No. 2020-08-20

In the Supreme Court of the United States

ANDREW FLIGHT, SUPERINTENDENT OF WYTHE DEPARTMENT OF EDUCATION, MARSHALL COUNTY SCHOOL BOARD, AND PHYLLIS BEARD, PRINCIPAL OF MARSHALL COUNTY HIGH SCHOOL,

Petitioners

v.

JACK HART,

Respondent

BRIEF FOR THE RESPONDENT

Team Number 2128

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Nature of the Case	§1983 challenge by student against school for punishing the lawful exercise of First Amendment and Second Amendment rights.
Trial Court's Disposition:	In the District Court for the District of Wythe, Hon. J. Kelley, granted motion for summary judgment by the defendants finding that disciplinary action was constitutional.
Circuit Court's Disposition	In the Court of Appeals for the Fourteenth Circuit, Hon. H. Spellman, joined by Hon. J. Kipi, vacated the grant of summary judgment and remanded, Hon. J. Pickney joined in part and dissented in part.

QUESTIONS PRESENTED

This court granted the Petition for Certiorari and certified the following two questions for argument:

1. Where the public-school house and one's home share a common space, does regulation of a student's possession of a firearm in his home violate the Second Amendment?
2. Does a school's regulation of a student's off-campus interactions on social media violate the first amendment?

CONSTITIONAL PROVISIONS AND STATUTES INVOLVED

Relevant Constitutional Provisions:

I. The First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

II. The Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

Relevant Statutes:

I. Gun Free Schools Act (Amended 3/1/2020; added language in Italics)

There is zero tolerance for a student's use of firearms: this includes firearms brought onto school property, a school bus, or any location where any activity sponsored by the school is presently being conducted *including any virtual format. While classes are conducted online, students may not have any weapons visible on camera.* Disciplinary action includes immediate suspension and potential expulsion.

Relevant Local Rules:

I. Marshall County High School Social Media Policy

Students must at all times respect their school, teachers and other school officials, and fellow students. Students may not use the internet to target the students or the school. This includes the use of foul language, threatening language and inappropriate gestures aimed at the student body or the school environment. There will be no tolerance for any negative information regarding the school or the student body shared on the internet.

STATEMENT OF FACTS

Jack Hart was a high school senior at Marshal County High School. R. at 2. He was an honors student with a 4.0 GPA who was on track to be his class's valedictorian. R. at 2. Due to the ongoing global health pandemic, all classes at the school went online via the video platform Viid starting March 16, 2020. R. at 2. On March 31, Mr. Hart signed into his Advanced Placement Literature class during which the class took a pop quiz. R. at 2. On the day in question, Mr. Hart attended class in his living room in order to be closer to the internet router. R. at 2. He made all his preparations to have total focus on the quiz, including wearing noise cancelling headphones, silencing his computer, and minimizing his other laptop windows. R. at 2.

Mr. Hart proceeded to take his quiz, not realizing that his father had come into the living room to inspect and clean his gun. R. at 2. Since the beginning of quarantine, the Hart's neighborhood had reported increased break-ins and Mr. Hart's father had accordingly grown to worry about his household's safety. R. at 2. In response he had begun to clean and inspect his legally owned guns each day and, in order to teach his son how to be a responsible gun owner, instructed Mr. Hart to do the same. R. at 2.

After finishing and uploading his quiz, Mr. Hart had some extra time before regular class would again resume. R. at 3. Not realizing that his Viid was still live and that his class could still see him, Mr. Hart joined his father in checking that his shotgun was in proper working order. R. at 3. A few minutes before class was scheduled to resume, he returned his gun to its safe and tried to log back into the program. R. at 3. To his surprise, the program had been running the entire time and the teacher was trying to get his attention. R. at 3. Mr. Hart, realizing his mistake, immediately apologized to the class and told his father to put the gun away. R. at 3.

Soon after, a police officer arrived at Mr. Hart's house, saying that he was sent there by the school. R. at 3. After finding that all guns in the house were legally owned and safely secured, the officer closed the investigation and left the house. R. at 4. Later that day, Mr. Hart received an email from the school informing him that he was being suspended for three days for violating the State's Gun Free School Act. R. at 4. Mr. Hart's father appealed to the school to lift the suspension. R. at 4. After this was rebuked by the school, he contacted a journalist to inform them of the school's potentially unconstitutional actions. R. at 4. The harsh nature of the police investigation and suspension produced both local and national interest outcry. R. at 4.

The suspension came to the attention of a politically active group on Picagram, a social media picture sharing app. R. at 5. The group, "Second Amendment Revolution," was upset at the school's invasion of a student's Second Amendment rights and an unknown group member posted a photo series about it. R. at 5. The series, which was merely "liked" by Mr. Hart, contained three photos. R. at 5. Mr. Hart "liked" the posts off of school property, on his own device, at a time when no school events were in progress. R. at 6. The first was a screenshot of the news article about the suspension. R. at 5. The second was a screenshot of contact information on the school's publicly available website with a caption that read, "What has this world come to?! Call, email, blast this school for trying to ignore the Second Amendment!!!" R. at 5. Mr. Hart "liked" a comment on this picture where another user had written "F--- this school." R. at 5. The third photo was a screenshot of the school's Picagram where users had left critical comments regarding the suspension. R. at 5. The caption read: "Great work everyone. Let's continue to defend the Second Amendment. Keep emailing and commenting. Let them know they can't infringe on theConstitution!" R. at 5. Finally, Mr. Hart "liked a comment that read, "If students and teachers could be f---ing armed, we wouldn't have a mass shooting in schools problem to begin with. #armtheschools." R. at 5.

On April 8, 2020, Mr. Hart received another email from the school informing him that he removed from valedictorian consideration and barred from making a graduation speech. R. at 5. As its rationale, the school said that Mr. Hart had "liked" "shameful and disgraceful social media posts." R. at 5. A student had screenshotted the posts "liked" by Mr. Hart and sent them to the school board. R. at 6. School administrators field some number of emails about these events, both critiquing its handling of the suspension and expressing concerns about the posts. R. at 6.

SUMMARY OF THE ARGUMENT

Public School is the place that most Americans first encounter the government. In addition to providing students with information, schools are meant to train students to be good citizens. It is essential for this mission to ensure that students understand and enjoy the constitutional protections that define the rights and obligations of citizens. Mr. Hart, a 4.0 student at Marshall County High School, has a deep understanding of his constitutional right to defend his home and voice his political opinions. When he exercised these rights, however, his government sent police to his home, exiled him, and revoked his hard-earned accolades as valedictorian and graduation speaker. To avoid this harassment and deprivation, Mr. Hart would have to surrender his capacity to defend his home during a time of heightened risk and remain silent after the government infringed on his rights.

The Second Amendment's most fundamental guarantee is the right to defend one's own home, family, and property. This court's guidance makes it clear that the government may not restrict firearms in the home that are commonly used for a lawful purpose. The government may not require that such firearms be kept inoperable or unavailable for immediate self-defense. The amendment to the GFSA expanded the school's traditional authority to restrict possession of guns in a sensitive public place by restricting lawful use in one's own home. The acceptable interest,

keeping students safe, is impossible to pursue by regulating possession in a place where there are no other students. Allowing this statute to stand would expand the scope of gun control far beyond this court's understanding of the constitution, and invite further state statutes mandating defenselessness.

The First Amendment's most fundamental guarantee is the peaceful expression of political dissent. When a citizen expresses a political view, the government is not permitted to retaliate. This is true for students in schools, with a few narrow exceptions for expression that substantially disrupts the education or wellbeing of others. Mr. Hart's endorsement of comments supporting the Second Amendment and condoning the school's actions did not disrupt the school's educational activities. Nor did his endorsement threaten or collide with the rights of his fellow students. Retaliating against Mr. Hart for being critical of the school's actions is a clear violation of his First Amendment rights that lacks any compelling justification.

ARGUMENT

I. The GFSA Amendment and School Board's Enforcement Violate the Second Amendment.

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. According to this Court, such a "fundamental right" is "necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). Yet, the GFSA Amendment as enforced by the School Board barred law-abiding citizens from bearing arms for effective self-defense of one's private home. This Court has never approved a school's authority to infringe upon Second Amendment rights in a private home where arms pose no risk to other students. Without the compelling interest of protecting children and public safety, such an aggressive restriction on defending one's home fails all levels of constitutional scrutiny.

This Court must uphold the lower court's ruling and its own precedent that this sort of exercise and the resulting retribution implicate the most fundamental concerns of the Second Amendment.

In *District of Columbia v. Heller,* the Supreme Court conducted an impressive analysis of the Second Amendment's history and text, which codified the pre-existing "individual right to possess and carry weapons." *District of Columbia v. Heller.* 554 U.S. 570, 720 (2008). Indeed, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" is "elevate[d] above all other interests." *Id.* at 635. *Heller* offers a broad framework inquiring: 1) whether Second Amendment rights are burdened, and 2) whether the burden conforms with the appropriate level of scrutiny. *Ezell v. City of Chicago,* 651 F.3d 684, 701 (7th Cir. 2011). The GFSA Amendment unambiguously aims to restrict firearms in the home, where their need for self-defense "is most acute." *Heller* at 628. The traditional interest of protecting students could not have been accomplished by punishing Mr. Hart for possessing a short-range firearm in the privacy of his home with no students nearby. The GFSA Amendment and School Board's enforcement therefore fail constitutional scrutiny.

A. THE GFSA AMENDMENT AND SCHOOL BOARD'S ENFORCEMENT HEAVILY BURDEN THE SECOND AMENDMENT'S FUNDAMENTAL GUARANTEE OF SELF-DEFENSE IN THE HOME.

The GFSA Amendment unambiguously infringes upon Second Amendment rights. *See, e.g., Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 365 (2001) (determining that "[t]he first step in [analyzing regulation of enumerated rights] is to identify with some precision the scope of the constitutional right at issue."). This Court has qualified that the Second Amendment does not guarantee a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626. Rather, the Second Amendment only protects "the sorts of weapons" that are "in common use at the time" and "typically possessed by law-abiding citizens for lawful purposes like self-defense." *Id.* at 625 (quoting *U.S. v. Miller*, 307

U.S. 174, 178–79 (1939) (approving the regulation of possession and use of the uncommon short-barrel shotgun since the Second Amendment does not "guarantee[ ] the right to keep and bear such an instrument")). "The Supreme Court . . . identified the core . . . protections by reference not only to particular uses and particular weapons but also to particular persons, namely, those who are law-abiding and responsible." *U.S. v. Jimenez*, 895 F.3d 228, 234–35 (2d Cir. 2018) (citing *Heller*). An inquiry of the burden asks whether the weapon restricted is one of common use that is typically possessed for lawful purposes.

1. Mr. Hart's exercise of his Second Amendment right involves common use.

The weapon at issue here is undeniably commonly owned. In As millions of responsible citizens own firearms that could be impacted by the challenged school policy, it is clear that the firearms at issue here are "in common use" as supported by statistics, the use of the phrase in *Heller* and throughout history, and the fact that shotguns like Hart's are among "the most popular weapon[s] chosen by Americans for self-defense in the home." *Heller* at 629. Although *Heller* involved a prohibition only on handguns, nothing in the holding indicates its limitation to only this small subset of weapons. Rather, *Heller* stressed that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Id.* at 582. As "common use" modifies the meaning of "bearable arms," any restriction on a common weapon that amounts to "the complete prohibition of their use is invalid." *Id.* at 629.

2. Mr. Hart's exercise of his Second Amendment right involves typical possession.

The weapon at issue here is "typically possessed by law-abiding citizens for lawful purposes." *Heller* at 625. Unlike the objective inquiry of "common use," "typical possession" involves a more subjective review of patterns of use and reasons for ownership. Examination of these factors unveils whether a weapon is "dangerous and unusual" even in the possession of a

responsible citizen. The Second Amendment's prefatory clause with "militia" supplies useful insight. A militia is "the body of all citizens . . . who would bring the sorts of *lawful* weapons that they *possessed at home* to militia duty." *Heller* at 627 (emphasis added). In contrast, sophisticated weapons "that are most useful in military service"—for example, an automatic M-16 rifle—are so dangerous and unusual that limitations on this particular class do not infringe upon the protections enshrined in the Second Amendment. *Heller* at 627. Comparing this example with the present case, Hart's shotgun is not analogous to the military's M-16 rifle and should not be treated as "dangerous and unusual" for Second Amendment purposes. Thus, the factual record clearly indicates that Hart's shotgun counts as "typically possessed by law-abiding citizens for lawful purposes."

3. The GFSA Amendment imposes a severe burden on Second Amendment rights.

The Second Amendment does not protect a citizen's right to use a firearm in whatever way they wish, but at a minimum ensures maintaining a common firearm in the home to be operable for immediate use. *McDonald*, 130 S.Ct. at 3020. One tolerable regulation this court outlined is restricting firearms in government buildings such as schools or government buildings that are particularly "sensitive places." *Heller*, 554 U.S. 570 (2008). The amendment to the GFSA heavily burdens this right by restricting the time, location, and otherwise lawful use of a firearm in one's home. Exercising this excessive authority, the School Board punished Mr. Hart for constitutionally-protected conduct which occurred far from any sensitive place. This action clearly burdens the Second Amendment's guarantee to ensure a tool for self-defense is safe and effective during a time of heightened threat to one's home.

The GFSA Amendment's burden is particularly great because it restricts conduct in one's private home. This Court recognizes that "the need for defense of self, family, and property is most acute in the home." *McDonald*, 130 S.Ct. at 3036 (citation omitted). Accordingly, restrictions that

may be tolerable in public places impose a more severe burden when forced into one's home. In both *McDonald* and *Heller*, this Court emphasized that the statutes banned possession in the home as opposed to a public area. *Id.* at 3020; *Heller*, 554 U.S. at 570. The School Board's authority to regulate gun possession is predicated on this court's approval of limiting weapons in sensitive government buildings. *Heller*, 554 U.S. at 626. The original GFSA exerted a considerably lower burden, as it was merely a condition for voluntarily entering a sensitive place for limited periods of time where one can expect a heightened degree of security. As amended and applied by the School Board, however, the GFSA restricted Second Amendment rights in one's home when students were forced to stay inside a place where they were subjected to greater risk of harm.

In addition to invading the privacy of one's home, the GFSA Amendment's burden is further weighted by its infringement on the capacity for self-defense. By mandating that students not "have any weapons visible," the GFSA requires students to distance themselves from any arms that could aid in self-defense. R.4. In *Heller*, this Court overturned restrictions on firearms in one's home that would cause a delay in one's capacity for self-defense. *Heller*, 554 U.S. at 630. The unconstitutional statute in that case required that firearms be unloaded, disassembled, or bound be a trigger lock. *Id.* This Court held that forcing a firearm to be inoperable "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* Here too, the requirement that weapons be stored out of sight restricts a student's prompt access, which is critical for effective self-defense. The GFSA's current language is so broad that it restricts any alternative for self-defense, unconstitutionally mandating complete defenselessness. *See contra*, *NYSRPA, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2010) (upholding ban against "only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features" as constitutional since numerous "alternatives remain for law-abiding citizens to acquire

a firearm for self-defense" and the particular prohibition "does not effectively disarm individuals or substantially affect their ability to defend themselves.").

This Court has established that the second amendment's guarantee is not met by simply allowing possession in the home, individuals also have a right to keep guns ready for use. The School Board punished Mr. Hart for performing responsible maintenance that is essential for the safe and effective operation of a common firearm. By barring this otherwise lawful and prudent conduct, the School Board imposed a limitation on the readiness of his firearm for self-defense. This is similar to the District of Columbia's attempts in *Heller* to require that guns be kept disassembled, unloaded, or locked away. *Heller*, 554 U.S. at 630. The School Board's restrictions infringed on a common use of a common weapon typically possessed for self-defense. The commonality of the firearm and conduct have historically dictated what rights are protected by the Second Amendment, and careful maintenance of a shotgun clearly meets this standard. *See Miller*, 307 U.S. at 174.

While the GFSA Amendment's invasion of private homes obstructs Second Amendment rights to self-defense, the severity and arbitrariness of the School Board's punishment heightens the burden even further. As Justice Scalia addressed in *Heller*, there have always been reasonable penalties on the negligent use of firearms. *Heller*, 554 U.S. at 633-34. The severity of the District of Columbia's penalty, however, contributed to the court's view that the restriction exceeded public safety concerns and was threatening citizens for reasonably exercising their rights. *Id.* Here, the School Board deprived Mr. Hart of accessing his education and permanently tainted his record with a serious offense. R. 4. The School Board sent a police officer to arbitrarily search Mr. Hart's home. R. 3. Mr. Hart was an honors student with a 4.0 GPA on track to become the valedictorian of his class, but the school barred him from this honor and from giving his graduation address. R.

2, 6. The school utilized every punishment available short of a complete expulsion. Beyond his emotional distress, Mr. Hart was deprived of substantial benefits to his education, reputation, and prospects for college and a future career.

The government's actions severely burdened the very conduct central to the Second Amendment's guarantee. The GFSA Amendment increased the School Board's scope far beyond authorized sensitive-place restrictions and attempted to curtail protected conduct in the home. To comply with the GFSA as applied by the School Board, Mr. Hart must compromise the readiness of his firearm and be unable to access it promptly for self-defense. The right to effectively protect one's own home is precisely the right contemplated by the Second Amendment and recognized by this court's precedent. This fundamental freedom has been infringed, and the government has not shown a compelling interest to justify the onerous burden of mandatory defenselessness.

B. THE GFSA AMENDMENT DOES NOT QUALIFY FOR A "PRESUMPTIVELY LAWFUL" EXEMPTION UNDER A "SENSITIVE PLACE."

Before proceeding further with the two-part test, discussion of a subset of cases that pose a conceptual challenge is necessary given that they do not easily fit into the framework. *Heller* declined to proscribe rigid guidelines for lower courts to determine the constitutionality of the myriad of firearms regulations throughout the country. Rather, *Heller* expressly advised that

> "nothing in our opinion should be taken to cast doubt on *longstanding* prohibitions on the possession of firearms by felons and the mentally ill, or *laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms."

554 U.S. at 626–27 (emphasis added). A footnote offered further explanation by characterizing the enumerated restrictions as examples of "presumptively lawful regulatory measures" and not part of an exhaustive list. *Id.* at 627 n.26. Although *Heller*, as well as *McDonald*, expressly endorsed a qualified view of the Second Amendment as subject to certain "longstanding" regulations that are

"presumptively lawful," circuit courts differ as to how these "exceptions" should be treated. *See McDonald*, 130 S.Ct. at 3020; *Heller*, 554 U.S. at 570. On the one hand, some circuits address the presumptively valid restrictions during the first step of the two-part inquiry, while other circuits factor the presumption into the scrutiny analysis in step two. Under either approach, the amended policy is unconstitutional, either for not qualifying as automatically exempt from the scope under step one or not surviving either level of scrutiny under step two.

1. "Presumptively lawful" under step one

This approach reads Heller's language as suggesting "the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment." *U.S. v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (choosing this "the better reading" of *Heller* after inferring the textual proximity of "presumptively lawful regulations with restrictions on dangerous and unusual weapons" revealed that "the Court intended to treat them equivalently — as exceptions to the Second Amendment guarantee."). At this stage, the review focuses on determining whether the challenged regulation: (1) falls explicitly into one of the listed categories, (2) falls implicitly into one of the listed categories by analogy, or (3) presents another type of "longstanding" law. If a restriction qualifies as "presumptively lawful," it "ostensibly fall[s] outside of the Second Amendment's prima facie protections" and does not infringe on the right. *NYSRPA, Inc.*, 804 F.3d at 257 n.73. When this occurs, the analysis does not proceed to step two.

The first situation is straightforward, as a law covered by one of the explicitly enumerated categories in *Heller* is consistently upheld as valid. *See e.g., U.S. v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010) (relying on *Heller's* "presumptively lawful" language to conclude that "felons are categorically different from the individuals who have a fundamental right to bear arms."). The second category extends the exemption to an unlisted restriction that "fits comfortably among the

categories or regulations that *Heller* suggested would be 'presumptively lawful.'" *U.S. v. Booker*, 644 F.3d 12, 24–25 (1st Cir. 2011); *see e.g., U.S. v. White,* 593 F.3d 1199, 1206 (11th Cir. 2010) (finding "no reason to exclude [restriction on domestic violence misdemeanants] from the list of longstanding prohibitions on which *Heller* does not cast doubt."); Similarly, circuits treat prohibitions as constitutional under the third category despite lacking similarities with *Heller's* examples when historical evidence clearly shows it is "longstanding." *See e.g., Jackson v. City and County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) (noting that other "presumptively lawful regulatory measures" also "fall outside the historical scope of the Second Amendment"); *see also NRA v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012) (holding that "a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework").

After the government carries the burden by proving that the disputed law is presumptively valid, the burden shifts to the challenger of the regulation to rebut the presumption of constitutionality. Indeed, the use of "presumptively" as a modifier instead of opposed to "conclusively" or "absolutely" strongly suggests rebuttal is allowed. *See U.S. v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010) (remarking that any treatment of Heller's language as irrebuttable would entirely invalidate the Second Amendment). These presumptions are deemed facially reasonable due to the longstanding quality, which "necessarily means it has long been accepted by the public [and] is not likely to burden a constitutional right." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (finding that "basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional"); *see also Peterson v. Martinez*, 707 F.3d 1197, 1218 n.1 (10th Cir. 2013) (quoting

Heller II's instruction that a party "may rebut the presumption of validity by showing that the regulation at issue has 'more than a de minimis effect upon his right'"); *U.S. v. Decastro*, 682 F.3d 160, 165 (2d Cir. 2012) (positing that the "natural explanation is that time, place, and manner restrictions may not significantly impair the right to possess a firearm for self-defense, and may impose no appreciable burden on Second Amendment rights").

Demonstrating that a presumption causes more than a de minimis burden is one way to rebut the presumption of validity. Relatedly, novel restrictions lack the requisite longstanding historical record to warrant this presumption since it is not yet known whether there is only a de minimis burden on the right, prompting the need for constitutional review under the appropriate level of scrutiny. *Heller II*, 670 F.3d at 1253 (finding separate restrictions on long guns too novel to qualify as presumptively lawful). Thus, when a challenged restriction is not presumptively valid for any reason, the analysis moves to the second step to determine if the regulation survives the appropriate level of review.

2. "Presumptively lawful" under step two

The second approach subjects the government to some degree of scrutiny and contends the restrictions are presumptively lawful due to passing constitutional muster under a lenient standard of scrutiny. *See U.S. v. Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011) (noting the "use of the word 'presumptively' suggests that the articulation of sensitive places may not be a limitation on the scope of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right"). A presumption of constitutionality does not indicate there is an automatic categorical exemption, but that the analysis changes at step two. Indeed, a facially valid restriction may still impose manifestly unreasonable restrictions in practice. Only those restrictions "outside the scope of Second Amendment coverage at ratification" are obviously "not within Second

Amendment protection now." *U.S. v. Moore*, 666 F.3d 313, 318 (4th Cir. 2012). Whereas, if a "statute has some Second Amendment coverage, the fact it is 'presumptively lawful' indicates it must 'pass muster under any standard of scrutiny.'" *Id.* Thus, courts should avoid an unnatural interpretation of "presumptively" in a manner that "approximates rational-basis review," which *Heller* prohibited. *U.S. v. Chester*, 628 F.3d, 673, 679 (4th Cir. 2010). Instead, the deliberate use of "presumptively" emphasizes that it is "a very different thing from an assertion." *Friedman v. City of Highland Park*, 784 F.3d 406, 420 (7th Cir. 2015). Indeed, "it is very different thing to presume a statute to be constitutional than to positively assert that it is." *Id.* Therefore, under this approach, the enumerated examples offer "a hint as to the types of governmental interests that might be sufficient to withstand Second Amendment challenges, as well as the context in which those interests could be successfully invoked," but do not endorse exclusion based on the presumption alone. *Masciandaro*, 638 F.3d at 469 (4th Cir. 2011) (internal citations omitted).

3. The GFSA Amendment does not qualify as "presumptively lawful."

The amended GFSA policy does not qualify as presumptively lawful under either approach. We agree with the circuits endorsing the second approach that "presumptively lawful" exceptions warrant consideration in step two of the framework. Given the fundamental nature of the right involved, *Heller*'s rejection of any analysis resembling rational-basis review for the Second Amendment, and the fact that the majority of circuits follow this approach, some degree of heightened scrutiny is necessary. *Heller* 554 U.S. 570. Whenever even a "presumptively lawful" restriction implicates a core right, as the presumption goes toward the government's interest rather than the scope of the right. While the next section on scrutiny will address presumptions of constitutionality at greater length, even if this Court followed the scope-method in the first approach, convincing arguments exist that the amended policy does not qualify for the validity

presumption. Indeed, even in the circuits with the most extensive restraints on firearms, not a single regulation currently in effect prevents extended use of the firearm inside the home by responsible citizens for the lawful purpose of self-defense.

Assuming arguendo that this Court determines it proper to consider the presumption of validity during the initial inquiry, every circuit supporting this approach would not certify the amended policy in this case as presumptively lawful for three reasons. First, qualifying exceptions belong to specific types of longstanding restrictions that generate a de minimis impact on the exercise of the right. he very fact that a restriction exists over long periods of time indicates that the public considers the impact de minimis. The amended GFSA is not only a recent change, but an unprecedented, as virtual classes conducted in a private home find no analog in history to substantiate any characterization of the effect as de minimis. Second, such a novel restriction cannot qualify as an exception due to lacking the requisite longstanding trait. Applied here, pandemic conditions prompted schools to migrate online *en masse* and created a setting entirely uncharted for implementing existing policies designed to promote safety, discipline, and conduct of students physically present. Accordingly, the absence of a sufficient historical record—compared to the pre-pandemic policies when school operated in-person—undermines any characterization of the challenged policy as a "longstanding" prohibition. Thus, as the amended GFSA is not a longstanding practice given its novelty and finds no concomitant support that the public views the impact as de minimis, the "presumptively lawful" exemption does not apply, and no scope issue exists to prevent step two.

Moreover, the unique facts in this case generate a previously unexplored reason that the "sensitive place" presumption does not apply at all. Of the circuits adopting the scope approach, not a single case exists in which a sensitive place existed in a non-physical location. The language

of *Heller* only explicitly rubber-stamped "laws *forbidding* the *carrying* of firearms *in* sensitive places." *554 U.S.* at 626–27 (emphasis added). the meaning of "carry" in the Second Amendment context—at the time of *Heller* in 2008 and at the time the school amended the policy in 2020—was not commonly used to describe cleaning a weapon in one's private home. As this Court explained, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584. "When used with 'arms,'. . . the term has a meaning that refers to carrying for a particular purpose—confrontation." *Id.* Accordingly, the right to "bear arms" involves an individual right to "'wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.* (quoting *Muscarello v. U.S.*, 524 U.S. 125, 143 (1998). Practically applied, the most natural understanding is the carrying of weapons in public. *See Peruta* v. *California*, 137 S.Ct. 1995 (2017) (Thomas, J., dissenting from denial of certiorari).

Furthermore, carrying—or bearing—is distinct from keeping. Given the textual equality of "to keep *and* bear Arms," to "speak of 'bearing' arms solely within one's home . . . would conflate 'bearing' with 'keeping,' in derogation of [*Heller's*] holding that the verbs codified distinct rights." *Drake*, at 444 (Hardiman, J., dissenting). To keep naturally describes possession in the home, whereas to carry or to bear naturally entails the exercise of the right in public. Thus, to argue that a student's private home is suddenly property under the school's control simply due to a video connection is beyond absurd. Given that self-defense in the home is the most central Second Amendment right, allowing this policy to stand sanctions punishment of lawful student over the age of eighteen in response to engaging in responsible gun cleaning alongside a parent without realizing the camera was still on.

C. NO LEVEL OF SCRUTINY IS SATISFIED BY THE GFSA AMENDMENT WITHOUT AN IMPORTANT OR COMPELLING INTEREST ACHIEVED BY BANNING GUNS IN THE HOME.

Having addressed the threshold question above that the policy burdens Mr. Hart's Second Amendment right, the analysis next turns to a determination of the appropriate constitutional scrutiny pursuant to the longstanding "levels of scrutiny" analysis. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 155 n.4 (1938). Although *Heller* did not specify the particular level of heightened scrutiny applicable to firearm regulations, at a minimum a court must apply intermediate scrutiny. *Heller*, 554 U.S. at 682 (rejecting rational basis review while also noting that strict scrutiny is not always appropriate). The majority of the post-*Heller* cases warranted intermediate scrutiny since the challenged restriction "place[d] either insubstantial burdens on conduct at the core of the Second Amendment or substantial burdens [only] on conduct outside the core." *Jimenez*, 895 F.3d at 234. This comports with *Heller's* holding that the Second Amendment is not an absolute and unlimited right. Like the complete ban on handguns in the home in *Heller*, laws that "place substantial burdens on core rights are examined using strict scrutiny. *Id.* In this case, the school policy burdened Hart's core right and strict scrutiny is appropriate. However, just as in *Heller*, the amended GFSA fails to pass constitutional muster under both strict and intermediate scrutiny analyses.

Borrowing from other individual rights jurisprudence—especially the First Amendment—*Heller* rubber-stamped the practice using frameworks developed in more comprehensive doctrines of fundamental rights. *Compare, Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (holding the most exacting scrutiny applies to discrimination of specific or particular messages in public) *with Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (affirming restrictions based on time, place, and manner of the speech when "justified without reference to the content of the regulated speech, . . . they are narrowly tailored to serve a significant governmental interest, and .

. . they leave open ample alternative channels for communication of the information."). When approaching the question of which level of scrutiny applies, the framework used in First Amendment cases is useful: wholesale restrictions on content warrant strict scrutiny, whereas content-neutral restrictions limited to time, place, and manner demand intermediate scrutiny. *See U.S. v. Grace*, 461 U.S. 171, 177 (1983) (noting that "restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.")

1. The GFSA Amendment does not pass muster under strict scrutiny.

Strict scrutiny is appropriate in this case due to the wholesale restriction on specific content. To pass constitutional muster, the amended policy must be "narrowly tailored to serve a compelling state interest." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 465 (2007). To assess whether strict scrutiny is appropriate, courts consider two factors: first, "how close the law comes to the core of the Second Amendment right" and, second, "the severity of the law's burden on the right." *NYSRPA*, 804 F.3d at 258 (2d Cir. 2015) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). This exacting level of scrutiny presumes the amended policy is invalid unless the state successfully carries its burden of rebutting the presumption. *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 817 (2000) (finding that the less restrictive alternative must be used if it would still serve the intended purpose).

a. *Strict scrutiny is appropriate due to the severe burden on a core right.*

Any regulation that directly restrains the core Second Amendment right demands strict scrutiny. As *Heller* and *McDonald* convey in no uncertain terms, self-defense in the home is central to the right to bear arms. Only regulations that do not touch upon the core right warrant a more deferential standard of scrutiny. *See e.g., U.S. v. Class*, 930 F.3d 460 (D.C. Cir. 2019) (finding

intermediate scrutiny appropriate since the prohibition in the parking lot of a sensitive place did not create more than a de minimis effect on the core right). A limitation on when one can use a firearm in a private residence potentially renders a law-abiding citizen entirely unable to defend himself during that time period such use is prohibited. This limitation also potentially renders any other law-abiding citizens in the home unable to defend during that same time period. These time periods are not trivial given that students attend virtual school for much of the week. Such "time, place, and manner restrictions" generally do "not significantly impair the right to possess a firearm for self-defense" and generally "impose no appreciable burden." *Decastro*, 682 F.3d at 165.

Additionally, unlike in a school setting in which the school assumes protection of the students present, no such safety guarantee exists in the home, which is why it is the seminal example justifying the core self-defense rationale is a private location. While severe burden may be justified on scope or danger reduction grounds, such is not true in the home. Mr. Hart's right of self-defense as a responsible citizen in his private family home exactly hits at the core of the protections constitutionally guaranteed. As such, the amended GFSA should not receive deferential treatment due to the severe burden the restriction places on exercise of this core right. Mr. Hart, as well as all members of his household, are totally and completely banned from exercising their right during long periods of time long time periods each week. In the absence of alternative means for self-defense under the blanket weapons ban, the burden is especially high. Allowing the amended GFSA to stand conflicts with longstanding protections for the core of the Second Amendment right. Such an immense burden not only infringes upon the rights of law-abiding students, but also upon the rights of all other lawful-abiding members in the home. Like the unconstitutional ban in *Heller*, the GFSA amendment renders an "entire class of 'arms'" functionally inoperable for large amounts of time that "extends, moreover, to the home, where the

need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. Consequently, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning rom the home '[a common] firearm . . . to keep and use for protection of one's home and family' would fail constitutional muster." *Id.*

b. *The GFSA Amendment no longer serves a compelling interest.*

To survive strict scrutiny, the government must demonstrate the regulation actually serves a compelling interest. *Grace*, 461 U.S. at 177. Unlike the First Amendment, the Second Amendment's jurisprudence lacks a comprehensive doctrine delineating what counts as a compelling interest. However, a few Second Amendment cases provide some indication of what qualifies as compelling. *See e.g., U.S. v. Salerno*, 481 U.S. 739, 749 (1987) (finding the government interest of crime prevention compelling); *U.S. v. Marzarella*, 614 F.3d 85, 94–101 (3d Cir. 2010) (finding the government interest of preserving serial tracing to assist law enforcement compelling). There is no dispute that, in the abstract, safeguarding the public from substantiated threats and protecting students from physical harm assuredly constitute compelling government interests. However, simply alleging a compelling interest exists must find support in factual evidence that not only substantiates the end, but also actually connects the interest to restrained conduct. *See U.S. v. Reese*, 627 F.3d 792 802 (10th Cir. 2010) (approving the approach of that actual threats to the compelling public safety must be substantiated). Absent a serious concern existing, the interest cannot qualify as compelling. A student that affirmatively brings a weapon to school creates a compelling security concern of physical injury, death, or trauma due to the prospect of serious harm. In contrast, a weapon visible on a screen instead of in immediate physical proximity simply does not raise a comparable safety issue as bringing a weapon to school.

When a regulation does not extend to most of the conduct implicating the compelling interest, such underinclusiveness demonstrates the regulation is inadequately justified by the alleged compelling interest. *See Carey v. Brown*, 447 U.S. 455, 465 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."); *see also Fla. Star v. B.J.F.*, 491 U.S. 524, 541–42, (1989) (Scalia, J., concurring) (opining that "a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." (citation omitted)). Prior to the pandemic, the restrictions targeted conduct within the school building or under the control of the school. That is, the restrictions prohibited the right to bear arms in these settings to achieve the compelling interest of student safety. With the move to online school, the compelling interest becomes underinclusive since most of the targeted conduct no longer implicates the compelling interest as a result of the loss of the security guarantee. Thus, the amended policy is fatally underinclusive.

Moreover, the change to online school downgrades the compelling nature of the interest of protecting students from physical harm since "it leaves appreciable damage to that . . . interest unprohibited." *Id.* School conducted in-person assuredly qualifies as a sensitive place due to the compelling interest of student safety. In such sensitive places that suspend Second Amendment rights, the state by necessity assumes the duty to protect students present in that location. The logic is that should no restriction on the individual's right to possess a firearm for self-defense, the individual can repel violent threats. However, absent the ability to use traditional means of self-defense in a sensitive place, the government assumes the self-defense obligation. This exists when students are inside the perimeters of a brick-and-mortar school. Yet, students attending classes through a computer—potentially in a location far from the school building—do not receive such

protection. A restriction that strips away all means of self-defense for significant periods of time without providing alternative means or guaranteeing other protection does not actually achieve a compelling interest of student safety. Indeed, security is inherent to any conception of safety.

c. ***The GFSA Amendment is not narrowly tailored.***

To survive under strict scrutiny, the regulation must not only advance the compelling interest it is designed to achieve, but do so through narrowly tailored means. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989). In practice, the law must be the "least restrictive means" of advancing the compelling interest. *Playboy Entm't Group, Inc.*, 529 U.S. at 813. Evidence that a large degree of protected conduct not implicating the interest is burdened strongly suggests the restriction is not narrowly tailored. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Here, the amended policy significantly limits the use of otherwise lawfully protected conduct without successfully accomplishing the stated interest. As a result, the restriction burdens a more significant amount of lawful use than necessary to protect the interest of keeping students physically safe since the safety interest is less acute online. Accordingly, the school's policy establishes overinclusive means as to the conduct it reaches without achieving the compelling end.

Less restrictive options are possible to hypothesize. For instance, rather than a categorical ban on all weapons, the policy could have included carveouts for situations that would not constructively prohibit lawful conduct, such as self-defense. Additionally, rather than calling the police right away, the teacher could have turned off Mr. Hart's video feed and called him or his parents to discuss his inadvertent gun cleaning. Suspension for such a minor mistake of forgetting the camera was still on is severe and does nothing to achieve a reduction in the visualization of guns given the common reality of inadvertent appearances during online conferences. As another example, a prohibition on firearms within 1,000 feet of a school explicitly created multiple

exceptions for core conduct like self-defense, as well as a process for responsible citizens to seek an exemption. *See Hall v. Garcia*, 2011 WL 995933 (N.D. CA. Mar. 17, 2011). Unlike in *Hall*, the notion that "sensitive place" extends into a private home not only directly contravenes *Heller* and *McDonald*, but also is not a limited restraint that a responsible citizen could avoid all or most of the time in order to exercise a core Second Amendment right. Absent minimal impact to justify the prohibition at home, the policy is insufficiently tailored in the least restrictive manner. The presumption of validity due to a "sensitive place" is insufficient to overcome problematic tailoring.

2. The GFSA Amendment does not pass muster under intermediate scrutiny.

Even if this Court declines to apply strict scrutiny due to viewing the present case as involving (1) a sensitive place presumption, (2) only a modest burden on the right, or (3) the policy does not implicate the core right, the Court must nonetheless ask "whether the statutes at issue are substantially related to the achievement of an important governmental interest." *NYSRPA*, 804 F.3d at 261 (internal quotation marks omitted). Accepting that it is "beyond cavil that . . . states have substantial, indeed compelling, governmental interests in public safety and crime prevention," this Court need only consider "whether the challenged laws are substantially related to the achievement of that governmental interest." *Id.* "To survive intermediate scrutiny, the fit between the challenged regulation" and the stated interest "need only be substantial, not perfect." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012). Moreover, unlike strict scrutiny, the means need not be the least restrictive, but must avoid burdening the right more than reasonably necessary. *Id.* Under intermediate scrutiny, the amended GFSA again fails to pass muster.

To begin, it is plain that the purpose of an anti-weapons policy traditionally served an important government interest prior to the pandemic. However, for the same reasons identified as to whether a compelling government interest exists during the pandemic, we fully incorporate

those arguments here that the physical safety interest is no longer sufficiently important—or compelling—when the school lacks any physical control over students and their surroundings to ensure safety. For traditionally sensitive places enumerated in *Heller*, the shared characteristics offer "a hint as to the types of governmental interests that might be sufficient." *Masciandaro*, 638 F.3d at 469. The logical understanding is that sensitive places pose too great a danger to physical safety to justify the possession of firearms in those locations. *See Heller*, 554 U.S. at 626–27. Like schools across the country, Hart's school policy prior to the pandemic prohibited the possession of firearms on school grounds, in a school building, or on a school bus for this reason. *Heller*'s exception for sensitive places reveals that the Supreme Court implicitly affirmed some limitations on the right to bear arms due to the physical danger posed by unlimited exercise of the right. *See id.* Notably, the implicated conduct in these places involves the right to "bear" arms rather than the right to "keep" arms. As *Heller* noted, "bear" contains "a meaning that refers to carrying for a particular purpose—confrontation*." Id.* at 584. Characterized by an affirmative or purposeful confrontation highlights the inherent danger when exercised unrestricted among sensitive persons. This danger no longer exists when the operative verb is no longer "bear," but instead "keep."

Even if this Court found this interest important despite the drastic change in conditions, the means by which the policy achieves its end do not reasonably fit. Unlike affirmatively bringing a firearm to school, endless scenarios exist in which a responsible person may use a firearm lawfully in their home. Due to the unnecessary burden that now exists once the policy extends into a private home, the blanket prohibition on all weapons without any safety carve-outs is not only far from a perfect means-end fit but cannot justifiably meet the substantial-fit minimum. *See Kachalsky*, 701 F.3d at 97. The amended GFSA places a new burden on the right that substantially undermines the longstanding tradition of keeping arms for safety in a private home. This burden unreasonably

decreases safety by prohibiting all weapons during significant periods of time without compensating for this reduction in safety by providing protection. When a school operates in person and provides security, this burden is mitigated as no longer unreasonable. To thwart a criminal actor seeking to commit a gun crime, students in their own homes cannot rely on immediate external help. In contrast, students at school can rely on external help in the form of the safety measures implemented and presence of campus police or other security personnel. Moreover, when a school operates in person and provides security, this burden is also not unnecessary since there is no intrusion into the core right.

Finally, in addition to the lack of carve-outs and the failure to provide alternative means for self-defense, the policy also harshly punishes even accidental infractions. The amended policy expanded its reach to unprecedented degree yet retained its near-absolute and punitive means. The school cannot point to any support that a substantial relationship between the policy and the interest exists. In the absence of reasonable adjustments to the policy since it now extends into a private home, the substantial relationship between the important interest and policy is too attenuated to withstand any form of scrutiny. Combined with the reduction in safety created by the policy, the means do not fit closely with the interest of ensuring the physical safety of students. Therefore, even under intermediate scrutiny the amended policy does not pass constitutional muster.

D. CONCLUSION

The school unilaterally extended the policy—crafted exclusively for in-person application—to the private homes of students to the same degree as if under the physical control of the school. As a result of this abject failure to consider the implications of the constitutional rights of students and their family members or find the least restrictive means to achieve the alleged interest, the amended school policy violates the very core of Hart's Second Amendment right. The

prohibited conduct falls within the scope of Second Amendment protections and causes a burden on that right. Due to passing the threshold inquiry, the policy warrants review under a heightened level of scrutiny. Strict scrutiny is justified due to the severe burden on the core right as a result of the blanket prohibition on all classes of weapons in a private home by a lawful citizen. Under this standard, a challenged policy passes constitutional muster only upon a showing of a compelling interest actually achieved through narrowly tailored means to rebut the presumptively invalid policy. Here, the factual, historical, and jurisprudential records—even when combined in totality—fail to rebut this presumption. The pandemic conditions change the compelling nature of the original safety interest and the policy does not utilize the least restrictive means. Moreover, even under intermediate scrutiny, the policy still does not pass constitutional muster. Not only is the stated interest likely too tenuous to qualify as an important government interest in practice, but the record contains a dearth of support that a substantial relationship between the policy and the important interest exists. Thus, the amended policy is unconstitutional under any level of scrutiny and violated Mr. Hart's Second Amendment right.

II. Punishing Mr. Hart for "liking" social media posts exceeds *Tinker's* allowances for schools to regulate free speech.

The School Board overstepped its constitutional restraints by punishing peaceful political expression that occurred off campus. The First Amendment protects Americans from reprisals for voicing dissent, and this Court has long established that students are included in that guarantee. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). This Court has never approved a school's authority to regulate speech that occurs off-campus, outside of school hours or activities, or from a student's private property. Nor has this Court approved punishing a student for political expression that does not disrupt the school's operations or collide with the rights of others. The Petitioners ask the court to recognize a new doctrine for punishing threats, but this case presents

none of the factors that lower courts have relied on to determine whether language is threatening. Mr. Hart expressed approval of three political statements and was retaliated against by a deprivation of credentials that significantly impact his property and liberty interests. This Court must uphold the lower court's ruling and its own precedent that this sort of expression and the resulting retribution implicate the most fundamental concerns of the First Amendment.

In addition to its basic educational purposes, schools play an important societal role in training children to be citizens. *See Meyer v. Nebraska*, 262 U.S. 390 (1923). Expressions of political opinion are precisely the kind of potentially unpopular speech that the First Amendment is meant to protect. *Virginia v. Black*, 538 U.S. 343, 365 (2003). School officials using their power to silence meaningful debate risks turning the school environment into an "enclave of totalitarianism." *Tinker*, 393 U.S. 503, 511. Schools represent most people's first interactions with the state; they should not be used to stifle speech and repress valid political opinions. This Court has repeatedly stressed that, rather than creating a homogenous populace, schools must foster an environment in which students are exposed to a wide variety of ideas and viewpoints. *Id* at 512, *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). School officials have a responsibility to foster a diversity of viewpoints and maintain the "marketplace of ideas" as they train the next generation of citizens to participate in American democracy. *Tinker*, 393 U.S. 503, 512.

A student's right to free speech was established in the 1965 case *Tinker v. Des Moines*. *Tinker*, 393 U.S. at 503. Public school students in Des Moines, Iowa planned to wear black armbands to protest the Vietnam War. *Id*. at 504. Upon learning of this plan, school officials formally banned wearing black armbands. *Id*. The students went ahead with their protest and were suspended by the school until they agreed not to wear the armbands. *Id*. The Court forcefully

affirmed that students retain their first amendment rights in school. *Id*. at 506 ("[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"). The Court went on to establish that it is only under limited conditions that a school can infringe upon students' freedom of speech. *Id*. For the school's action to be constitutional, it must rest on "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id*. at 509. Mr. Hart was expressing his unpopular view that his Second Amendment rights had been violated. The fact that a circuit court agreed with his interpretation and this case now stands before the Supreme Court shows that his suspension does raise an important constitutional complaint. Speech of this nature, defending one's fundamental rights, is precisely the kind of political opinion that the First Amendment most stringently protects.

A. THE SCHOOL BOARD LACKS AUTHORITY TO REGULATE MR. HART'S OFF-CAMPUS EXPRESSION.

Mr. Hart's speech occurred off-campus, outside of school hours, and from his own personal device. Circuits have disagreed on how to address regulation of off-campus speech with reasonable foreseeability, nexus to pedagogical interests, and limiting *Tinker* to on-campus speech emerging as the three primary approaches. Confining *Tinker* to on-campus speech provides the clearest guidance to relevant parties and faithfully adapts prior precedent. This Court's review of free speech in schools has solely scrutinized expression that occurred on school grounds or speech that appeared to be school-sponsored. While Mr. Hart's expression would not be permissibly punishable under any of these approaches, adopting the reasonable foreseeability or nexus tests would facilitate a dramatic expansion of the narrow First Amendment exceptions laid out by this Court.

The language of *Tinker* itself suggests that speech must occur on school grounds in order to be permissibly regulated by the school. Subsequent cases have expanded this slightly to allow for regulation when events are technically off-campus but are clearly school-sponsored. *Morse v. Frederick*, 551 U.S. 393, 405 (2007). Now, a significant circuit split has developed in how to treat off-campus student speech in the social media age. Technology has developed to facilitate recorded speech can be viewed in any number of locations. This Court must decide whether *Tinker* applies to social media posts that were created off-campus and carry no imprimatur of the school. In order to clarify the bounds of permissible speech for both students and administrators as well as reinforcing the importance of First Amendment principles, the Court today should adopt the Third Circuit's approach that *Tinker* does not apply to off-campus speech that is not threatening or bullying.

The most liberal test for whether a school can regulate off-campus speech was the Second Circuit's measuring of reasonable foreseeability. In *Wisniewski v. Board of Education*, the court held that it was appropriate to apply *Tinker* because it was reasonably foreseeable that the message in question would come to the attention of school authorities or otherwise reach campus. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39 (2nd Cir. 2007). A student had created an instant message icon that depicted a teacher being shot and the icon was sent to a large number of students. *Id*. at 36. The court held that the student's actions had made it reasonably foreseeable that the speech would reach the school and that the violent content qualified as a substantial disruption under *Tinker*. *Id*. at 39.

Mr. Hart's speech would be protected even under the reasonable foreseeability test. In the two leading Second Circuit decisions, the court found the student's manner of distributing the speech important in determining reasonable foreseeability. The *Wisniewski* court rested its finding

of reasonable foreseeability on the "excessive distribution" of the icon as it had been shared with many people, all but ensuring it would come to the attention of school authorities. *Id*. In *Doninger v. Niehoff*, the reasonable foreseeability threshold was met in the case of a student's blog post containing offensive language directed towards the school. *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008). The court found that the blog "was purposely designed by Avery to come onto the campus." *Id*. at 50. Mr. Hart's expression shares neither of those qualities. He merely liked preexisting posts created by others. He neither distributed the posts nor designed them to reach the school. With these considerations in mind, it would not be reasonably foreseeable to Mr. Hart that his likes would have reached the school.

The Fourth Circuit adapted the reasonable foreseeability standard test into a nexus test. In *Kowalski v. Berkeley County Schools*,a student-created webpage was used to bully a classmate. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011). Upholding the school's right to discipline the student, the court stated that it was satisfied that there was a strong nexus between the student's speech and the school's pedagogical interests. *Id*. at 573. Since promoting a safe, secure, bullying-free environment is part of a school's mission, the administrators were able to restrict speech that threatened those aims. Since Mr. Hart's speech did not affect other students' classroom experience or well-beings, it does not have a sufficient nexus to pedagogical interests and the discipline is unconstitutional under this test as well. The school made clear that its punishment was rooted in disapproval of the posts' tone and the fact that they were critical of the school. This rationale, regulating unpleasant posts to suppress negative opinions about the school, does not qualify as a legitimate pedagogical interest.

The Fifth Circuit declined to endorse either of those tests in its leading case on off-campus student speech. In *Bell v. Itawamba County School Board*, the court addressed whether a school

was permitted to discipline a student for creating a rap song that contained vulgar language directed towards school employees. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (en banc). The court chose to focus on the specific facts of each case and said that the school's action in that case was appropriate because it was intentionally directed at the school community and was reasonably understood to threaten, harass, and intimidate a teacher. *Id*. at 394. Since both of those factors are entirely absent from Mr. Hart's speech as it was neither directed at the school nor threatening, the school's disciplinary action would be unconstitutional under this approach.

The Third Circuit, after considering all of these approaches, declined to endorse any of them and instead held that *Tinker* simply does not apply to most off-campus speech. In *Levy v. Mahanoy Area School District*, a student was kicked off of the cheerleading team after Snapchats critical of the team came to the attention of coaches. *B.L. by and through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3rd Cir. 2020). Emphasizing the narrow accommodation of *Tinker*, the court held that it would be too great an expansion of school authority to allow them to punish students for off-campus speech. *Id*. at 177, 89. It defined off-campus speech as "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Id. at 189. It reasoned that while new technologies like social media produce new challenges, courts should address them using the principles of prior precedent and not allow technological changes to erode constitutional protections. *Id*. The court also clarified that this approach did not limit schools' ability to deal with off-campus speech that is subsequently brought into the school environment or speech that threatens violence or harasses other students. *Id*. at 190. Those types of speech would fall squarely within a previously recognized exception to First Amendment protections. *Id*.

The Second, Fourth, and Fifth Circuit approaches all have significant flaws that render them inadequate for addressing the issue of off-campus student speech. First, the reasonable foreseeability test adopted by the Second Circuit is far too broad and would effectively dismantle the limited application that *Tinker* stands for. If the test is simply that regulable speech is that which could be reasonably expected to reach the school environment, essentially any internet activity would fall under the disciplinary authority of the school. Students socialize and conversate at school. Any controversial post is undoubtedly going to be discussed to some degree within the confines of the schoolground, even if it was made entirely off-campus and not during school hours. This test would make it so that any speech made on the internet, a primary form of communication for today's youth, would fall under the scrutiny of school authorities. This is surely antithetical to the central premise of *Tinker* which is that schools in narrow circumstances can discipline student speech for specific reasons. The reasonable foreseeability test would flip this on its head and make First Amendment freedom of speech the narrow exception and censorship the norm, effectively gutting students' constitutional rights.

The nexus test is also unnecessarily broad. The language of *Kowalski*, which created the nexus test, mostly mirrors the original *Tinker* test of substantial disruption. *Kowalski*, 652 F.3d 565, 73. The court there said that it did not matter where the speech originated because it materially and substantially disrupted the school's work and collided with the rights of other students to be secure and let alone. *Id*. It would seem that if that was the case, the speech could be regulated under *Tinker* without needing to add an additional test. All the nexus language serves to do is potentially bring many forms of previously unconstitutional school actions into the *Tinker* and its progeny's exceptions. Dramatically expanding *Tinker* to include all off-campus speech that in any way interferes with a school's educational mission not only runs counter to the original opinion

but also risks inviting schools to abuse that power in dangerous ways. If a hard line is not drawn, schools will inevitably drift towards the exact regulation of unpopular or controversial speech that the original *Tinker* opinion explicitly rejected.

The Fifth Circuit approach does not create a system of analysis and is therefore not ideal for adoption. That case involved threatening language which is speech of its own category. Threats, even if they are made off-campus, would invite legitimate disciplinary action under any of the approaches. Because the Fifth Circuit's opinion in *Bell* concerns such a situation and is highly fact-specific, it does not offer guidance for applying *Tinker* to off-campus speech going forward. The only somewhat viable reading in regards to this case is that for off-campus speech to fall under *Tinker*, it must include identifiable threats of violence, a quality that is not present in Mr. Hart's case.

The Third Circuit approach strikes the correct balance between acknowledging the realities facing school officials and respecting students' constitutional rights. Additionally, it stays the most faithful to existing Supreme Court precedent. The Third Circuit method simply says that when off-campus, students are afforded the same constitutional rights as other citizens. *B.L.* 964 F.3d 170, 189. *Tinker* only comes into effect when the speech "occurs in a context owned, controlled, or sponsored by the school." *Id*. This provides clarity to students and administrators alike. *Id*. Under the reasonable foreseeability test, whether or not a student's speech is protected by the First Amendment essentially depends on circumstances outside of their control. Constitutionality should not hinge on whether posts are shared or liked enough; the speaker needs to be able to know at the time of speaking whether they are engaging in protected speech or not. The Third Circuit test solves that by limiting *Tinker* to on-campus speech. It additionally addresses the concerns of school officials by including exceptions for speech that harasses or threatens other students. The

Third Circuit approach rests on an understanding that existing precedent is appropriate to deal with new forms of speech and new technology should not be used as an excuse to erode students' constitutional rights.

B. MR. HART'S POLITICAL EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT.

Even if the School Board had the authority to regulate off-campus speech, it would still be limited in doing so to meet specific important interests. *Tinker*. This court has recognized three narrow exceptions to First Amendment rights for student speech that is vulgar, sponsored by the school, or advocating for the use of illegal drugs. Mr. Hart's endorsement of social media posts does not meet any of these exceptions. The Petitioners ask this Court to recognize a new carveout for threatening speech, but Mr. Hart's conduct was not specific or suggestive enough to satisfy any of the tests articulated in the lower circuits. Mr. Hart did not direct his expression towards any other students, nor did his speech collide with their right to be let alone and learn in a secure environment. Mr. Hart's conduct did not significantly disrupt the school's functioning or the students' wellbeing, so there was no constitutional justification for the school to retaliate against his constitutionally-protected expression.

Tinker, while standing for the idea that students retain their First Amendments rights in school, does allow for some regulation of speech in limited circumstances. *Id*. at 509. The Court said that a prohibition on speech could be maintained where there is a finding that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id*. at 509. It later clarifies that a regulation, in order to stand, must be justified by a showing that the prohibited conduct would "materially and substantially disrupt the work and discipline of the school" or "impinge on the rights of other students." *Id*. The language of *Tinker* itself in discussing what qualifies as a substantial disruption

focuses on the classroom. The opinion says that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts *classwork*…" is constitutionally allowed to be regulated and that the demonstration "caused discussion outside of the classrooms, but no interference with work and no disorder." *Id*. at 513, 14 (emphasis added). This focus on the classroom and classwork, combined with the court including impinging on other students' rights as a valid reason for stifling speech, makes clear that in order to qualify as a substantial disruption, the prohibited speech must actually interfere with the classroom learning experience.

Mr. Hart's actions do not meet this basic requirement of the *Tinker* test. He liked the posts off school property and at times when no school events were in progress. There is nothing in the record to suggest that any class activity was disrupted or any school event was interfered with. The petitioner argues that the emails sent to school administrators represent a material disruption, but this interpretation of disruption runs counter to the language in *Tinker* which repeatedly mentions classwork, the classroom, and other students' learning. Administrators having to deal with a high volume of criticism and protests does not affect students' learning experience whatsoever. To accept that receiving emails qualifies as a substantial disruption would allow schools to punish students for utilizing one of the only ways they have to peacefully resist violations of rights. In the email informing Mr. Hart that he was removed from valedictorian consideration and barred from making a graduation speech, the school said that it was due to his "shameful and disgraceful" likes on social media. While some students claimed the conduct was somewhat triggering, that was not the reason the school gave for the punishment. This inappropriate purpose is further established by the school's Social Media Policy itself, which states: "There will be no tolerance for any negative information regarding the school or the student body shared on the internet." Petty

avoidance of discomfort and unpleasantness is what *Tinker* specifically called an impermissible rationale for suppressing speech. The school made the controversial decision to suspend Mr. Hart and sought afterwards to sanction any criticism of that decision. The mere unpleasantness that comes with defending its prior controversial decision does not justify the school limiting its students' constitutional rights.

Three Supreme Court cases following *Tinker* have added a limited number of additional circumstances in which a school may regulate student speech, none of which apply to Mr. Hart. In *Bethel School District No. 403 v. Fraser*, a student gave a lewd speech at a school assembly and was suspended for three days. *Fraser,* 478 U.S. 675. This Court held that schools can regulate speech that is vulgar, lewd, or plainly offensive. *Id*. at 685. Upholding the suspension, this Court focused on the fact that there were minors in the audience and that part of a school's mission is to demonstrate the appropriate forms of civil discourse. *Id*. at 683. In distinguishing *Tinker*, the Court noted that the assembly speech was devoid of any political message, unlike the black armbands used to protest the Vietnam War. *Id*. at 685. In his concurrence, Justice Brennan noted that if circumstances had been slightly different, i.e., not at a widely attended assembly, the speech may have been protected even if it had occurred in the school. *Id*. at 689.

The Court's reasoning shows that although Mr. Hart liked two messages that contained expletives, the specific circumstances of the speech do not bring it within the *Fraser* vulgarity exception. For one, Mr. Hart's speech was directly political. Unlike the assembly speech in *Fraser* which was essentially lewd for the sake of lewdness, Mr. Hart was expressing the political opinion that his suspension violated his Second Amendment rights. The language of *Fraser* suggests that this political valence should be considered in determining the constitutionality of a school's actions and that even obscene language should be allowed if it is utilized to convey a political point.

Additionally, *Fraser* continues *Tinker's* focus on where the speech takes place and what it disrupts. Crucially, the obscene speech was delivered in an assembly on grounds during school hours where many younger students were present. The Court emphasizes that there were many fourteen-year-old students there as a captive audience that were exposed to the lewd language as part of their school day. It reasoned that "a high school assembly or classroom is no place for a sexually explicit monologue" and that the school was correct to make clear that it did not condone the behavior. *Id*. at 685. This is because a speech made at an assembly can reasonably be understood to be school-sanctioned, a concern entirely not present with Mr. Hart's social media activity. The posts' political content, the fact that they occurred outside of school grounds and hours, and the fact that they were not forced upon a captive audience of young children all combine to show that *Fraser* does not support making the school's action constitutional.

Other Supreme Court student speech cases also do not condone the school's action. In *Hazelwood School District v. Kuhlmeier*, the Court held that it is constitutional for a school to regulate school-sponsored (as in a student newspaper) speech as long as its actions are reasonably related to legitimate pedagogical concerns. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 73 (1988). In *Morse v. Frederick*, the Court upheld a school's suspension of a student that had displayed a banner reading "Bong Hits 4 Jesus" at the Olympic torch relay passing near the school. *Morse*, 551 U.S. 393. The Court held that schools are allowed to prohibit speech that promotes the use of illegal drugs. *Id*. at 407. In so holding, the Court reasoned that the relay was a school sponsored event. Id. at 400. Therefore, while Mr. Hart's case clearly does not fall within the direct terms of these two cases, they can shed light on themes throughout the Court's student speech jurisprudence. Namely, the three opinions that create additional exceptions to *Tinker* all emphasize that the speech in question could be seen as school-sponsored in some way. Whether because it's

at an assembly, an article in a school newspaper, or part of a school event, this line of cases makes clear that speech must be reasonably able to be seen as school-sanctioned in order for schools to be able to regulate it if it does not cause a substantial disruption under *Tinker*. Mr. Hart's speech did not promote drug use, did not bear the imprimatur of the school, and cannot be reasonably read to be school-sponsored in any way. It therefore was unconstitutional for the school to punish Mr. Hart's speech under existing precedent.

Having failed to satisfy the exceptions established in the 53 years since *Tinker*, the Petitioners now ask this court to uphold their actions because Mr. Hart's liking of a social media post constituted threatening speech. Circuits differ on the formality and severity of this exception, but none of the existing tests can be properly applied to this case where the allegedly threatening conduct was as bland and harmless as signaling approval of a protest. This conduct was not reasonably expected or intended to cause substantial disruption or material interference with the school. No reasonable person would consider Mr. Hart's actions an expression of intention to inflict bodily harm or death. His role in the expression at issue does not even meet the specificity requirements in the most liberal of threat doctrines. Mr. Hart's expression did not meet *Tinker*'s broad category of invading, impinging, or colliding with "the rights of others." *Tinker* at 508. This court may decide to formally incorporate a threat exception to *Tinker*, but finding a threat in this case would greatly exceed the cautious approach by lower courts.

Tinker and its progeny have already provided a standard for determining whether speech can be regulated for its threatening effect, which is to determine if the speech could have reasonably been expected to substantially disrupt or materially interfere with a school. *Tinker* 393 U.S. at 503. The Third Circuit looked to this standard in *Snyder v. Blue Mountain SD* when a school attempted to punish a student under a policy barring threatening or abusive expression. J.*S.*

ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3d Cir. 2011). The Third Circuit found that the student could not have anticipated that her expression on a personal social media account would disrupt the school. *Id.* Mr. Hart did not and reasonably could not have anticipated that his expression would disrupt the school. The standard should not be altered simply because this expression has been colored by the School Board as threatening.

Other Circuits have created more specific tests to determine if speech is threatening and therefore warrants regulation. The Sixth Circuit defines an unprotected threat as a written or oral statement that a reasonable speaker would foresee being interpreted as a "a serious expression of an intention to inflict bodily harm or take the life of the target." *U.S. v. Lineberry*, 7 Fed. Appx. 520, 523 (6th Cir. 2001). The Ninth Circuit probes whether the threatening expression was sufficiently specific and directed. *Wynar v. Douglas County School Dist.*, 728 F.3d 1062 (9th Cir. 2013). N Mr. Hart "liked" a post advocating for peaceful political expression and a comment expressing a policy opinion about the Second Amendment. Nothing about Mr. Hart's expression conveyed any intention to cause bodily harm or death to anyone nor was his expression (endorsing another's comment) at all specific.

The second prong of *Tinker* gives schools the right to regulate speech that collides with "the rights of other students to be secure and to be let alone." *Tinker* at 508. As then-Circuit Judge Alito wrote, "[t]he precise scope of Tinker 's 'interference with the rights of others' language is unclear." *Saxe v. State College Area School Dist.*, 240 F.3d at 217 (3d Cir. 2001). Circuits have interpreted this language differently, with some drawing the line at tortious speech. *See Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368 (8th Cir. 1984) (holding that tortious speech is not protected free speech). Other Circuits perform a more fluid assessment of whether students suffer a legitimate disruption of their ability to learn. The Ninth Circuit has held that racist comments are

permissible to regulate, as they are intended to injure and intimidate certain students, which compromised their sense of security and interfered with their opportunity to learn. *Harper v. Poway Unified School Dist.* 445 F.3d 1166 (9th Cir. 2006). The Second Circuit has held that students were not protected under *Tinker* for distributing lewd surveys during school. *Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977). Unlike these cases, Mr. Hart did not thrust his expression onto any other students in a disruptive way; he flagged approval of non-threatening comments made by another person. This clearly does not offend *Tinker*'s recognition that other students have a right "to be let alone." *Tinker* at 508. Although some students may have disagreed with the political sentiment in posts that Mr. Hart "liked," courts agree that "it is certainly not enough that the speech is merely offensive to some listener." *Wynar v. Douglas County School Dist.*, 728 F.3d at 1072 (3d. Cir. 2013) (quoting *Saxe*, 240 F.3d at 217).

PRAYER

This Court must uphold the Fourteenth Circuit's decision and allow this case to proceed at trial. The 2020 amendment to the GFSA expanded a reasonable restriction of possessing firearms in a sensitive place and handcuffed gun owners in their own home, where the need for second amendment rights is most acute. Punishing a student for cleaning their firearm to ensure it was safe and operable for self-defense exerts the state's police power against a constitutionally protected activity and must be rebuked. The school's retaliation against Mr. Hart for endorsing criticism and political expression on social media is a plain violation of the First Amendment that does not meet any of the rationale in *Tinker* and its progeny. The School Board has consistently and grievously violated two of Mr. Hart's most fundamental rights, and he must be afforded the due process of law to remedy this miscarriage of power.