

**IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT
DOCKET NO. 07-4465**

JUSTIN LAYSHOCK, a minor, by and through his parents, **DONALD
LAYSHOCK** and **CHERYL LAYSHOCK**

Appellees,

v.

THE HERMITAGE SCHOOL DISTRICT; KAREN IONTA, in her
official capacity as Superintendent; **HICKORY HIGH SCHOOL, ERIC
W. TROSCH**, in his official capacity as Principal; **HICKORY HIGH
SCHOOL, CHRIS GILL**, in his official capacity as Co-Principal

Appellants.

Appeal from the Opinion and Orders of the Honorable Terrence F. McVerry
of the United States District Court for the Western District of Pennsylvania,
of July 10, 2007, published in *Layshock v. Hermitage School District*, 496 F.
Supp. 2d 587 (W.D. PA 2007). Third Circuit Docket No. 07-4465

BRIEF OF *AMICUS CURIAE*
THE RUTHERFORD INSTITUTE
Filed in Support of Appellees

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INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in the Federal Courts of Appeal and U.S. Supreme Court in numerous cases involving student rights in the public education setting, including *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Morse v. Frederick*, 127 S. Ct. 2618 (2007). Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

The Rutherford Institute works to preserve the maximum freedom for citizens to express opinions without fear of repression or discrimination and to enhance respect and protection for free speech rights guaranteed by the First Amendment. The Institute diligently promotes a society where the free marketplace of ideas can predominate. Furthermore, The Rutherford Institute is dedicated to assuring that all citizens, including students, teachers

and school administrators, appreciate the delicate balance between the First Amendment's protection of free expression and the need for students to be well-educated, productive citizens of our republic with a healthy respect for, and tolerance of, differing opinions and viewpoints and an understanding of the rights granted under the Bill of Rights.

SUMMARY OF ARGUMENT

This case will have a critical impact on the First Amendment rights of student-citizens expressing their views off school property. Student speech occurring away from school property should not be made subject to rote application of school rules that are appropriate to speech occurring in school. Rather, unless the student is formally representing the school or is present at a school-sponsored event, restrictions on off-campus student speech should be determined according to the reasonable and principled standards that apply to the forum where the speech occurs.

Just as students do not forfeit their First Amendment rights upon entering the schoolhouse gate, so, too, schools should not be able to censor student speech uttered off-campus based on rules that otherwise might be proper within the school. In other words, unless students are physically on school property, formally representing the school system or at a school-related event, student speech outside the schoolhouse gates should not be restricted any more than the legitimate restriction of utterances by adult members of the community in the same forum. Likewise, punishment for off-campus expression of a viewpoint that conflicts with the school system's preferred message constitutes unlawful viewpoint discrimination.

Finally, Appellants' misguided attempt to obtain control over off-campus speech, if sustained, will greatly undermine First Amendment values and send the wrong message to upcoming citizens. Student speech has often prompted, and even produced, broad cultural and political change. If administrators are accorded the power to censor and punish students for off-campus speech or protest, the nation and its political dialogue will suffer indescribable loss. It would create a constitutional double standard that would destroy the public school system's credibility among America's youth and cripple its role in educating students about the importance, as well as the prudent and proper exercise, of constitutional freedoms.

ARGUMENT

A. LAYSHOCK'S SPEECH DID NOT CREATE A "SUBSTANTIAL DISRUPTION," AS REQUIRED UNDER *TINKER*, NOR IS IT GOVERNED BY THE PROGENY OF *TINKER*.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ("*Tinker*"), the United States Supreme Court declared the vital importance of student speech and the protection it deserves, even on school campuses:

Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—the kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09. While school officials have some latitude in regulating the speech of students occurring within the context of the educational environment, *Tinker* also made clear at the same time that "state-operated schools may not be enclaves of totalitarianism." *Id.* at 511. The place and geography where speech occurs is a critical factor in determining the level of protection afforded under the First Amendment. *Frisby v. Schultz*, 487 U.S. 474 (1998); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473

U.S. 788, 802 (1985). *Tinker* and its progeny dealt with student speech that either occurred within the metes and bounds of the school, at school assemblies or in school curricula. See *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (“*Fraser*”) (lewd and profane speech “has no place” in a “high school assembly or classroom”); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (“*Kuhlmeier*”) (school districts may regulate “school-sponsored” events). Most recently, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (“*Morse*”) upheld the right of school officials to engage in viewpoint discrimination against speech that can reasonably be regarded as advocating illegal drug use at a school-supervised event.

Layshock’s speech, however, falls outside the *Tinker* progeny. The MySpace (www.myspace.com) profile that Layshock posted of the school principal, Mr. Trosch, was created on a computer at his grandparents’ home and in his own free time. As such, none of *Fraser*, *Kuhlmeier* and *Morse* is controlling and cannot be used to justify the punishment the school imposed on Layshock. To sustain its actions, therefore, the school must rely on satisfying the “material and substantial disruption” to the school environment requirement of *Tinker*.

However, *amicus* appreciates that with the growth of modern communication technology since the U.S. Supreme Court's rulings on on-campus/off-campus speech, the line between what constitutes on-campus speech and what constitutes off-campus speech has been blurred somewhat. If this Court accepts the Appellants' arguments, though, the concept of private student speech would be seriously endangered. Anything posted by public school students on the Internet that even vaguely related to the school environment, teachers, students, etc. could be targeted as on-campus speech, and therefore subject the student to discipline. Considering this rife potential for abuse by school administrators, it is imperative that there remains an area where students are subject to First Amendment protections. Students must not be subject to the chilling effect of the fear of reprisals for engaging in private speech whenever the speech relates, however slightly, to school.

Appellants would try to expand the reach of their disciplinary power because the school district can only justify its actions if it can show, at minimum, that Layshock was punished because his speech caused a material and substantial disruption to the school environment. *See Tinker*, 393 U.S. at 511. However, rather than Layshock's parody leading to material and substantial disruption of the school environment, the evidence demonstrates that Layshock was punished because the school officials interpreted his

speech to be offensive, demeaning and demoralizing. Whether Layshock's speech was offensive, demeaning and demoralizing is irrelevant, however, as the First Amendment does not allow government officials—including school officials—to punish a student simply for its perceived offensive content outside of the school environment. To overcome Layshock's First Amendment right, the school district "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained." *Id.* at 509, quoting *Burnside v. Byars*, 363 F. 2d 744, 749 (5th Cir. 1966).

The clear factual disruption necessary to satisfy *Tinker* is conspicuous by its absence in this case. The discovery of the profile was not brought about by disruptive behavior by students, but rather, it was discovered outside of the school environment by Mr. Trosch's daughter. Even after the school officials became aware of the profiles, the school did not take any steps to quell the disruption—because there was no disruption to quell. No classes were cancelled, and there was no mass access of the profiles on the

school computers. On the facts, the *Tinker* standard is not even approached, let alone satisfied. Indeed, the evidence suggests that the school “disruption” which followed the posting of the parodies of Mr. Trosch was of the school’s making, rather than Layshock’s (and the other anonymous students who created the other profiles). It is more likely that the school officials decided to take steps to prevent access to the profiles because of the perceived demeaning nature of the profiles, rather than to quell any disruption. To satisfy *Tinker*, it has to be the *student’s* speech that causes the disruption; an overzealous response by school officials does not suffice. Appellants’ attempt (and indeed motive) to expand disciplinary power to student speech uttered *beyond* the schoolhouse gates should therefore be viewed with great suspicion by this Court.

Moreover, similar juvenile and mean-spirited words must be uttered numerous times by students across the country every day, both inside and outside of school. Even where the courts have upheld disciplinary action for cruel statements and caricatures, there is a need for something considerably more than hurt feelings. See *J.S. v. Bethlehem School District*, 569 Pa. 638 (Pa. 2002) (“*J.S.*”) (holding that a student’s threats, statements and caricatures of a teacher, created in private, which led to the teacher being

forced to take over 20 days of medical leave and necessitating the use of three substitute teachers, adversely impacted the education environment).

B. IF THE SCHOOL'S DISCIPLINARY ACTION IS SUSTAINED, IT WOULD SET THE PRECEDENT FOR AN OMNIPRESENT SCHOOL AUTHORITY OVER OFF-CAMPUS SPEECH, FREE TO ENGAGE IN VIEWPOINT DISCRIMINATION, AND ESTABLISH A CHILLING EFFECT ON STUDENT SPEECH.

Courts are typically reluctant, for obvious reasons, to interfere with the administration of school discipline. The traditional "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Thomas v. Board of Education, Granville Central School District*, 607 F. 2d 1043, 1044-45 (2nd Cir. 1979) ("*Thomas*"). When it is suggested, however, that school disciplinary authority should reach beyond the schoolhouse gates, traditional judicial deference is no longer appropriate. Barring extraordinary circumstances, ordinary constitutional principles apply just the same as they do to all citizens.

This Court's sister circuit, the Second Circuit, declared that "[w]hen an educator seeks to extend his dominion beyond [the schoolhouse gate]... he must answer to the same constitutional commands that bind all other institutions of government." *Id.* at 1045. The court distinguished *Thomas* from *Tinker* based on the off-campus location of the speech, noting that "[w]hile prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." *Id.* at 1050. The Second Circuit held that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.*

It is accepted that in an age of rapidly developing communication technology, the line between on-campus and off-campus speech is no longer as clear as it once was, but the proper response is not simply to declare any speech that concerns the school to fall under an all-inclusive umbrella of on-campus speech. Such virtually unlimited censorship authority, as advanced here by the Appellants, would not only result in a grossly overbroad violation of the First Amendment but would disserve the students and the body public. If school administrators are granted authority to punish speech

occurring off school grounds, the effects are potentially dire. As Judge

Kaufman warned in *Thomas*:

It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*... at a neighborhood newsstand and lends it to a student friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Parens patriae*.

The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression. In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act "arbitrarily, erratically, or unfairly," the chill on expression is greatly exacerbated.

Id. at 1051. The decision in *J.S.* has already shown that off-campus student speech impacting a single teacher can be disruptive enough to justify discipline. If the Appellants are successful, the bar as to what private speech school administrators could target would be set even lower.

If the Court sustains the school's disciplinary action, it would give school administrators *carte blanche* authority to punish students' private

speech whenever it related to the school, teachers, students, etc., simply because they disagree with it—even innocent jokes could be targeted. School officials would be free to act in an arbitrary and capricious manner, with unrestricted freedom to engage in viewpoint discrimination. It is not difficult to envision “positive” comments being allowed by school officials, but “negative” comments resulting in disciplinary action against the students who made them. The potential for abuse and inconsistent application by school administrators represent very serious First Amendment concerns.

Furthermore, a rejection of the Appellants’ argument would not leave school officials at the mercy of *unprotected* student speech. The legal system has substantial recourse for school officials who are defamed or subject to “true” threats. The appropriate relief in such cases should not be through an overreaching of the arm of the school (and corresponding weakening of students’ First Amendment rights), but rather through appropriate remedies in tort and criminal law.

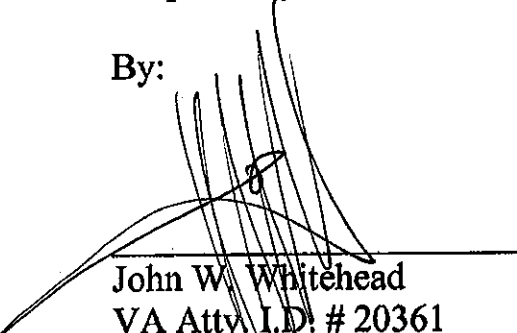
CONCLUSION

The public schools cannot be expected to cure all of America's social ills. There is, and must remain, a line over which school administrators cannot transgress into the views and daily lives of students and parents. That line is the schoolhouse gate. Absent the direct and substantial disruption of the normal functioning of the school, the discipline of students away from school is the job of parents and law enforcement officers, not school officials.

For the foregoing reasons, The Rutherford Institute respectfully asks this Court to affirm the decision below.

Respectfully submitted,

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May 7, 2008

CERTIFICATE OF BAR MEMBERSHIP

I, John W. Whitehead, attorney for *Amicus Curiae*, certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.



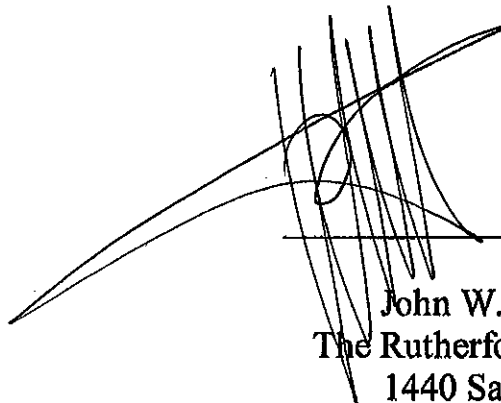
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 (a) AND

L.A.R. 31.1(c)

1. *Amicus Curiae* Brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because *Amicus Curiae* Brief contains 2,548 words.
2. *Amicus Curiae* Brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because *Amicus Curiae* Brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 14, Times New Roman style.
3. The text of *Amicus Curiae* Brief in electronic form is identical to the text in paper copies.
4. Attorney for *Amicus Curiae* has run a virus detection program (McAfee Total Protection for Small Business) and detected no virus on the electronic version of *Amicus Curiae* Brief.



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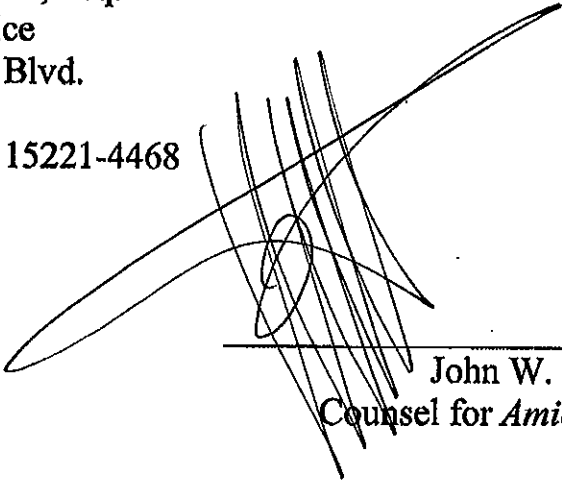
CERTIFICATE OF SERVICE

I, John W. Whitehead, certify that on May 7, 2008, I caused to be filed ten copies of the foregoing *Amicus Curiae* Brief with the Clerk's Office of the United States Court of Appeals for the Third Circuit, by first-class mail, postage prepaid, and I further certify that I served two copies of the *Amicus Curiae* Brief by first-class mail, postage prepaid, to counsel for the Parties at the address indicated below:

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