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

BRIEF FOR *AMICUS CURIAE* PARENTS DEFENDING EDUCATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

Parents Defending Education is a national, nonprofit, grassroots association. Its members include many parents with school-aged children. Launched in 2021, PDE uses advocacy, disclosure, and litigation to combat the increasing politicization of K-12 education. It opposes schools' growing efforts to indoctrinate children—over the objections of their parents—with divisive ideologies concerning race, gender, sexuality, and other important topics.

This case directly implicates PDE's mission. According to the Mahanoy Area School District, it can punish any off-campus speech that "disrupts the school." Pet'r Br. 19. And "disruption," the school district adds, occurs whenever off-campus speech "'upset[s]'" other students. Pet'r Br. 6-7. This approach to the First Amendment has little basis in our history and tradition. If the Court adopts it, especially in these hypersensitive times, the results will be predictable: Students who reject the prevailing campus orthodoxy will self-censor their speech at home. Not because they should. Not because their parents disapprove. But because they fear the backlash at school. And while public schools placate the mob, parents' authority to raise, teach, and discipline their children will suffer.

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[*] After receiving timely notice, all parties consented to the filing of this brief. No party's counsel authored any part of it, and no one (other than *amicus*, its members, and its counsel) made a monetary contribution intended to fund it.

SUMMARY OF ARGUMENT

The school district tries to claim the mantle of history and tradition. Under the regime of *in loco parentis*, it says, schools could punish students for any off-campus speech that "threatened on-campus order." Pet'r Br. 14. And so the school's decision to punish B.L. for posting vague profanities on Snapchat over the weekend would have posed no difficulties under the common law. *See* Pet'r Br. 13-17.

The school district takes the wrong lesson from history. The Latin phrase *in loco parentis* means "in the place of a parent." *Black's Law Dictionary* (11th ed. 2019). It never meant "'displace parents.'" *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000). The rule that best approximates the common law, as it stood in 1868, is the one adopted by the Third Circuit: schools have no special authority to regulate speech that is "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Pet.App.31a.

I. Under the common law, parents delegated their authority to the school while their children were in the school's custody. When the school's custody ended, so did its authority to act *in loco parentis*. Courts routinely invalidated schools' attempts to regulate what students did under their parents' roof. This was the governing understanding of *in loco parentis* for decades, both long before and well after the ratification of the Fourteenth Amendment.

II. As the regime of *in loco parentis* waned, courts focused less on custody and more on preventing "disruptions" at school—a shift that culminated in the 1960s with this Court's decision in *Tinker*. But that approach initially proved controversial, splitting the courts well into the 20th century. It was not widely accepted in 1868, when the Fourteenth Amendment was ratified, and would not have been part of the original public understanding of that provision (let alone the First Amendment). The ratifying generation would have followed the common law's longtime distinction between the school's jurisdiction at school and the parents' jurisdiction at home.

III. If this case were decided in 1868, the school district could not have invoked *in loco parentis* to justify punishing B.L. All agree that, when B.L. posted "fuck cheer" on Snapchat, she was fully under her parents' custody—not the school's. Reasonable people can disagree about how B.L. should have been punished for posting a vulgar Snap on the weekend while hanging out with her friend at a convenience store. But the common law would have placed that decision where it belongs: with B.L.'s parents.

This Court should affirm.

ARGUMENT

The doctrine of *in loco parentis* continues to play a role (though not a starring one) in this Court's precedent. This Court has rejected the notion that, under the logic of *in loco parentis*, public schools are entirely exempt from the First Amendment. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). At the same time, this Court has drawn on the history of *in loco parentis* to define the scope of students' constitutional rights. *E.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). One Justice has relied on *in loco parentis* to conclude that the original First Amendment "imposed almost no limits on the types of rules that a school could set *while students were in school*." *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring) (emphasis added).

But that's just it: The doctrine of *in loco parentis* applied "while students were in school." *Id.*; *accord id.* at 411 ("in public schools"); *id.* at 418 ("in schools"); *id.* at 419 ("in public schools"); *id.* at 420 ("in public schools"); *id.* at 421 ("in public schools"). The common law drew a firm line that ended schools' power to act *in loco parentis* once students reentered their parents' custody. No exceptions to this rule were generally accepted when the Fourteenth Amendment was ratified. In 1868, the school district could not have invoked *in loco parentis* to punish B.L. for vague profanities that she posted at a convenience store on a Saturday, when she was concededly under her parent's custody.

I. Under the common law, schools had no authority to act *in loco parentis* when students were under their parent's custody.

As the Latin phrase suggests, schools acted *in loco parentis* when they were standing in place of a child's parents. Nothing in the logic, history, or caselaw surrounding the doctrine allowed schools to act *in loco parentis* after the parents had regained custody. Attempts to do so were viewed as improper usurpations of parents' rights.

In loco parentis rested on a theory of delegation. The idea was that parents delegate their parental authority to the school; so when the school disciplines the child, it is acting as "the parent, not the State." *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *accord Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 399 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting "the common-law view that parents delegate to teachers their authority"). As Blackstone put it, a father would "delegate part of his parental authority … to the tutor or schoolmaster of his child, who is then *in loco parentis*." 1 Blackstone, *Commentaries on the Laws of England* 441 (1765) (Blackstone); *accord State v. Pendergrass*, 19 N.C. 365, 366 (1837) ("The teacher is the substitute of the parent; is charged in part with the performance of his duties, and in the exercise of these delegated duties, is invested with his power.").

But as Blackstone recognized, this delegation was "part[ial]." 1 Blackstone 441. Because the school was given only the "portion of the power" that the parent "committed to [its] charge," the school could discipline

the child only as "*necessary* to answer the purposes for which [it] is employed." *Id.* (emphasis added); *accord Hailey v. Brooks*, 191 S.W. 781, 783 (Tex. Civ. App. 1916) (delegation is "limited" and school has only "reasonably necessary" powers); *Vanvactor v. State*, 15 N.E. 341, 342 (Ind. 1888) (teacher's delegation is "restricted to the limits of his jurisdiction and responsibility as a teacher"). When schools took unnecessary actions that exceeded the bounds of their partial delegation, courts held them liable. *See, e.g.*, *Guerrieri v. Tyson*, 24 A.2d 468, 469 (Pa. Super. 1942) (school could not decide how to treat student's injury); *State ex rel. Bowe v. Bd. of Educ. of City of Fond du Lac*, 23 N.W. 102, 104 (Wis. 1885) (school could not punish student for failing to collect firewood); *Hardy v. James*, 5 Ky. Op. 36, 1872 WL 10621, at *1 (1872) (school could not punish child for "trivial" playground dispute); *State v. Ferguson*, 144 N.W. 1039, 1044 (Neb. 1914) (school could not force student to take a cooking class).

The most important limit on this partial delegation of parental authority was temporal. *In loco parentis* was a "custodial" power; it attached when students were in the school's custody and ended when students returned home. *Vernonia*, 515 U.S. at 655; *accord Richardson v. Braham*, 249 N.W. 557, 559 (Neb. 1933) (*in loco parentis* is "temporar[y]" and applies "[d]uring school hours"). As a majority of the Missouri Supreme Court put it, "[w]hen the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed." *Dritt v. Snodgrass*, 66 Mo. 286, 298 (1877)

(Norton, J., joined by Sherwood, C.J., Napton & Hough, JJ., concurring). The school could punish a student "[f]or his conduct when at school"; but "he is subject to domestic control" for "his conduct at home." *Id.* It would "certainly" be unlawful, the Mississippi Supreme Court agreed, for a school to "invade[] the home and wrest[] from the parent his right to control his child." *Hobbs v. Germany*, 49 So. 515, 517 (Miss. 1909).

Courts policed this limit on schools' authority. Schools exceeded the bounds of *in loco parentis* when they punished students for attending an after-school party, *State ex rel. Clark v. Osborne*, 24 Mo. App. 309, 314-15 (1887); for violating the school's rule about mandatory at-home study hours, *Hobbs*, 49 So. at 516-18; for shopping at a store near the school, *Hailey*, 191 S.W. at 782-83; for joining fraternities, *Wright v. Bd. of Educ. of St. Louis*, 246 S.W. 43, 47 (Mo. 1922); or for "holding dances outside the schoolhouse and grounds and not during school hours," McConnell & Hilton, *Laws of Minnesota Relating to the Public School System Including the State Normal Schools and the University of Minnesota* 49 (1919). Once "parental authority had been resumed," courts stressed, the school's authority to act *in loco parentis* ended. *Clark*, 24 Mo. App. at 315.

That *in loco parentis* was tied to the child's presence at school made sense: Punishing students for conduct done under their parents' custody would have turned the common law on its head. The founding generation placed "'the major responsibility for the moral training of children'" with the family. *Brown v. Ent.*

Merchants Ass'n, 564 U.S. 786, 828 (2011) (Thomas, J., dissenting). Parents had "absolute authority over their minor children," the "right" to direct their growth and development, and the "responsib[ility] for maintaining, protecting, and educating" them. *Id.* at 822-32. Because this right was "exclusive," the state ordinarily could not interfere with it. *Morrow v. Wood*, 35 Wis. 59, 64 (1874); *Rulison v. Post*, 79 Ill. 567, 573 (1875).

A school thus could not regulate students "in the home"—the place where "the parental authority is and should be supreme." *Hobbs*, 49 So. at 517. Such regulations would have "invaded the right of the parent to govern the conduct of his child, when solely under his charge." *Dritt*, 66 Mo. at 298. Especially when the school contradicted the parent, such regulations would have violated "one of the earliest and most sacred duties taught the child, to honor and obey its parents." *Morrow*, 35 Wis. at 64. Allowing the state to usurp a parent's "right to control his child around his own hearthstone" would have been "inconsistent with any law that has yet governed" and "any law that will ever operate here so long as liberty lasts." *Hobbs*, 49 So. at 517; *accord Ferguson*, 144 N.W. at 1044 (explaining that, if *in loco parentis* were "unlimited" or exercised "too jealously," it would fail to give "due regard for the desires and inborn solicitude of the parents of such children").

This respect for parental authority was reflected in the positive law. Several States governed the scope of *in loco parentis* via statute, and courts denied that schools had any authority beyond what the statute

conferred. *See, e.g.*, *Murphy v. Bd. of Directors of Indep. Dist. of Marengo*, 30 Iowa 429, 432 (1871) (school could not suspend student for publishing articles ridiculing school-board members). Those statutes confirmed that *in loco parentis* ended once parents resumed custody of their children. West Virginia's statute, for example, gave teachers parental authority "from the time [the students] arrive at the school grounds until they return to their respective homes." 1908 W. Va. Acts 27, §97.

Pennsylvania's statute similarly gave teachers parental authority over students "during the time they are in attendance, including the time required in going to and from their homes." Act of May 18, 1911, P.L. 309, §1410 (24 Pa. Stat. §1382). The same rule remains in force today, *see* 24 Pa. Stat. §13-1317; §5-510, and it bans Pennsylvania schools from acting *in loco parentis* when students are no longer under their supervision, *see D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Directors*, 868 A.2d 28, 35-36 (Pa. Commw. Ct. 2004); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929 n.5 (3d Cir. 2011) (en banc).

In short, under the regime of *in loco parentis*, "[t]he schoolmaster generally had no right to punish a pupil for conduct that occurred after the class was dismissed." Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 70-71 (1996) (Dupre). What happened when students were back "under the control of their parents," especially, was of "no concern" to the school. *Kinzer v. Directors of Indep. Sch. Dist. of Marion*, 105 N.W. 686, 687 (Iowa 1906). "[W]hen the pupil

[wa]s released and sent back to his home, neither the teacher nor directors ha[d] the authority to follow him thither, and govern his conduct while under the parental eye." *Clark*, 24 Mo. App. at 314 (quoting *Dritt*, 66 Mo. at 297).

II. When the Fourteenth Amendment was ratified, *in loco parentis* did not cover all off-campus speech that "disrupted" the school.

As explained, the common law drew a firm custodial line: schools could not act *in loco parentis* once students returned to their parents' custody. This rule held firm during the Founding and the Second Founding. Cases that seemed like "exceptions" to this rule, such as students' misconduct on the way to and from school, only confirmed the rule's centrality. Decisions that deviated from this rule were isolated, rare, and controversial. And no court adopted the *Tinker* standard—the rule that the school district wants here.

During the era of *in loco parentis*, several courts held that schools could regulate students not only at school, but also on their way to and from school. According to the Missouri Supreme Court, the "weight of authority" was that schools could punish misconduct done "while the pupils are returning to their homes." *Deskins v. Gose*, 85 Mo. 485, 488 (1885). Prior cases also allowed schools to punish "misconduct on the way to school." *Kinzer*, 105 N.W. at 687. "Most parents," after all, "would expect and desire that teachers should take care that their children, in going to and returning from school, should not loiter, or seek evil company, or frequent vicious places of resort." *Lander v. Seaver*, 32 Vt. 114, 120 (1859).

These cases only confirmed the general rule that *in loco parentis* ended when the parents' custody resumed. Courts stressed that the time when "pupils are returning to their homes" occurs "*before* parental control is resumed." *Deskins*, 85 Mo. at 488 (emphasis added). Students coming to and from school are not fully under their parents' control or the school's control. During this time, the "jurisdiction of the parent, on one side, and of the [school] and teachers, on the other, is concurrent." 9 Mann, *The Common School Journal* 196 (Fowle ed. 1847) (Mann); *accord* Bardeen, *The New York School Officers Handbook: A Manual of Common School Law* 157-59 (9th ed. 1910). But this concurrent jurisdiction was narrow. It covered only "a portion of time" and "a portion of space between the door of the schoolhouse and that of the paternal mansion." 9 Mann 196. The "principle of necessity … define[d] its extent and affixe[d] its limit." *Id.* Once the school's concurrent jurisdiction was "not essential" because the parents had resumed full custody, the school's jurisdiction was "forborne." *Id.*

Cases involving truancy also fit comfortably within the traditional scope of *in loco parentis*. Because schools could not regulate students while they were under their parents' custody, some plaintiffs argued that schools had no power to compel students' attendance. Truancy, the argument went, was off-campus conduct that schools couldn't reach. *See, e.g.*, *King v. Jefferson City Sch. Bd.*, 71 Mo. 628, 630 (1880). Courts rejected this argument because rules banning truancy regulate *on-campus* conduct. Truant students fall behind their classmates. So when they are on campus, they either hold back the rest of the class or are unable

to keep up in their studies. *See id.* at 630-31; *Ferriter v. Tyler*, 48 Vt. 444, 471 (1876). A rule banning truancy thus "operate[d] directly upon … the pupils when assembled for instruction" and was "a rule for the *government* of the *school*." *Burdick v. Babcock*, 31 Iowa 562, 567-68 (1871) (emphasis in original).

"Some courts" went further, however. Dupre 71. In *Lander v. Seaver*, the Vermont Supreme Court allowed a school to punish a student for conduct that occurred "after the boy had returned home" and reentered "his father's service." 32 Vt. at 120. Specifically, "about an hour and a half" after school, the student drove a cow by his schoolmaster's house and, "in presence of the [schoolmaster] and of some of his fellow pupils," called the schoolmaster "Old Jack Seaver." *Id.* at 115. Schools could punish such misconduct, according to *Lander*, whenever the offense "has a direct and immediate tendency to injure the school and bring the master's authority into contempt." *Id.* at 120. The student's taunt qualified because the jury found it was "'contemptuous,'" had "'a design to insult,'" and directly undermined "'the authority of the master.'" *Id.*

While the taunt in *Lander* certainly could have been punished if the student said it at school, *see Morse*, 551 U.S. at 414-15 (Thomas, J., concurring), the notion that it could be punished while the student was under his father's custody was unprecedented. "No authority was cited" for this proposition. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373, 383 n.43 (1969) (Goldstein). Only one prior case provided

any support for it. *Id.*; *see Sherman v. Inhabitants of Charlestown*, 62 Mass. 167, 162-63 (1851) (school could exclude student who had engaged in prostitution). Just twelve years before *Lander*, Horace Mann—"America's most famous educator," Pet'r Br. 14—tackled the "difficult[]" subject of "how far the school … may exercise authority over school children" after they leave campus. 9 Mann 196. Mann opined that schools could regulate students on their way to and from school—that's it. *See id.*

Lander's understanding of *in loco parentis* thus would not have been part of the original public understanding of the First or Fourteenth Amendments. Since Blackstone, the law barred schools from acting *in loco parentis* when a student was under his parents' custody. *Supra* I. *Lander*'s deviation from that principle was isolated and novel. It cannot be said that, when the Fourteenth Amendment was ratified in 1868, *Lander*'s deviation was "the general understanding at the time." Scalia, *Original Meaning* 185, in *Scalia Speaks* (C.J. Scalia & Whelan eds., 2017) (quoting Ltr. from J. Madison to M.L. Hurlbut (May 1, 1830)).

Indeed, schools' authority to regulate off-campus conduct remained unsettled decades after the Fourteenth Amendment's ratification. Although the doctrine of *in loco parentis* originated in England, in 1893 the Queen's Bench thought the question whether schools had *any* authority to punish off-campus conduct was "not an easy one." *Cleary v. Booth*, 1 Q.B. 465, 467 (1893). "[T]here [wa]s no authority," the court

observed, and the question was one of "first impression." *Id.* Courts in this country agreed. Well into the 20th century, courts noted that a school's power to discipline students at home remained an open question. *See, e.g.*, *Hobbs*, 49 So. at 518 (refusing to decide "if that power exists" and noting that, as of 1909, no such case had "come[] before the court"); *Wright*, 246 S.W. at 46 (hedging in 1922 that this power only "possibly" exists).

Reflecting this continued uncertainty, cases that addressed off-campus conduct reached directly contradictory results. Schools in Georgia could ban students from socializing on weeknights, but schools in Mississippi and Kansas City could not. *Compare Mangum v. Keith*, 95 S.E. 1 (Ga. 1918), *with Hobbs*, 49 So. at 517, *and Clark*, 24 Mo. App. at 315. Schools could ban students from patronizing a nearby store in Nebraska, but not in Texas. *Compare Richardson*, 249 N.W. at 559, *with Hailey*, 191 S.W. at 782-83. A student could be suspended in Wisconsin for criticizing the school in the newspaper, but a suspension for the same conduct was not allowed in Iowa. *Compare State v. Dist. Bd. of Sch. Dist. No. 1*, 116 N.W. 232 (Wis. 1908), *with Murphy*, 30 Iowa at 431-32. Schools in Washington and Illinois could ban students from joining fraternities, but schools in Missouri could not. *Compare Wayland v. Bd. of Sch. Directors of Dist. No. 1 of Seattle*, 86 P. 642 (Wash. 1906), *and Wilson v. Bd. of Educ. of Chicago*, 84 N.E. 697 (Ill. 1908), *with Wright*, 246 S.W. at 47 (criticizing *Wayland* and *Wilson*). Even seemingly easy cases were controversial. When the Iowa Supreme Court held that students on a football team "purporting to represent … the high school" could be

banned from playing off-campus games, *Kinzer*, 105 N.W. at 688, the Missouri Supreme Court found that decision "extreme," *Wright*, 246 S.W. at 47.

This uncertainty and conflict—continuing *four decades* after the Fourteenth Amendment was ratified—is decisive. It means that, even if *Lander* let Vermont schools regulate students under their parents' custody, that decision did not reflect "the general consensus of the ratifying society at large." U.S. Dep't of Justice, Office of Legal Policy, *Original Meaning Jurisprudence: A Sourcebook* 20 (Mar. 12, 1987). Original public meaning is not discerned from precedents whose legality was "a hotly contested question in state courts throughout the 19th and into the 20th century," *Kelo v. City of New London*, 545 U.S. 469, 513 (2005) (Thomas, J., dissenting), or from "late-arising historical practices that are ambiguous at best," *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment). *Lander* reveals that the longstanding limits on *in loco parentis* were "not universally followed," "as is true for most common-law doctrines," but it does not diminish the fact that those limits were "the prevailing rule" at the time. *Uzuegbunam v. Preczewski*, 592 U.S. ___, ___ (2021) (slip op. at 7).

Uncertainty and conflict are especially decisive in free-speech cases, like this one. If *in loco parentis* extended to students' off-campus speech, then this category of speech would be entirely exempt from the First Amendment. *Cf. Morse*, 551 U.S. at 419 (Thomas, J., concurring). But this Court is "'reluctant to mark off new categories of speech for diminished constitutional

protection.'" *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Any such category must be "narrowly limited," "well-defined," and grounded in "persuasive evidence of a long … tradition" of no protection. *Ent. Merchants Ass'n*, 564 U.S. at 822 (Thomas, J., dissenting) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)); *NIFLA*, 138 S. Ct. at 2372 (cleaned up). None of that is true for off-campus speech, given the history outlined above.

But even if cases like *Lander* did reflect the Fourteenth Amendment's original meaning, those cases did not embrace the rule that the school district presses here. The school district asks this Court to apply the *Tinker* standard—to hold that schools can sanction any student speech that "disrupts the school environment." Pet'r Br. 5. But the *Tinker* standard was not part of the common law; it was "new" when this Court announced it in 1969. *Morse*, 551 U.S. at 420 (Thomas, J., concurring). While a few older cases had mentioned "disruption" in passing, "it was not until [the 1960s]" that "distraction" became a basis to uphold "coercive rules governing student conduct that invade the interests of [parents]." Goldstein 420.

Because the *Tinker* standard is ahistorical, importing it here would introduce all the familiar problems with that standard. While the school district wants to use *Tinker* to restrict students' rights, rather than expand them, that motive does not make the *Tinker* standard any less "malleable." *Morse*, 551 U.S. at 420 (Thomas, J., concurring). Applying it to off-

campus speech would thus create yet another rudderless jurisprudence that says "students have a right to speak … except when they do not." *Id.* at 418.

Instead of prophesying the coming of *Tinker*, cases like *Lander* tolerated much narrower deviations from *in loco parentis*. *Lander* reiterated that "the control of the teacher ceases" once "the child has returned … to his parent's control." 32 Vt. at 120. The only exception to this rule, according to *Lander*, was misconduct that had "a direct and immediate tendency to injure the school and bring the master's authority into contempt." *Id.* This exception was narrow, *see id.* at 120-21, covering only those "personal overt acts" that "render the pupil objectionable as a member of the school," *Wright*, 246 S.W. at 46. The school could not punish "ordinary acts of misbehavior" or mere "improper conduct or language." *Lander*, 32 Vt. at 120-21. For that conduct, "the parents, and they alone, ha[d] the power of punishment." *Id.* at 120.

Put simply, the Third Circuit got it right as an original matter. The common law did not allow schools to regulate students when they were fully under their parents' custody. Although courts eventually allowed schools to reach inside the home, that expansion happened long after the ratification of the Fourteenth Amendment. It was not part of the original public meaning. Nor, of course, was the *Tinker* standard. The best reading of the common law is that, in 1868, schools could regulate students at school and on their way to and from school. Any authority to regulate students at home was, at worst, nonexistent and, at best,

limited to conduct that directly and immediately undermined the school's authority.

III. The school's decision to punish B.L. for posting vague profanities while under her parents' custody exceeded the traditional bounds of *in loco parentis*.

The doctrine of *in loco parentis*, as it was understood in 1868, would have given the school no authority over B.L.'s speech. When she posted her Snap, B.L. was far outside the school's custody, delegated authority, and legitimate concern.

As the school district concedes, B.L. posted the Snap while she was under her parents' custody. Pet.App.68-69a. She was not at school. She was not going to or from school. It was a Saturday. J.A.27. She was not cheerleading, participating in any school activity, or representing the school in any way. Pet.App.40a-41a; J.A.24. She was at the Cocoa Hut, a convenience store that is not on school property. J.A.24. While her parents were not with her, that fact doesn't diminish their custody over her. *See Clark*, 24 Mo. App. at 315 ("If the parent entrusts his child beyond his immediate supervision, he will either place him under the authority of another or leave him free to control himself. That is a matter for the parent."). What B.L. said at the Cocoa Hut thus fell under her parents' jurisdiction, not the school's. *See supra* I.

B.L.'s parents did not "delegate" this power to the school either. 1 Blackstone 441. When B.L. spoke, she was not at school, cheerleading practice, a football

game, or anywhere near a teacher or coach. Reasonable parents do not expect schools to remotely monitor their child's behavior at a convenience store on the weekend. In Pennsylvania especially, school districts have no authority to punish students after they return home. *See J.S.*, 650 F.3d at 929 n.5. The lower courts also found that "B.L.'s snap was not covered by any of the rules" that the school imposes on cheerleaders—a holding that the school district no longer contests. Pet.App.41a.

Even under the expanded view of *in loco parentis* taken in *Lander*, the school district had no authority over B.L.'s speech. Her Snap was a picture of her and a friend raising their middle fingers with a caption that said, "Fuck school fuck softball fuck cheer fuck everything." J.A.20. (B.L. got in trouble for the "fuck cheer" part, *see* Pet.App.4a.) B.L.'s Snap did not have a "direct and immediate tendency" to undermine the authority of any school official. *Lander*, 32 Vt. at 120. It was not "direct[ed]" at anyone: B.L. mentioned no one, B.L. sent it to no one in particular, and B.L. had no reason to think that any school official would even see it. *See* J.A.26; Pet.App.15a. Nor did she speak "in the presence" of any school official, or even any fellow cheerleader. *Lander*, 32 Vt. at 120; *see* Pet.App.51a; J.A.25.

Instead, B.L.'s Snap was the epitome of what *Lander* called "ordinary acts of misbehavior." 32 Vt. at 120. The district court found that the school punished B.L. for "mere … profanity." Pet.App.74a. Her coach testified that B.L. would have been punished all the same if her Snap had said "cheerleading is fucking

awesome" instead of "fuck cheer." Pet.App.74a; J.A.35, 78. But to quote *Lander*, merely using "improper … language" has no "direct and immediate" impact on the school or any school official's authority. 32 Vt. at 120. It is general misconduct that "the parent alone has the power to punish." *Id.*

And B.L.'s parents *did* address her conduct. They "sat her down," "talked" with her, and told her "that's the wrong thing to do" and "we don't speak like that." J.A.110. B.L. then apologized for her Snap "multiple times." J.A.29-30. That is how B.L.'s parents decided to address her improper language. And that is where this matter should have ended—with the family, in the home, without the state's interference.

CONCLUSION

The Third Circuit's decision best fits the regime of *in loco parentis* that existed when the Fourteenth Amendment was ratified. It should be affirmed.

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