No. 18-7286

In the Supreme Court of the United States

JOHNATHAN MASTERS,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Kentucky

MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* THE STUDENT PRESS LAW CENTER, THE JOSEPH L. BRECHNER CENTER FOR FREEDOM OF INFORMATION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE CENTER FOR JUVENILE LAW AND POLICY, IN SUPPORT OF PETITIONER

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MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Movants – the Student Press Law Center, Joseph L. Brechner Center for Freedom of Information, the Marion B. Brechner First Amendment Project, the National Coalition Against Censorship and the Center for Juvenile Law and Policy at Loyola Law School (the "Movants") – hereby respectfully request leave to file the accompanying *amici curiae* brief in this case. The proposed brief will be submitted in support of the Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Kentucky. Petitioner Johnathan Masters has consented to the filing of this brief. Respondent, the Commonwealth of Kentucky, has not consented, through the Commonwealth's counsel with the Office of Attorney General.

INTERESTS OF *AMICI*

Amici curiae are five organizations – the Student Press Law Center, Joseph L. Brechner Center for Freedom of Information, the Marion B. Brechner First Amendment Project, the National Coalition Against Censorship and the Center for Juvenile Law and Policy at Loyola Law School – with decades' worth of experience advocating for the rights of all citizens, including young people, to have a meaningful voice in the issues of public concern that affect their lives. (More detailed identifying information is included in the Statement of Interest in the accompanying Brief Amici Curiae, submitted

for filing jointly with this motion.) The question in this case – whether the government's burden to prosecute and jail a speaker addressing school authority figures is less demanding than the burden on school disciplinarians to justify punishing the same speech – goes to the heart of *Amici's* concerns as organizations invested both in the welfare of children and the welfare of our First Amendment.

ISSUES ADDRESSED BY MOVANTS IN BRIEF

In support of this motion, *amici* assert that this case presents issues of great national import, as twenty-two states have some variation of a statute like the one at issue here, which exposes a speaker to criminal prosecution for speech that "disrupts" or (in the case of Kentucky) "interferes with" the operations of a school, no matter how briefly or insubstantially. Courts in Arizona and North Carolina have declared analogous statutes unconstitutional, and Kentucky courts have invalidated a materially similar predecessor to the statute at issue (Kent. Rev. Stat. § 161.190). The ruling below thus stands as a confusing anomaly. So long as the ruling and the challenged statute remain on the books, schoolchildren and parents in Kentucky will be in peril of arrest and prosecution for speech that would not even be sufficiently disruptive to constitute grounds for after-school detention, under this Court's half-century-old student-speech jurisprudence.

Amici propose to appear for the purposes of helping the Court understand the magnitude of the risk that Section 161.190 presents not just to

Petitioner Masters, but to parents and students throughout Kentucky who advocate forcefully for their families' educational interests. *Amici* propose to offer, through their brief, a full appreciation of where Section 161.190, and the erroneous ruling upholding it as "content neutral," depart from bedrock First Amendment standards and principles, resulting in an intolerable chilling effect on peaceful school protests and other such non-dangerous advocacy speech, commentary and whistleblowing.

DATED: February 4, 2019.

Respectfully submitted,

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QUESTION PRESENTED

Does the First Amendment permit criminal prosecution of speech directed at government employees upon a showing that the speech "interferes with" the operations of a public school, a lesser standard than the Constitution and this Court require for the imposition of school discipline?

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BRIEF OF *AMICI CURIAE*

INTEREST AND IDENTITY OF *AMICI CURIAE*[1]

The Student Press Law Center is a nonprofit legal-assistance organization headquartered in Washington, D.C., with a mission of supporting substantive, civic-minded journalism in schools and colleges nationwide. Since its founding in 1974, the SPLC has been the nation's only source of legal assistance dedicated to the needs of student journalists and journalism educators. Its volunteer attorneys regularly represent student journalists who face threats of reprisal from their schools for speech addressing matters of public concern, whose speech is chilled when broadly drawn prohibitions on speech expose students to prosecution for criticizing the performance of school officials.

The Joseph L. Brechner Center for Freedom of Information (the "Brechner Center") at the University of Florida in Gainesville exists to advance understanding, appreciation and support for freedom of information in the state of Florida, the nation and

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[1] Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rules 37.2(a) and 37.2(b), counsel of record for all parties received notice, at least 10 days prior to the due date, of *Amici Curiae*'s intention to file this brief. Petitioner Johnathan Masters has consented to the filing of this brief. Respondent, the Commonwealth of Kentucky, has not consented, through the Commonwealth's counsel with the Office of Attorney General.

the world. The Center's focus on encouraging public participation in government decision-making is grounded in the belief that a core value of the First Amendment is its contribution to democratic governance. Since its founding in 1977, the Brechner Center has served as a source of academic research and expertise about the law of gathering and sharing information, and the Center regularly appears as a friend-of-the-court in federal and state appellate cases nationwide where the public's right to informed participation in government is at stake. The Center is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The Marion B. Brechner First Amendment Project (the "Project") in the College of Journalism and Communications at the University of Florida in Gainesville is an endowed project dedicated to contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The Project pursues its mission through a wide range of scholarly and educational activities benefiting scholars, students and the public. The Project's scholarly and educational interest in filing this amicus brief is to bring to the Court's attention important First Amendment principles related to the following: political expression; speech about matters of public interest; public forums; and viewpoint discrimination. The Project is exercising the academic freedom of its faculty to express their scholarly views, and is not submitting this brief on behalf of the University of Florida or the University of Florida Board of Trustees.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve the protections of the First Amendment in government-created online public speech forums. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

The Center for Juvenile Law and Policy ("CJLP") at Loyola Law School in Los Angeles provides legal advocacy to vulnerable children through direct advocacy in Los Angeles and policy initiatives impacting youth in Los Angeles and throughout the United States. CJLP's clients are children involved in the juvenile justice system, children experiencing school problems like inadequate special education services and discriminatory disciplinary practices, and youth who are unjustly sentenced disproportionate adult prison sentences. Many of the CJLP's clients become involved in the juvenile justice system as a result of incidents at school for which they are referred for prosecution in addition to experiencing school-based discipline. Disruption of school activities remains a common, often unjust and discriminatorily applied, reason for school discipline for CJLP's clients. Making sure that our clients and others similarly situated throughout the country are not

also prosecuted for disrupting school activities through exercising their First Amendment right to free speech is essential to CJLP's mission of stopping unjust prosecutions for children especially stemming from the school setting.

SUMMARY OF ARGUMENT

For more than two centuries, this Court has stood as a bulwark against persistent attempts by government authorities to jail their opponents. The oldest and most deeply entrenched of all of First Amendment principles is that citizens may not be criminally prosecuted for criticizing government officials and policies. But in too many jurisdictions, state law puts schoolchildren in unique peril of being arrested, prosecuted and jailed for "talking back" to school employees. Kentucky has one of the most extreme of these statutes. It creates a criminal offense for speaking in a manner that "interferes with" school operations – a threshold so insubstantial as to invite discriminatory, viewpoint-based abuse. Johnathan Masters' petition provides the Court with the opportunity to clarify an area of obvious confusion in the law that puts schools in the business of policing incivility at gunpoint. *Amici* respectfully request that this Court accept review of Masters' petition and reverse the Kentucky Court of Appeals' erroneous conclusion that Kentucky's "disruptive school speech" statute is constitutional.

ARGUMENT

I. Vague Laws Criminalizing Speech Place Vulnerable Students in Special Danger

The Kentucky statute in this case is a holdover from the discredited "zero tolerance" movement in public schools. It has seen students dragged from their schools in handcuffs for "crimes"

no greater than playing cowboy games or carrying bottle openers. *See* American Psychological Association Zero Tolerance Task Force, *Are zero tolerance policies effective in the schools?: An evidentiary review and recommendations*, American Psychologist 63(9), 852-862 (2008). (describing zero-tolerance overreactions including Florida school's expulsion of 10-year-old girl whose mother placed a small knife in her lunchbox to cut an apple). These arrests often involve an element of expression, including political speech that unquestionably would enjoy full First Amendment protection anywhere outside of a school. *See, e.g.,* Victoria Taylor, *West Virginia Teen Suspended, Arrested After Wearing NRA Shirt Returns to School in the Same Shirt,* New York Daily News, Apr. 23, 2013 (describing arrest of eighth-grader who refused to change out of a National Rifle Association T-shirt with a drawing of a rifle and the slogan, "Protect your right"). As destructive as "zero tolerance" has been to student safety and welfare, Kentucky's statute is even more dangerous. That's because the alleged misbehavior it criminalizes has nothing to do with violence and may be no more serious than a momentary instance of "back-talking."

The statute makes it a crime to "direct speech or conduct toward" a public school employee that the speaker "knows or should know … [will] disrupt or interfere with normal school activities." K.R.S. 161.190. History demonstrates that, invariably, laws that enable school authorities to press criminal charges based on a subjective assessment of whether speech is "disruptive" will be applied disproportionately against students of color, students with special needs, and students experiencing

mental-health issues. This, in turn, exacerbates the well-documented "school to prison pipeline" that can set children on a pathway to lifelong failure.[2] The over-criminalization of minor acts of youthful misbehavior became so acute and widespread that, in 2014, the Attorney General and Secretary of Education took the extraordinary step of instructing schools to rethink their use of out-of-school suspensions and expulsions, 95 percent of which were imposed for nonviolent infractions as insubstantial as violating a dress code. *See* Donna St. George, *Holder, Duncan announce national guidelines on school discipline*, Washington Post, Jan. 20, 2014. Research by law professor Jason Nance documents that the most heavily policed schools are schools serving primarily nonwhite populations, *see* Melinda D. Anderson, *When School Feels Like Prison*, The Atlantic, Sept. 12, 2016, so statutes that criminalize speaking to school officials in a "disruptive" way unavoidably will end up being used disproportionately against people of color. As First Amendment scholar Catherine Ross has

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[2] *See* Artika R. Tyner, *The Emergence of the School-to-Prison Pipeline*, American Bar Association GPSolo eReport, Aug. 15, 2017 ("Zero tolerance policies can also serve as a gateway into the school-to-prison pipeline. … [I[n some instances the enforcement of zero tolerance policies can be far-reaching, therefore increasing the likelihood of interaction with law enforcement and future incarceration."), *available at https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2014/june_2014/the_emergence_of_the_school-to-prison_pipeline/.* Federal data shows that, although school violence is trending downward, school referrals to police continue to increase, with black students accounting for 31 percent of school arrests although they comprise only 15 percent of the student body. Moriah Balingit, *Racial disparities in school discipline are growing*, federal data show, Washington Post, April 24, 2018.

observed: "The proliferation of armed police officers at schools has only intensified the risks of entering the fast track from school to court. These officers frequently advise principals about the law and immediately arrest offenders who might have never come to the attention of law enforcement for minor infractions in the past." Catherine J. Ross, *"Bitch," Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 Temp. L. Rev. 717, 723-24 (2016).

That schools may take disciplinary action against students whose speech materially and substantially disrupts school functions is settled law. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). But criminalization is quite a different matter. Across the country, students are engaging in acts of civil disobedience that might foreseeably "interfere with" normal school functions and activities, including demonstrations in response to mass school shootings. *See* Vivian Yee & Alan Blinder, *National School Walkout: Thousands Protest Against Gun Violence Across the U.S.*, New York Times, Mar. 14, 2018 (describing how students walked out of schools nationwide "by the thousands" following the fatal school shootings in Parkland, Fla., at times accepting disciplinary consequences). That a student who demonstrates against gun violence might be exposed to criminal prosecution and a year in jail is intolerable in a civilized society. Unfortunately, however, that is the reality for students in Kentucky today. Sadly, Kentucky is not alone; one author's study finds 22 states with statutes criminalizing various forms of "disruptive" student expression. *See* Amanda Ripley, *How America Outlawed Adolescence*, The Atlantic, Nov.

2016. Manifestly, states need guidance from the Court on where the line is properly drawn as the growing presence of police in school corridors increases the likelihood that cases once handled through the disciplinary system will ripen into arrest.

II. This Court Has Regularly Invalidated Statutes Criminalizing Pure Speech, Especially Speech Directed to Government Officials

Again and again, the Court has struck down statutes criminalizing unwelcome speech directed toward government employees. In *Houston v. Hill*, 482 U.S. 451 (1987), the Court invalidated a municipal ordinance making it a crime to "assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." The Court found the ordinance to be facially overbroad, because it extended beyond assaultive conduct and also swept in "verbal interruptions of police officers." *Id.* at 461. As Justice William Brennan wrote for the Court: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 463.

More than half of all schools in America have a police or security officer, according to federal statistics. *See* David Sherfinski, *Percentage of public schools with resource officers on the rise: Report*,

Washington Times, Mar. 29, 2018 (citing study from U.S. Department of Education documenting that the presence of police or security officers on K-12 campuses rose 10 percent over the past decade, and that 90 percent of on-site officers carry firearms). That the Kentucky statute makes no exception for speech directed to the many thousands of armed police officers patrolling schools is, by itself, conclusively fatal under *Houston*.

The *Houston* case built on the Court's prior rulings striking down similarly broad prohibitions in *Gooding v. Wilson*, which involved a Georgia statute criminalizing "opprobrious words or abusive language, tending to cause a breach of the peace," 405 U.S. 518, 519 (1972), and *Lewis v. New Orleans*, where a statute made it a crime to "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." 415 U.S. 130, 132 (1974). In each instance, the Court found it decisive that the statute broadly criminalized pure speech without limiting itself to the narrow categories of constitutionally unprotected speech, such as "fighting words" as defined in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571 (1942).

The statute here is as comparably broad and subjective when compared with those invalidated in *Houston*, *Gooding* and *Lewis*. It provides:

> Whenever a teacher, classified employee, or school administrator is functioning in his capacity as an employee of a board of education of a public school system, it

> shall be unlawful for any person to direct speech or conduct toward the teacher, classified employee, or school administrator when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities or will nullify or undermine the good order and discipline of the school.

KRS § 161.190.

Nothing about "interfere[nce] with normal school activities" requires proof that the speech constitutes "fighting words" or otherwise falls within the limited categorical exceptions to the First Amendment recognized by the Court, such as threats of violence. Indeed, the Kentucky statute is considerably broader than the one found unsustainably broad in *Houston*, for this reason: The *Houston* statute applied only to speech that actually interrupted or otherwise interfered with an officer during the performance of duties, encompassing only face-to-face speech in the immediate vicinity of the officer. The statute here applies to speech that is merely *directed toward* an employee, which could include emails, text messages, blog posts or other expression (unlike that in *Houston*) that is entirely unmoored from conduct. It could apply to speech that never even reaches its targeted recipient and that never actually results in disruption, so long as disruption was reasonably foreseeable.

In a case involving a disciplinary code rather than a criminal one, the U.S. Court of Appeals for Third Circuit in *Saxe v. State Coll. Area Sch. Dist.*

struck down a school policy that "punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the purpose or effect of' interfering with educational performance or creating a hostile environment. This ignores *Tinker*'s requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it." 240 F.3d 200, 216-17 (3d Cir. 2001) (Alito, J.). Similarly, the criminal code here singles out speech that "such person knows or should know . . . will disrupt or interfere" with school functions, without proof that any disruption actually ensued. This case itself exemplifies why the standard is faulty: Principal Haynes himself said he never thought Masters was going to attack him. The speech that Masters was arrested for caused no material disruption; no instruction stopped and students went home at the normal time. If the regulation in *Saxe* was unconstitutionally overbroad, then this statute – which provides for arrest and jail time, not just school discipline – must necessarily be.

In the context of school discipline, students have been found to have engaged in "substantially disruptive" speech for behavior as mild as authoring an intemperately worded blog post that incited members of the public to call and email a high-school principal with complaints. *Doninger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008). The ruling below poses the chilling prospect that student critics and whistleblowers will face prosecution if their political advocacy is so effective that it provokes protests.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because

society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citations omitted). Consequently, "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (plurality opinion) (internal quotation marks and citations omitted). Because the statute fails to accommodate for political speech directed to a public official, such as a school principal or superintendent, in the course of a dispute over policymaking, it is insufficiently tailored to survive the exacting scrutiny that this Court has always applied to statutes criminalizing speech.

III. The Statute is Facially Invalid as a Broad Content-Based Prohibition on Speech

That Section 161.190 is a content-based prohibition on speech is self-evident, first, on the face of the statute, which by its terms applies to "speech *or conduct*" (emphasis supplied). Had the Kentucky legislature intended to penalize only the nonspeech elements of expressive conduct, the inclusion of "speech" would be superfluous and "conduct" alone would have sufficed. Because a statute cannot be read to render material terms a nullity, *see Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"), the term "speech" as juxtaposed with "conduct" necessarily refers to the speech element of expressive conduct.

That the statute is content-based is further evidenced by how it was applied and interpreted in this situation. This Court has said that a statute "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014), *see also State v. Bishop*, 368 N.C. 869 (2016) (holding that a statute outlawing online bullying was an unlawful content-based restraint on speech, because it "criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication."). The opinion below does not say that Masters shouted, that he came uncomfortably close to Haynes while speaking, or that he repeated himself in a harassing manner after being told to stop – any of which *would* be content-neutral justifications for punishment. To the contrary, the Court of Appeals expressly stated that the decisive factor was Masters' choice of words: "Angrily telling someone you are going to physically harm them is precisely the type of speech that would incite a reasonable person to violence." *See Masters v. Kentucky,* 551 S.W.3d 458, 461 (Ky. App. 2017).

It is incorrect to characterize the statute as content-neutral because it explicitly regulates speech based on its function. As this Court observed in *Reed v. Town of Gilbert*, "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." 135 S. Ct. 2218, 2227

(2015). *See also Saxe supra*, at 216-17 (striking down school regulation that "punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the purpose or effect of' interfering with educational performance or creating a hostile environment"). So too, in this case, the statute criminalizes speech "when such person knows or should know that the speech or conduct will disrupt or interfere with normal school activities(.)" *Masters*, 551 S.W.3d at 460. The statute, on its face, runs afoul of the constitutional standard recognized in *Reed*.

The Court of Appeals' conclusion that the statute is content-neutral is internally self-contradictory because the Court based its determination on the anticipation that Haynes would react to Masters' words by escalating into violence. "[W]here the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is by definition based on the speech's content." *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010), *citing Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

The North Carolina Supreme Court's decision in *Bishop*, *supra*, striking down a comparably broad criminal prohibition on school-related speech is instructive. In *Bishop*, North Carolina's Supreme Court found that a statute criminalizing social-media bullying was an excessively broad, content-based restraint on speech – not, as the courts below had found, a content-

neutral time, place and manner restriction. The statute at issue made it a criminal offense "to use a computer or computer network … (to) post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor ... with the intent to intimidate or torment a minor." N.C.G.S. § 14-458.1(a)(1)(d). Because it penalized speech based on content, the statute was presumptively unconstitutional unless it survived strict scrutiny as a narrowly tailored response serving a compelling government interest. *Id.* at 818.

Here, the state's justification for criminalizing speech is considerably more slender. The *Bishop* statute was premised on the state's concern for "protecting children from physical and psychological harm," *id.* at 820, an undeniably compelling rationale. Even then, the court found the statute to be a mismatch for the harm averted – for reasons directly applicable to the statute here. Because the operative prohibitions in the North Carolina cyberbullying statute – against speech that "torments" or "intimidates" a minor – lacked any statutory definition, the court found, they could result in prosecution for speech that is merely "annoying" and presents no safety hazard. *Id.* at 821. Such is equally the case here.

A school's interest in preventing "interference" is categorically less compelling than the state's safety concerns in *Bishop*. Nothing in the Kentucky statute requires the slightest hint that anyone's safety is at risk, and unlike the North Carolina law, Kentucky's statute applies exclusively to speech directed at adults, not children. If the *Bishop* statute is unconstitutional, then the Kentucky statute here is doubly so.

The result reached by the court below is irreconcilable with the North Carolina Supreme Court's ruling in *Bishop*, setting up a state of confusion in which broad criminal prohibitions on undesired student speech will be constitutional – or not – in neighboring jurisdictions. The Court should intercede and clear away the uncertainty left by the errant ruling below.

It is especially unrealistic to characterize the Kentucky statute as a "time, place and manner" restriction because it applies to speech directed to government officials while they are conducting government business – exactly the time and place in which they must necessarily be accessible for citizen feedback. If the "time and place" to speak with school employees about how they do their jobs is not at school during the school day, then when and where is? Government employees must necessarily be prepared while on the job to accept criticism – even, at times, unfair and undeserved criticism – without calling the police. (Indeed, there is every likelihood that the statute would even fail the Court's relaxed scrutiny for a content-neutral time, place and manner regulation. Such regulations must afford a reasonable opportunity for constitutionally protected speech to reach its intended audience, and the Kentucky statute applies to all hours during which school employees are performing official duties, leaving only their off-hours within which it is safe to direct complaints to them without fear of prosecution.)

The Court of Appeals invoked the doctrine of "fighting words" as if to suggest that it would be reasonably foreseeable for a person expressing anger over a government official's decision to anticipate

that the official will respond with violence. Surely that is not the case. People in positions of authority, such as a high-school principal, are expected to be the "cool head" in a time of conflict. This was not a barroom, and it most certainly would not be foreseeable that even the most vituperative dressing-down of a government official during a business meeting would provoke a punch in the nose. As Justice Powell observed in his concurrence in the *Lewis* case, "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." *Lewis*, 415 U.S. at 135 (Powell, J., concurring) (internal quotes omitted). Similarly, when the state of Arizona tried to salvage an unconstitutionally overbroad statute criminalizing disruptive school speech by claiming it applied only to fighting words, the Arizona Supreme Court was unpersuaded that a fistfight was a foreseeable result of even repeated, harsh profanity directed toward a school employee: "We do not believe that the natural reaction of the average teacher to a student's profane and insulting outburst, unaccompanied by any threats, would be to beat the student." *In re Nickolas S.*, 245 P.3d 446, 452 (Ariz. 2011). The "fighting words" doctrine does not redeem this fatally defective statute.

As a content-based restraint on speech, the statute is invalid unless it is narrowly tailored to advance a compelling state objective and criminalizes no more speech than is necessary to attain that objective. The statute is not narrowly tailored, as it applies in situations where safety and student welfare are not at issue. The statute outlaws interference with school activities or with good order,

but says nothing about physical danger; singing loudly in the hallway, which poses a threat to no one's safety, could qualify as a crime if the song was perceived as being directed toward a school employee.

IV. The Statute's "Interference" Standard is Constitutionally Unsustainable

In its landmark *Tinker* case, this Court struck a delicate midway balance between authority and autonomy in the schoolhouse setting: School authorities may not impose discipline for the content of speech absent a showing that punishment "is necessary to avoid material and substantial interference with schoolwork or discipline(.") *Tinker*, 393 U.S. at 511. Throughout its 1969 opinion, the Court refers to the importance of holding school disciplinarians to proof of "material" and "substantial" disruption, not simply a fleeting and incidental interference. It is inconceivable that the threshold for jailing a student can be lower than the threshold for suspending her from school, but that is where the ruling below leaves the state of the law: A school may more easily justify a year in jail than an afternoon in detention.

"Interference" is far too insubstantial a standard upon which to base prosecution and conviction. A student who sings "Happy Birthday" to her favorite teacher may delay the start of class by two minutes. A student who overstays her appointment with the principal for five minutes may cause the principal to be late to a school board meeting. Since there is no materiality threshold in

the statute, students are in peril of arrest and prosecution over the most fleeting of irritations. As this Court stated in invalidating a similarly overbroad statute criminalizing speech in *United States v. Stevens*, 559 U.S. 460, 480 (2010), "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

In a closely analogous case in Arizona, the state Supreme Court explained that the constitutional threshold for imposing criminal penalties on speech is necessarily more exacting than that recognized in *Tinker* for school discipline. *Nickolas S.*, 245 P.3d at 448. There, the court concluded that a high-school student could not constitutionally be prosecuted for repeatedly directing curse-words toward a teacher in a dispute over disciplinary sanctions, under an Arizona statute comparable to the one at issue here: "A person who knowingly abuses a teacher or other school employee on school grounds or while the teacher or employee is engaged in the performance of his duties is guilty of a class 3 misdemeanor." *Id.* at 449. The court relied on a string of prior cases in which similar "verbal abuse of school employee" statutes were struck down as vague and/or overbroad, including *Shoemaker v. Arkansas*, 38 SW 3d 350 (Ark. 2001) and *Washington v. Reyes*, 700 P.2d 1155 (Wash. 1985) (same). It is the overwhelming consensus of the state courts – other than Kentucky's – that students may not be imprisoned for verbally abusing school employees, the very conduct that Sec. 161.190 criminalizes.

If *Tinker* has been criticized as codifying the heckler's veto,[3] this statute does so in spades, as it lacks even the *Tinker* safeguards of substantiality and materiality. A student could be prosecuted under this statute for entirely harmless and even well-intentioned behavior based on the foreseeability that other students will react to the speech in a wrongfully disruptive way – for instance, answering a teacher's question in class by voicing an unpopular political opinion, knowing that others in the class are likely to find the opinion provocative and escalate the discussion into shouting. *See, e.g., Dariano v. Morgan Hill Unified School Dist.*, 745 F. 3d 354 (9th Cir. 2014) (finding that the display of American flags on students' apparel was a proscribable act of disruption under *Tinker* when the symbol might be expected to provoke backlash from classmates during a day dedicated to celebrating Latin-American heritage).

Nothing in the statute requires that the "interference" be wrongfully motivated. Would a student who is falsely accused of vandalizing the restroom be "interfering" with school activities if he vigorously protests his innocence? Would a student be subject to prosecution for refusing a teacher's unlawful order to stand for the Pledge of Allegiance and explaining why her refusal is constitutionally protected? The chilling potential of such a malleable standard, with no threshold of materiality, is self-evident. Where a statute fails, as here, to give the

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[3] *See* Clay Calvert, *Reconsidering Incitement, Tinker, and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109, 122 (2018) (noting that the *Tinker* standard "permits schools to censor speech – and, by extension, speakers – based on past misconduct" by those exposed to similar speech).

speaker fair notice of what conduct is proscribed and a reasonable ability to conform her behavior to the statute, the law fails the tests both of the First Amendment and of due process.

Indeed, the court below appeared to recognize the infirmity of the statute by attempting a saving gloss: "The statute ... attempts to preserve a suitable learning environment by curbing *unreasonable, and potentially dangerous,* disruptions to routine school operations." *Masters*, *supra.* at 461 (emphasis supplied). That may, in fact, have been a constitutionally permissible way for the Kentucky legislature to write the statute – but it did not. The statute requires neither proof of an "unreasonable" disruption nor of potential danger. Lacking any rational stopping point, the statute is unsustainably vague.

The "disruption" and "interference" proviso is the pivotal proviso of the statute, for in the absence of that proviso, the statute would be materially indistinguishable from one already struck down as an unconstitutional infringement of speech in *Commissioner v. Ashcraft*, 691 S.W.2d 229 (Ky. App. 1985). The Kentucky legislature reenacted the invalidated statute as current Section 161.190, with the "disruption" and "interference" language as the only operative change. Hence, this statute is constitutional only if "interference" with school functions or activities – of any nature or duration – is the threshold for criminalization. And this Court's precedent in *Houston*, *Lewis* and *Gooding* flatly foreclose that possibility.

CONCLUSION

Although this is an outlier case because it involves a school visitor, the far more common application of the statute will be against students. And those students – including protesters, whistleblowers and editorial commentators – will suffer the brunt of vague, subjective enforcement if this infirm statute is permitted to remain on the books. *Amici* therefore respectfully request that the Court grant the petition for certiorari, accept review of Masters' case, and reverse the erroneous ruling upholding the statute as constitutional.

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Respectfully submitted,

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