapes attempts to impose some dominant view on dissenters—or even those who have simply failed to memorize the new shibboleths.

Amici have both encountered the censorious climate at schools in their own work. For instance, *Amicus* Liberty Justice Center represents Barton Thorne, a career educator in Tennessee who saw that career threatened simply for explaining the value of the marketplace of ideas to his students. *See Thorne v. Shelby County Board of Education*, Western District of Tennessee No. 2:21-cv-02110. As part of his job as principal, Thorne delivered a “principal’s message” with thoughts to consider to his students as part of the weekly announcements video. These messages inspire, educate, inform, and challenge his high school students with broad themes and life advice from their principal.

After the tragic and disturbing events of January 6, 2021, our country experienced a teachable moment around the importance of free speech and the dangers of cancel culture and deplatforming as social media moderators reacted to the content of various accounts. Thorne used this teachable moment: if you seek to restrict the speech of others, he explained, “[y]ou may be in agreement with the people who are doing the filtering, but it’s just one moment away from somebody else being able to filter you. And so, if they can do that to a minority—or if they can do that to a powerful voice, it doesn’t have to be a minority—what will stop them one day from doing that to you?” This straightforward articulation of fundamental American values earned Principle Throne a suspension and investigation—even advocating *the First Amendment* is too much for some school administrations.

Amicus Firearms Policy Coalition has encountered these threats to speech as well. A few years ago, it represented a minor, G.M., who was disciplined for wearing one of *amicus*'s own T-Shirts that celebrated constitutional rights. See *Guardanapo v. Washoe County School District*, District of Nevada No. 3:18-cv-00172. The shirt in question referenced the Constitution in general and the Second Amendment in particular, but included no depictions of firearms, or any other weapon of any kind. G.M. was disciplined anyway, while the school district simultaneously supported students with the opposite view participating in the National School Walkout, a formal, organized protest calling for expansive new gun control measures.

Indeed, one could fill a full brief with student T-Shirts alone. A student in Oregon was suspended for a shirt that advocated building physical barriers on the southern border. Eli Rosenberg, "A student was suspended for wearing a border wall shirt. It cost the district \$25,000 and an apology," *Washington Post* (July 25, 2018).² A sophomore in Pennsylvania was suspended for wearing a shirt that said "Keep America Great" and a mask that said "Women for Trump." Chacour Koop, "'Make Liberals Cry Again.' Pro-Trump student suspended over apparel, PA lawsuit says," *Center Daily Times* (Oct. 23, 2020).³ Students in Arizona were disciplined for wearing "Make America Great Again"

² Available online at <https://www.washingtonpost.com/news/local/wp/2018/07/25/a-student-was-suspended-for-wearing-a-border-wall-shirt-it-cost-the-district-25000-and-an-apology/>.

³ Available online at <https://www.centredaily.com/news/nation-world/national/article246663238.html>.

apparel to the school's official "Party in the USA" theme day. Ellie Nakamoto-White, "Parents say students at Perry High School told to remove MAGA gear, student suspended," AZCentral (Mar. 2, 2019).⁴ In California, students may be disciplined simply for wearing the stars and stripes on their shirt at school. *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir. 2014). And these clothes were *worn to school*. A ruling for the school district in this case would allow schools to check up on what clothing students wear on their weekends and over the summer.

Even when the schools approve of student activism, it must be on the administrators' terms. At Utica Academy for International Studies in Michigan, students were encouraged to participate in the National School Walkout, mentioned above. However,

The rules required the students to stick to "pre-identified chants" as they marched outside the school, and any posters they wished to carry during their walkout would need to be submitted to administrators for advance approval. Incredibly, the rules also provided that no "political messages" would be permitted. Several students who refused to be silenced by school administrators were suspended for peacefully participating in the walkout and holding up signs with political messages.

⁴ Available online at <https://www.azcentral.com/story/news/local/chandler-education/2019/03/02/parents-say-students-perry-high-school-told-remove-maga-gear-donald-trump/3035751002/>.

ACLU of Michigan, “Students Suspended For ‘Unapproved’ Political Speech.”⁵ Even those students that choose to support the administrators’ proposed messages must jump through their hoops.

Nor does the climate students face in high school improve when they are ready to move on to higher education. Such was the discovery of a high school senior in Wisconsin, who chose to express her personal political views on social media. *See* Jackson Walker, “Marquette University threatened to rescind student’s admission over pro-Trump TikTok video,” *The College Fix* (July 7, 2020).⁶ Simply for expressing entirely mainstream political support, she was subject not just to criticism from other students, but “bias complaints” that lead to her being dragged before university administrators to explain herself, and warned darkly that her admissions status at the university was uncertain—all for the modern equivalent of “I Like Ike.”

Just a few years earlier, the same university had suspended a professor for having the temerity to suggest, on his personal blog, that universities should allow honest debate in the classroom. *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 712 (Wis. 2018). Dr. McAdams, a professor of political science, criticized another instructor who had announced, categorically, that her ethics class would permit no discussion on the

⁵ Available online at <https://www.aclumich.org/en/cases/students-suspended-unapproved-political-speech>.

⁶ Available online at <https://www.thecollegefix.com/marquette-university-threatened-to-rescind-students-admission-over-pro-trump-tiktok-video/>.

merits of such topics as gay rights, civil rights, or any other view inconsistent with progressive orthodoxy—these topics were apparently beyond ethical debate. *Id.* at 713. McAdams argued instead that a university classroom should be a battleground for the open conflict of ideas. For his efforts, he received a formal complaint, based on which the University moved to revoke his tenure and terminate his employment. *Id.*

And such complaints are no longer unusual. On university campuses across the country, these sorts of “bias complaints” alleging “offensive” behavior have proliferated, with schools instituting “bias response teams” to punish disfavored speech. As the Sixth Circuit recognized, even when the investigation does not lead to formal sanction, there is an inherent danger in a “formal investigative process, which itself is chilling even if it does not result in a finding of responsibility or criminality.” *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019). At the University of Wisconsin-La Crosse, “bias incidents” have run the gamut from vulgar bathroom graffiti, to common political slogans such as “Trump 2016,” to a Christian group’s use of a cross on their poster—this most common symbol of the Christian faith ostensibly created an “unsafe” environment for gay and lesbian students. Nathan Hansen, “Students use UW-L bias/hate system to report everything from Christian posters to offensive images,” *La Crosse Tribune* (Sep. 26, 2016).⁷ At Emory University, chalk declaring “Trump 2016” was likewise investigated as a “bias” incident, with the President of the University affirming that the culprits

⁷ https://lacrossetribune.com/news/local/students-use-uw-l-bias-hate-system-to-report-everything/article_759c0e01-e64e-5aa4-bb29-4e7236d4f5f8.html

would be sought out and promisingly ominously: “[i]f they’re students,’ he said, ‘they will go through the conduct violation process.” Jeffrey Aaron Snyder and Amna Khalid, “The Rise of “Bias Response Teams” on Campus,” *The New Republic* (Mar. 30, 2016).⁸ At Appalachian State University, on the other hand, one student filed a bias report because he was “offended by the politically biased slander that is chalked up everywhere reading “TRUMP IS A RACIST.” Foundation for Individual Rights in Education, *Bias Response Team Report 2017*.⁹

When some students at Bowdoin College threw a juvenile “fiesta,” featuring tequila and sombreros, the punishment for their wrongthink was swift indeed: the students were forced to move out of their dorm, banned from various college social events, and forced to attend mandatory reeducation sessions. Editorial, “Out of Focus,” *The Bowdoin Orient* (Mar. 4, 2016).¹⁰ The Vice Chancellor of the University of California, Santa Barbara, as part of her announcement of the creation of a Bias Response Team, encouraged students to report “bias incidents” to campus police. Jason Garshfield, “UCSB Bias Response Team Speaks Volumes About Free Speech,” *The Bottom Line* (Dec. 12, 2015).¹¹ And lest one think such “bias incidents” are limited to

⁸ Available online at <https://newrepublic.com/article/132195/rise-bias-response-teams-campus>.

⁹ Available online at <https://www.thefire.org/research/publications/bias-response-team-report-2017/>.

¹⁰ Available online at <https://bowdoinorient.com/bonus/article/11035>.

¹¹ Available online at <https://thebottomline.as.ucsb.edu/2015/12/ucsb-bias-response-team-speaks-volumes-about-free-speech>.

white supremacist vandalism, the University of California publishes an official list of examples of what it deems biased “microaggressions,” including asking things like, “Where are you from or where were you born?” and saying that “America is a melting pot” or “the land of opportunity.” *Id.*

Santa Clara University’s now-revised Bias Incident Reporting policy, which defined a “Bias Incident” as “a speech, act, or harassing action that targets, threatens, or attacks an individual or group because of their actual or perceived race, color, national origin, ethnicity, religious affiliation, sex, gender identity, disability, or sexual orientation,” instructed students that “If the bias incident is in progress or just occurred: **ALWAYS CALL 911 IMMEDIATELY.**” *Bias Incident Reporting*, Santa Clara University, Archived as of June 11, 2015 (emphasis in original)¹². The University has since had the minimal good sense to rewrite this policy and remove the reference to 911, instead giving students multiple options to report their “bias” incident, from calling campus security to using an online reporting form. *Bias Incident Reporting*, Santa Clara University.¹³

If one doubts the extent to which these anti-“bias” efforts target speech, one need only consult the ways in which they have reacted to events *about freedom of*

¹² http://web.archive.org/web/20150611154725/http://www.scu.edu/provost/diversity/education_training/biasincidentreporting.cfm

¹³ <https://www.scu.edu/diversity/initiatives-and-reports/bias-incident-reporting>

speech. For instance, a poster at the University of Minnesota advertised a panel discussion about speech and censorship in the wake of the *Charlie Hebdo* massacre. Given the subject of the event, the poster included an image of one of *Charlie Hebdo*'s magazine covers depicting the Prophet Mohammed. In response to an event about free expression inspired by then-recent events of serious public concern, "the university's Equal Opportunity and Affirmative Action office held a formal investigation and concluded that 'university members should condemn insults made to a religious community in the name of free speech.'" Snyder and Khalid, "The Rise of 'Bias Response Teams'", *supra*.

At the University of Colorado, a professor was investigated for daring to encourage a classroom discussion regarding contemporary transgender issues. Adam Steinbaugh and Alex Morey, "Professor Investigated for Discussing Conflicting Viewpoints, 'The Coddling of The American Mind,'" FIRE (June 20, 2016).¹⁴ According to the report, the professor was advised to avoid discussing transgender issues in his classroom. *Id.* Another professor was investigated for encouraging his students to think critically and debate rhetoric and ideas related to gay rights. *Id.* In that case, a student complained that students should not be required to listen to arguments from opponents of gay marriage. *Id.* That critical thinking and debate are now treated as a danger to the college community, rather than its *raison d'être*, should give this Court pause.

¹⁴ Available online at <https://www.thefire.org/professor-investigated-for-discussing-conflicting-viewpoints-the-coddling-of-the-american-mind/>.

The scope of what constitutes ‘controversial’ speech on campus now envelopes everyday life, elevating even the most minor events to matters of official concern. At the University of Michigan, a snow-man style amateur sculpture was reported as a bias incident because the offended student deemed that the work reminded her of a phallus. Erin Dunne, “Snow Penis Reported as Bias-Incident,” *The Michigan Review* (Feb. 25, 2016).¹⁵ At Colby College, a student was reported for bias after using the phrase “on the other hand,” which apparently is now deemed “ableist.” FIRE, Bias Response Team Report, *supra*. At the University of Wisconsin-Platteville, students were reported for dressing as the “Three Blind Mice” of nursery rhyme fame on Halloween, because someone somewhere might think the purpose of such a costume was not nostalgia for Mother Goose but rather to mock people with disabilities. *Id.*

The COVID-19 pandemic has provided its own new avenues for the stifling of student speech. One school threatened to suspend a student for including the sitting President of the United States in his background for virtual learning. FIRE, “Student faces possible suspension, fine for Zoom background of President Trump,” (Aug. 7, 2020).¹⁶ A high school student in Washington likewise faced similar sanction for a pro-Trump flag in the frame of his webcam. Bradford Betz, “Washington high school student kicked out of Zoom class over pro-Trump flag, parents say,” Fox News

¹⁵ Available online at <http://www.michiganreview.com/snow-penis-reported-as-bias-incident/>.

¹⁶ Available online at <https://www.thefire.org/student-faces-possible-suspension-fine-for-zoom-background-of-president-trump/>.

(Sep. 23, 2020).¹⁷ The same happened to a student in Maine as well. Jackie Mundry, “Student says she was removed from Zoom class for having Trump flag,” News Center Maine (Oct. 4, 2020).¹⁸ Another student was punished for using social media to criticize classmates who ignored the masking requirements intended to ensure student safety. Fernando Alfonso III, “Free speech experts call on public schools to not penalize students for sharing images of maskless classmates,” CNN.com (Aug. 8, 2020).¹⁹

And while the pandemic may soon resolve itself, its blurring of the line between the campus and the home should give this Court even greater pause in expanding the speech-regulating rights of school administrators: can schools punish students for the posters on the walls of their private bedrooms? For the T-Shirts they happen to have hanging in the closet behind them? Is a student to be punished because their parent keeps an antique rifle on the mantel behind the couch which is their one quiet place to try to learn? As schools intrude virtually more and more into the private areas of students—and teachers—should this expand the

¹⁷ Available online at <https://www.foxnews.com/us/washington-high-school-student-kicked-out-of-zoom-class-over-pro-trump-flag-parents-say>.

¹⁸ Available online at <https://www.newscenter-maine.com/article/news/politics/student-says-she-was-removed-from-zoom-class-for-having-trump-flag/97-fd7f79f5-81aa-41be-a1fe-b65793b16104>.

¹⁹ Available online at <https://www.cnn.com/2020/08/08/us/georgia-teen-photo-crowded-school-first-amendment-free-speech-trnd/index.html>.

scope of their censorial power to our most intimate spaces? *Amici* submit the answer is no, and that this Court should emphasize that whatever limited power schools have to direct children's education stops at the schoolhouse door.

CONCLUSION

For the reasons stated above, and by Respondent, the decision below should be affirmed.

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