UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-4138

J.S., a minor, by and through her parents, TERRY SNYDER and STEVEN SNYDER, individually and on behalf of their daughter,
Plaintiffs-Appellants,

v.

BLUE MOUNTAIN SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal From The Judgment Of The United States District Court for The Middle District of Pennsylvania Dated September 11, 2008, At Civil Action No. 3:07cv585

SUPPLEMENTAL BRIEF OF APPELLANTS

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INTRODUCTION

In *Tinker v. Des Moines Independent School District*,[1] the Supreme Court carved out an exception to full First Amendment protection for speech and expression, grounded in the "special characteristics of the school environment," that justifies school officials' "comprehensive authority … to prescribe and control conduct in the schools." This case presents the question whether the "special characteristics of the school environment" can also justify the exercise of school authority beyond the "schoolhouse gates" to censor student speech that takes place entirely outside of school.

Prior to the Panel's now-vacated decision in this case, neither the U.S. Supreme Court nor this Court had ever upheld school officials' authority to punish students for off-campus speech, or speech outside the proverbial schoolhouse gate. Extending *Tinker* (or some variation of it), as the U. S. Court of Appeals for the Second Circuit has done, to allow school officials to punish students' off-campus speech would expand school officials' authority and correspondingly curtail the rights of public-school students far beyond anything the Supreme Court or this Court has ever endorsed. Such a radical change in law would effectively empower school officials to engage in viewpoint censorship whenever and wherever students speak critically of the school or its officials and create a new class of speakers with

[1] 393 U.S. 503 (1969).

diminished First Amendment rights, namely, public-school students. Such a curtailment of students' rights is unnecessary because expression that poses real threats to school operations can be addressed under established First Amendment paradigms. As the Supreme Court cautioned this term, courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" but rather should simply apply "existing [First Amendment] doctrine."[2]

This Court should decline to dilute minors' free-speech rights in the community and reject the invitation to extend *Tinker* to students' off-campus expression. When school officials seek to regulate students' behavior in the community, they need to respect parents' rights over their children and abide by the standards that govern government officials' censorship in the community. The School District in this case cannot possibly satisfy the strict scrutiny that attends content-based censorship. If, however, this Court elects not to address this important issue of first impression, it should still hold for J.S. since the District has failed to satisfy its burden under *Tinker*.[3]

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[2] *United States v. Stevens*, 130 S.Ct. 1577, 1586 (2010) (parenthetical in original; citations omitted).

[3] *See* Appellants' Brief at 29-34 and Appellants' Reply Brief at 14-19. The now-vacated Panel decision in *Layshock v. Hermitage School District* adopted this approach to rule in favor of the student. 593 F.3d 249 (3d Cir. 2010), opinion vacated, rehearing *en banc* granted (April 9, 2010).

I. *TINKER* SHOULD NOT BE EXTENDED TO OFF-CAMPUS SPEECH.

Forty years after *Tinker*, it is indisputable that the "special characteristics of the school environment" justify restricting students' speech rights inside the schoolhouse gates,[4] but prior to the Panel decision in this case neither the Supreme Court nor this Court had ever ruled that the same standard of diminished rights continues to follow students when they exit through the gates back into the community,[5] where by virtue of the Fourteenth Amendment parents reacquire their custodial and supervisory authority.[6] J.S. has argued throughout this case that school officials seeking to restrict students' expression off campus cannot rely on the Supreme Court's in-school-speech precedents, including *Tinker*. Instead, they must satisfy the First Amendment standards that constrain government officials'

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[4] *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (citations omitted); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002) (student rights diminished "in the public school setting").

[5] Contrary to the Panel majority's assertion that *Tinker*, by virtue of saying the standard applies "in class or out of it" extends off campus, *see* Panel Op. at 21 n.6, the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), described *Tinker* as controlling "educators' ability to silence a student's personal expression that happens to occur *on the school premises*." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001) (quoting *Hazelwood*, 484 U.S. at 270-71) (emphasis added); *see also* Panel Dissenting Op. at 51 and 56 n.15.

[6] *See* Appellants' Brief at 38-43 and Appellants' Reply Brief at 1-3.

authority in the community, not in school.[7] This *en banc* Court can avoid the larger, unresolved question of whether *Tinker* applies to students' off-campus speech because in this case the school has not met and cannot meet the *Tinker* standard, as it has been applied in this Court by *Saxe* and *Sypniewski*. But evading the larger issue will leave school districts without guidance in an age of ever-increasing temptation for schools to regulate students' speech in the community, particularly on the Internet. Since the Panel addressed the issue, we discuss herein why extending *Tinker* to students' off-campus speech is unconstitutional and unnecessary.

A. The Ability to Communicate Via the Internet Provides No Justification for Relaxing Students' First Amendment Rights in the Community.

For most children, school is the primary focus of their young lives. They spend seven or eight hours a day in school — more if they are involved in athletics and other extra-curricular activities. Friendships are formed and the knowledge, arguments, frustrations, ideas, social interactions and life skills learned during the day impact them even after the school day ends. Not surprisingly, then, students think and talk about school both when they are in school and when they are away from it. They talk about school to their parents and friends. They do so in person,

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[7] *See* Appellants' Brief at 23-27. The student in *Layshock v. Hermitage School District*, which is also being reconsidered *en banc* on June 3, has maintained the same argument.

by telephone and, in today's world, electronically, whether by email, text message, instant message, Twitter or one of the social networking sites like MySpace or Facebook. Inevitably, some of what students say is critical of or offensive to their teachers, administrators and other students. Yet these off-campus communications typically have not been subject to school discipline or control.[8]

This "boundary on school authority" is important, for reasons explained by the Second Circuit:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.[9]

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[8] *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615-20 (5th Cir. 2004) (reviewing off-campus speech cases). Unless the student personally, intentionally and physically brings the speech into school, the courts have typically disallowed the school's punishment for purely off-campus expression. In *Porter*, the court concluded that because a student never brought a sketch depicting a violent siege of the school into the building – it was accidentally brought in by his younger brother – and did not intend to do so, the sketch was protected by the First Amendment. *Id*. at 620.

[9] *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.,* 607 F.2d 1043, 1052 (2d Cir. 1979) (holding that school district violated First Amendment free-speech rights of students who were punished for distributing independent newspaper off school grounds).

Extending school officials' authority to punish students for expression that occurs inside their own homes would give school officials "discretion to suspend a student who purchases an issue of National Lampoon … and lends it to a school friend" or to "consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television."[10] That discretion, though permissible inside the schoolhouse gate to preserve schools' interest in educating students, is constitutionally untenable outside of it.

More recently, however, the Second Circuit has held, at least in the context of electronic communications, that when it is "reasonably foreseeable" that a student's out-of-school speech "will come to the attention of school authorities," it is subject to school discipline under *Tinker*, just as if it had been spoken at school.[11] This erasure of any line between in- and out-of-school speech is a significant departure from *Tinker* and its progeny, which are based on the idea that students' full First Amendment rights may be narrowed by the "special characteristics of the school environment" while they are in school.[12] The district court in this case, as well as the Panel, agreed with the Second Circuit, essentially

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[10] *Id.* at 1051.

[11] *See Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (*citing Wisniewski v. Bd. of Educ. of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007)), cert. denied, 128 S.Ct. 1741 (2008).

[12] *See* Brief of Appellants at 23-30.

finding that the potential reach of electronic communications by school students changes the game.[13]

But the fact that student speech now travels more quickly and cheaply through electronic means cannot justify greater regulation of that speech. Both this Court and the Supreme Court have rejected the contention that the ease of publishing speech on the Internet makes it different from other speech for the purposes of the First Amendment.[14] Similarly, the broader reach of Internet speech does not make it less protected than speech with a smaller audience.[15] Internet speech is entitled to the full protections of the First Amendment, and the U.S. Supreme Court and this Court have repeatedly struck down efforts to restrict online expression due to its accessibility to minors.[16] But allowing public-school principals to discipline students for off-campus Internet speech would effectively

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[13] See District Court Op. at A.16 n.5; Panel Op. at 25-26.

[14] *See Reno v. ACLU*, 521 U.S. 844, 885 (1997); *Ashcroft v. ACLU*, 542 U.S. 656, 672-73 (2004) (applying strict scrutiny to content-based restriction on Internet speech); *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008) (same).

[15] *See Smith v. Doe*, 538 U.S. 84, 99 (2002); *Reno*, 521 U.S. at 870.

[16] *Reno*, 521 U.S. at 870 (explaining that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to" Internet); *see, e.g.*, *Ashcroft*, 542 U.S. at 672-73 (invalidating statute prohibiting Internet publication of materials deemed harmful to minors); *Mukasey*, 534 F.3d at 190 (same).

make them "censors of the world wide web," thus restricting the free-speech rights of both the student publishers and their readers.[17]

Practically speaking, the two Second Circuit cases could have played out identically before or without the Internet. Whereas before the Internet children congregated after school in the playground, ball field or malt shop, now they gather in virtual cafes and game rooms. Aaron Wisniewski's icon saying "Kill Mr. VanderMolen" could have been photocopied and handed out while Avery Doninger could have prompted her friends to contact school officials about the canceled band concert by phone or in person. Moreover, today's technology enables schools to filter or block objectionable Internet sites from being accessed in school, as officials did in this case, but students always have and likely always will find ways to gossip and speak ill of others, be it in the hallway between

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[17] *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007); *see Ashcroft v. ACLU*, 535 U.S. 564, 596 (2002) (Kennedy, J. concurring in the result) ("if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web."); *id.* at 603 (Stevens. J., dissenting opinion) ("In the context of the Internet … community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web"); *ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003) ("As discussed in our initial opinion on the matter, when contemporary community standards are applied to the Internet, which does not permit speakers or exhibitors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings.").

classes, in the lunchroom, during recess or outside of school. Consequently, there is no legal or practical reason to apply a different analysis to students' Internet speech that is broadcast from outside the school than any other form of out-of-school speech.

In this case, J.S. made a profane and insulting parody profile of her principal from a home computer, posted it on the Internet, and told some of her friends where to find it. She could have printed the exact same content on a flier that she handed out at the mall or printed it on a t-shirt and worn it about town. If she had meant her lewd insinuations about the principal's conduct to be taken seriously, she could have put them in a letter to the editor of the local newspaper. Presumably, none of these communications would be subject to school discipline under *Tinker* and its progeny. There is, in short, nothing about the electronic nature of these communications that "changes the game" for school officials, or is inherently more destructive of the school environment than the same communications would be if made in a more traditional or old-fashioned way.

B. The Second Circuit's Test Invites Viewpoint Discrimination.

The Second Circuit's test is problematic beyond just diluting protections for Internet communications: it is vague and effectively invites viewpoint-based

censorship.[18] Under *Doninger* and *Wisniewki,* the *Tinker* substantial-and-material-disruption test applies whenever it is "foreseeable that the off-campus expression might [] reach campus."[19] The precise reach of this test is unclear. It could apply whenever the speech is accessible in school, as would be the case for any downloadable Internet content. Or it could apply whenever someone other than the speaker, like a third party, might bring it to school, which is what happened in *Wisniewski*. Under the Panel's decision in this case, even Internet postings that are displayed privately, with access restricted to selected users, could be subject to school sanction because the principal directs a student to bring it to school. Thus, under this test it is foreseeable that any and all student speech, regardless of how or where it is broadcast, may "reach campus."

Plainly, however, not all student speech will be sanctioned. Only speech about the school or its employees and officials will be subject to discipline, and even then only speech that offends or criticizes school officials, or presents controversial views, will be targeted for censure. The Second Circuit test opens the door wide to censorship based on content – speech about the school or people

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[18] *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183, 193 (3d Cir. 2008) (citations omitted); *Saxe*, 240 F.3d at 207 (viewpoint-based restrictions "ordinarily subject to the most exacting scrutiny").

[19] *Doninger*, 527 F.3d at 48 (citing *Wisniewski*, 494 F.3d at 40).

in the school community – and even viewpoint, since pabulum and complimentary speech is likely to be ignored.

C. Extending *Tinker* to the Community Would Be Unconstitutional Because It Is Substantially Overbroad and Regulates a Class of Speakers.

Allowing school officials to punish students' off-campus speech under *Tinker* would effectively make local school districts censors of a broad array of protected speech in the community.[20] Most in-school cases decided under *Tinker* involve not unprotected speech, but unpleasant speech that makes officials or students uncomfortable, which clearly would be protected if expressed in the community. On the other hand, outside the institutional setting, "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[21]

Under *Tinker*, courts have upheld bans on "derogatory comments … that refer to race, ethnicity, religion, gender, sexual orientation or disability."[22] One

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[20] *See* note 17, *supra*.

[21] *Saxe*, 240 F.3d at 210 (quoting *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989)) (other citation omitted).

[22] *Nuxoll v. Indian Prairie Sch. Dist*., 523 F.3d 668, 674-75 (7th Cir. 2008). The court in dicta was equivocal about whether this standard could be applied outside of school, saying it "probably would not wash." *Id*. at 674; *see also West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358 (10th Cir. 2000) (upholding punishment

can readily imagine a school with racial, religious or sexual-orientation-related tensions where school officials would feel compelled to curtail derogatory speech by students, even away from school and especially on the Internet. This Court held in one case that racist speech in school, in the form of clothing adorned with the Confederate flag, could be censored under *Tinker*.[23] If *Tinker* were to become the standard for regulating student speech in the community then students in Warren Hills would not be allowed to wear such clothing even in town.

Other forms of political speech could also be censored, as occurred in *Doninger*, a case that stirred some disquietude among the judges on the *Layshock* panel.[24] While Avery Doninger's blog posting contained mild profanity ("douchebags in central office" and "piss [administrators] off"), her expressive efforts were designed exclusively to enlist the broader community's help to convince school officials to change their decision about canceling an extracurricular event,[25] and the school's rationales for Avery's punishment

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of student who drew picture of Confederate flag in school); *but see Saxe,* 240 F.3d 200 (finding anti-harassment policy overbroad even in school context).

[23] *Sypniewski*, 307 F.3d at 254.

[24] In distinguishing *Doninger,* the Panel noted that it did not want to "suggest that we agree with [*Doninger*'s] conclusion that the student's out of school expressive conduct was not protected by the First Amendment there." *Layshock*, 593 F.3d at 263.

[25] 527 F.3d at 44-45.

included one about Avery disregarding the principal's advice on how she should not engage the outside community to address school problems.[26]

Even non-political speech, such as the crude and offensive expression that was punished in this case, in *Layshock* and in *Killion v. Franklin Regional School District*,[27] is protected by the First Amendment outside of school. As the Supreme Court recently held, "Most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation.'"[28] A standard that extends *Tinker* beyond the schoolhouse gates, therefore, would encompass a great deal of protected speech.

A second problem with extending *Tinker* beyond the schoolhouse gates is that it creates a different standard for expression based on the identity of the speaker.[29] As with content and viewpoint-based censorship, "[s]peech restrictions based on the identity of the speaker are all too often simply a means of content control."[30] Extending school officials' authority to censor students' speech outside of school under *Tinker* would likely chill criticism of school district decisions. But

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[26] *Id*. at 46.

[27] 136 F. Supp. 2d 446 (W.D. Pa. 2001).

[28] *Stevens*, 130 S.Ct. at 1591 (parenthetical in original; citations omitted).

[29] *See Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 898-99 (2010).

[30] *Id*. at 898-99 (citations omitted).

it would also mean that public-school students would not enjoy the same free-speech rights outside of school as other members of their communities, including other similarly aged students who happen to attend private schools or schools in neighboring districts, even if their speech had the same effect on the school as the non-students' speech. For example, an expansion of *Tinker* would allow school officials in Warren Hills to prohibit their students from wearing a Confederate flag on their clothing both in and out of school, even though that form of expression would be constitutionally protected if worn by anyone else in the community. It would also have the perverse effect of allowing a school district to punish a student for creating an offensive MySpace profile of her principal the day before graduation, but not the day after, even though the effect, if any, on the community at large and the school community would be the same. Allowing such a dual standard makes little practical sense and cannot be countenanced constitutionally.

In addition to the First Amendment constraint on extending *Tinker* to students who have exited the schoolhouse to return to the community, parents' rights to direct and control their children, under the substantive due process clause of the Fourteenth Amendment, provide an additional obstacle to such an extension.[31] Schools should not be able to supersede the views of parents who, like the Sypniewskis, either promote or at least permit wearing Confederate flag logos

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[31] *See* Appellants' Brief at 38-43 and Appellants' Reply Brief at 1-3.

at home and about town, or the Nuxolls, whose belief that homosexuality is a sin leads to outward expressions of that belief.[32] The best way to respect parents' substantive due process rights is to limit school officials' authority over students who have exited the schoolhouse gate and returned to family and community.

II. CONFINING SCHOOL OFFICIALS' AUTHORITY UNDER *TINKER* TO CENSOR EXPRESSION INSIDE THE SCHOOLHOUSE GATES WILL NOT RENDER SCHOOL DISTRICTS POWERLESS TO ADDRESS SERIOUS PROBLEMS.

Limiting *Tinker* to the schoolhouse will not prevent school officials from addressing problems involving students that take place wholly or partially outside of school. For example, in cases like this one where students behave rudely, no law prevents the principal from discussing the matter with the student and his or her parents. In most situations, one or both steps will achieve the desired change in behavior. For more serious problems, school officials may contact law enforcement or social service agencies. Criminal laws exist to protect against terroristic threats,[33] harassment – which makes it a crime to "communicate[] to or

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[32] Furthermore, at least in Pennsylvania, state law limiting school officials' authority over students to "such time as they are under the supervision of the board of school directors and teachers, including the time necessarily spent in coming to and returning from school." 24 Pa. Cons. Stat. § 5-510. *See* Appellant' Brief at 43-44.

[33] 18 Pa. Cons. Stat. § 2706.

about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures[34] – and stalking.[35]

Moreover, if the foregoing avenues of redress are insufficient, school officials may still regulate students' off-campus expression, but they must do so under First Amendment principles that apply in the community. True threats are unprotected speech. Expression likely to cause a "clear and present danger" is similarly unprotected. Teachers and officials have redress individually for defamation through the civil courts. Even outside these categories of unprotected speech, situations may emerge where officials will have a compelling reason to act and thereby be able to satisfy strict scrutiny.

In sum, confining *Tinker* to the schoolhouse (and school-sponsored activities) will not prevent school officials from dealing with serious threats emanating from the community. On the other hand, empowering school officials with censorship authority over students in the community under the *Tinker* standard will greatly diminish some students' rights – at least the rights of those who happen to attend a school in that school district – and conflict with the rights of their parents.

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[34] 18 Pa. Cons. Stat. § 2709.

[35] 18 Pa. Cons. Stat. § 2709.1.

CONCLUSION

For the reasons advanced in this and Appellants' earlier briefs, this Court should reverse the District Court and grant judgment for Plaintiffs/Appellants.

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Dated: May 24, 2010

CERTIFICATE

Witold J. Walczak, one of the attorneys for Appellants, hereby certifies that:

1. I caused a true and correct electronic copy of the foregoing Supplemental Brief of Appellants to be served upon the following counsel of record this 24th day of May, 2010, and a bound copy will be sent by UPS Next Day Air on May 25, 2010 to: Jonathan P. Riba, Esquire, Sweet, Stevens, Katz & Williams LLP, 331 Butler Avenue, P.O. Box 5069, New Britain, PA 18901.

2. The Supplemental Brief of Appellants was filed with the Court electronically on May 24, 2010, and bound briefs will be delivered to the Court on May 25, 2010.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing second-step briefs. The brief contains 3946 words, excluding the Cover Page, Table of Contents, Table of Authorities, and this Certification.

5. The printed Brief of Appellants filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Brief of Appellants filed with the Court was virus checked using AVG Anti-Virus, version 271.1.1/2893 on May 24, 2010, and was found to have no viruses.

/s/ Witold J. Walczak

Witold J. Walczak