No. 08-4138

IN THE

United States Court of Appeals for the Third Circuit

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

Appellants,

v.

BLUE MOUNTAIN SCHOOL DISTRICT; DR. JOYCE E. ROMBERGER, Superintendent Blue Mountain District, and JAMES E. MCGONIGLE, Principal Blue Mountain Middle School, both in their official and individual capacities,

Appellees.

On Appeal from the judgment and the Order of the United States District Court for the Middle District of Pennsylvania dated September 11, 2008 at Docket No. 3:07-cv-585

BRIEF FOR *AMICI CURIAE*
Student Press Law Center
Pennsylvania Center for the First Amendment
Filed in Support of Appellants, Seeking Reversal

Frank D. LoMonte (Ga. Id. No. 456505)
Michael C. Hiestand (Wash. Id. No. 33913)
Adam Goldstein (N.Y. Bar, Admitted Sept. 2003)
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209-2211
(703) 807-1904

Robert D. Richards (Pa. Id. No. 50077)
Clay Calvert (Cal. Id. No. 155130)
PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT
The Pennsylvania State University
308 James Building
University Park, PA 16802
(814) 863-1900

February 25, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

OTHER AUTHORITIES:

IDENTITY OF THE *AMICI CURIAE* STATEMENT OF INTEREST, AND SOURCE OF AUTHORITY TO FILE

This Amicus Curiae Brief is respectfully submitted by the Student Press Law Center and the Pennsylvania Center for the First Amendment (collectively, "Amici").

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

Because the SPLC's work focuses in part on issues relating to the First Amendment rights and responsibilities of high school and university students, their parents, and the authority and constitutional limits imposed on school district and government officials, the SPLC has a special interest in the potential consequences of the decision of the United States District Court in this matter, which substantially implicate issues of censorship of off-campus speech in public schools.

The Pennsylvania Center for the First Amendment (the "PCFA") was established by the Pennsylvania State University in 1992 to promote awareness and understanding of the principles of free expression to the scholarly community and

the general public. The PCFA's goals support the University's outreach mission of providing the Commonwealth and the nation with education, research and service. Faculty members involved in the PCFA have published books and articles on First Amendment topics. The PCFA regularly tracks issues related to student expression, and the research generated from those projects is presented annually at national education law conferences. Additionally, the PCFA provides expert testimony to courts and legislative bodies grappling with First Amendment issues.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed without a motion seeking leave of Court, because the Appellants and the Appellees have consented to its filing.

INTRODUCTION

When a student speaks off-campus on personal time outside of school events, that student has the full protection of the First Amendment. She may not libel or threaten anyone, invade privacy or steal copyrighted work without incurring legal consequences, but so long as her speech is lawful, she is subject to no more government restraint than is any citizen; the authority of school administrators does not follow her into her bedroom. This is a well-accepted principle, and courts in the Third Circuit have reaffirmed it repeatedly.

In its brief to the District Court, the Blue Mountain School District ("Blue Mountain") acknowledged that a policy permitting school officials to punish speech lacking a physical connection with the school – *e.g.*, typed on school computers, duplicated on school copiers, created during school time – would be unconstitutional.[1] In a neat sleight-of-hand attempting to salvage the constitutionality of its overall speech policy, Blue Mountain conceded that the punishment meted out here – against a student who did *not* use school computers, school copiers or school time – was administered *outside of the policy*. In other words, the punishment was without grounding in legal authority.

---

[1] *See* Defendant's Brief in Support of Their Motion for Summary Judgment at 24 ("[T]his policy cannot be considered overbroad because there is a distinct 'geographical limitation' on the limit of the school's authority to discipline students.") (hereinafter cited as, "Def. Summ. Jdgmt. Brf.").

So deft was Blue Mountain's sleight-of-hand that the Court below did not notice it. Blue Mountain's asserted legal position leaves only two logically permissible outcomes: (1) the school's punishment of J.S. for speech occurring off-campus on personal time was not done under the authority of Blue Mountain's speech policy, meaning it lacked legal basis and must be overturned, or (2) the punishment of J.S. *did* take place under the authority of Blue Mountain's speech policy, meaning that the entire policy is unconstitutionally overbroad because it reaches speech with no physical connection to the school. There are no other permissible choices.

The District Court took neither of the permissible options. To find neither Blue Mountain's policy nor this application of discipline to be unconstitutional, the Court was forced to invent a new First Amendment standard, based on a fundamental misapplication of Supreme Court precedent. The District Court's standard – that off-campus speech is entitled to no First Amendment protection if it is "vulgar, lewd, and potentially illegal speech that had an effect on campus" – is not the law of this Circuit (or of any circuit). If made the law of this Circuit, it would invest government officials with boundless censorship discretion.

The speech in which Plaintiff/Appellant J.S. engaged in this case undeniably is distasteful. Her social networking page ridiculing Principal McGonigle was a juvenile attempt at humor, and it richly deserved to be punished – by J.S.'s parents,

which it was. If the page would be taken by a reasonable reader to imply factual falsehoods about Principal McGonigle, it could also have been libelous. If so, Principal McGonigle would have recourse through a civil proceeding to recover for any damage to his reputation. Parental discipline, civil remedies and criminal enforcement are the appropriate and legally permissible responses when a child engages in injury-causing conduct off school premises and outside of school supervision.

What is *not* a legally permissible response is what Principal McGonigle and the school district did here – and especially not under the makeshift standard fashioned by the District Court to justify it. A public school is the government, and the government may not punish a citizen for the content or viewpoint of lawful speech absent a finite few exceptions recognized by the Supreme Court. None of the exceptions applies here.

The analysis conducted by the District Court was plainly driven by the Court's revulsion at the coarse language used to ridicule Principal McGonigle in the website at issue. But there is no "disgustingness" exception to the First Amendment. "The Supreme Court has held time and again, both within and outside the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001). However unpleasant

we find this particular speech, a school does not have plenary authority over the lives of its students every waking moment of every day, and most certainly not over the viewpoints they express.

Students "are 'persons' under our Constitution," entitled to "fundamental rights which the State must respect." *Tinker v. Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503 (1969). While *Tinker* and cases following *Tinker* recognize that the First Amendment rights of students in the school setting are not always coextensive with those of adults, the Supreme Court has never held that the reduced level of protection necessary to maintain order during the school day follows students everywhere throughout their lives. To the contrary, the Court has always recognized – as it recently did again in *Morse v. Frederick*, 127 S. Ct. 2618 (2007) – that the same speech which may be sanctionable in the school setting is protected speech when uttered outside of school.

To be clear, Amicis' interest in this case is not about J.S. and about the "right" to call the principal bad names. Amicis' concern is that the District Court's opinion muddies the previously clear state of the law, so that future online speakers with messages of much greater social usefulness than J.S.'s will publish under a cloud of fear and uncertainty. This Court should reaffirm the heretofore well-accepted principle that students' off-campus expression is the disciplinary responsibility of parents and not the school.

To the extent that speech on personal time were punishable at all, it surely could not be penalized absent a *substantially disruptive* effect on the school. This is the showing required under *Tinker* – the legal standard that the school district itself urged the District Court to apply. Because the District Court created its own, less demanding standard, having acknowledged that no substantial disruption occurred, reversal is required.

ARGUMENT

I. BLUE MOUNTAIN'S PUNISHMENT OF PURELY OFF-CAMPUS SPEECH IS UNCONSTITUTIONAL AS AN APPLICATION OF THE DISTRICT SPEECH POLICY, OR IS UNLAWFUL AS A DEVIATION FROM THAT POLICY.

A. Blue Mountain's Own Policies Concededly Do Not Permit Punishment for Off-Campus Speech Using Non-School Computers

The disciplinary sanction issued to J.S. identified two sources of authority under which she was being punished. The first is the Blue Mountain Student/Parent Handbook ("Handbook"), and the second is the Acceptable Use Of The Computer, Network, Internet, Electronic Communications Systems and Information Policy ("Policy 815.1"). In an effort to avoid having these policies struck down in their entirety by the District Court, Blue Mountain (Def. Summ. Jdgmt. Brf. at 23-25) argued that the policies are not unconstitutionally vague or overbroad, specifically because they do not allow schools to punish the type of conduct in which J.S. engaged. While that argument may spare the policies from

being unconstitutional, it concedes that the policies were not lawfully applied in this instance. That concession should have ended the inquiry and resulted in a judgment for J.S.

Specifically, Blue Mountain argued that the Handbook is not unconstitutionally vague or overbroad because it contains the following limitation on school disciplinary authority:

> Principals and teachers are directed to maintain order in the schools so that learning can occur. Maintenance of order applies during those times when students are under the direct control and supervision of school district officials.

Def. Summ. Jdgmt. Brf. at 23 (emphasis in original). The Handbook is constitutional, Blue Mountain argued to the Court below, "because there is a distinct 'geographic limitation' on the limit of the school's authority to discipline student expression." *Id.* at 24.

Next, Blue Mountain argued that Policy 815.1 is not unconstitutionally vague or overbroad because, by its terms, the Policy "incorporates all other relevant School District policies, such as, but not limited to, the student and professional employee discipline policies(.)" *Id.* at 24 (quoting Policy 815.1). Because the computer use policy incorporates by reference the Handbook language limiting discipline to settings in which the student is under the direct control and supervision of school officials, Blue Mountain told the District Court, Policy 815.1 is not unconstitutional: "(T)he District is limited to only those situations in which

they have direct control and supervision of students. In no way does Policy 815.1 attempt to regulate, control, or punish activities that do not involve the use of either District computers, network, internet, electronic communications or information systems." *Id.* at 25 (emphasis added). Of course, this means that the punishment of J.S. for speech created and distributed when she was outside of school supervision and not using school computers exceeded the limits of both the Handbook and of Policy 851.1, which limitations are conceded to be necessary to make the policies constitutional.

To attempt to salvage the constitutionality of both the overall policies and of the discipline of J.S., Blue Mountain was forced to resort to an agonizing logical contortion: (1) Blue Mountain's Handbook and Policy are constitutional because they do not apply to off-campus speech when the student is not under school control or using school computers; (2) J.S.'s speech took place off-campus at a time when she was not under school control or using school computers, so therefore (3) the punishment of J.S. must not have taken place under the authority of the Handbook and Policy (even though those were the sources of authority that the school relied on). That is a neat bit of jujitsu, and it clearly bamboozled the District Court, but it ought not fool this Court for a minute.

Blue Mountain has conceded that its disciplinary policies do not permit discipline against a student who engages in the conduct for which J.S was punished. That should conclusively end the matter.

B. A Policy Allowing Schools to Punish Students Purely for Off-Campus Speech is Unconstitutional.

Even if a school district rule *did* confer authority on school officials to punish speech made outside of school supervision and without using school computers – which Blue Mountain's rules patently do not – such a rule would violate the First Amendment. The District Court's position that off-campus speech may be punished upon the mere showing that it "had an effect on campus" cannot be squared with any accepted concept of the First Amendment. If permitted to stand, the "effect on campus" exception would swallow the rule, and would permit school administrators to punish off-campus speech anytime the speech is likely even to be *talked about* on campus.

1. Students enjoy full First Amendment protection outside the "schoolhouse gate."

Once students exit the proverbial "schoolhouse gate" and are not participating in school-sponsored or school-sanctioned activities, they regain the full benefits of citizenship, and consequently, their speech may not be punished by school authorities. Rather, the off-campus speech of a student is governed by the very same legal regimen that applies to any American citizen, adult or minor,

which is to say that threatening, harassing or obscene speech may be criminally prosecuted, and defamatory or invasive speech is subject to civil action.

(a) The Supreme Court has recognized that speech off-campus and apart from school events is not under the same limited First Amendment protection as "school speech."

To begin with first principles, the Supreme Court recognized in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Consistent with the First Amendment, school authorities may discipline students for speech only if the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others(.)" *Id.* at 513. *Tinker* has been accepted for 40 years as the "default" standard under which school authority over students' speech must be viewed. *See Saxe*, 240 F.3d at 211-14 (explaining *Tinker* exceptions recognized in *Fraser* and in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and concluding, "Speech falling outside of these (*Fraser* and *Hazelwood*) categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school"); *see also Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006) ("[F]or all other speech, meaning speech that is neither vulgar, lewd, indecent or plainly offensive under *Fraser*, nor school-sponsored under *Hazelwood*, the rule of *Tinker* applies. Schools may not regulate such student

speech unless it would materially and substantially disrupt classwork and discipline in the school.").

The *Tinker* Court held that, within the "schoolhouse gate," school officials may restrict student speech only if such speech "materially and substantially disrupts the work and discipline of the school." *Id.* at 513. The Court emphasized that in analyzing students' First Amendment rights, the government's enhanced disciplinary powers at school were to be considered in "light of the special characteristics of the school environment." *Id.* at 506. Nowhere did the Court suggest that such powers extended beyond the "schoolhouse gate," nor has the Court made any such suggestion in the 40 years since *Tinker* was decided. In fact, the Court has been consistently careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activity. This is how the Third Circuit has always understood *Tinker*. *See, e.g., Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) ("*Tinker* acknowledges what common sense tells us: a much broader 'plainly legitimate' area of speech can be regulated at school than outside school.").

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the first student speech case after *Tinker*, the Court upheld the punishment of a student who gave an "offensively lewd and indecent speech" at a school function. *Id.* at 685.

This punishment was not prohibited by the First Amendment because the speech was delivered on school property during school time, and the Court recognized the school's interest in disassociating itself from vulgar speech to a captive audience at an official school function.

Subsequently, in *Kuhlmeier*, the Court held that a principal could remove stories from a high school-sponsored student newspaper when the censorship was "reasonably related to legitimate pedagogical concerns[.]" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In that instance, the principal believed that stories about teen pregnancy were inappropriate because they failed to effectively disguise the identities of teens who agreed to discuss their pregnancies anonymously. Nevertheless, the Court recognized that, although the school could censor certain speech in a curricular publication that might reasonably be read as the official voice of the school, "[it] could not censor similar speech outside the school." *Id.* at 266.

In *Morse v. Frederick*, decided in 2007, the Supreme Court held that a school could punish a student who, at a school-sanctioned event during school hours, stood directly across from the school grounds and displayed a banner interpreted as promoting drug use. *Morse*, 127 S. Ct. at 2625. Writing for the majority, Chief Justice Roberts expressly rejected the argument that it "[wa]s not a school speech case," noting that (unlike in this case) the events "occurred during

normal school hours" at a school-sanctioned and school-supervised gathering. *Id.* at 2624. Even in *Morse*, the majority emphasized the importance that the speech occurred at an official school event, and made the same point Justice Brennan made in *Fraser*: while "Fraser's First Amendment rights were circumscribed [at school,]" had he "delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 2626-27.

In sum, no Supreme Court case addressing student speech has held that a school may punish students for speech away from school – indeed, every Supreme Court case addressing student speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected.[2]

---

[2] Consistent with the *Tinker* line of Supreme Court cases, lower courts have refused to permit schools the same leeway to regulate off-campus speech as on-campus speech, even where there is some limited nexus to the school or the speech reaches or impacts the school. *See, e.g.*, *Thomas v. Bd. of Educ., Granville Central Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979). In *Thomas*, four high school students were suspended for the off-campus distribution of a satirical humor newspaper that contained lewd content, after a reader brought a copy of the paper to campus and a school administrator saw it. In finding that the student editors' First Amendment rights were violated, the *Thomas* Court insisted on a strict delineation of the boundary beyond which the punitive reach of school administrators may not extend: "[O]ur 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." *Id.* at 1052. Because school administrators had "ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith," the *Thomas* Court held, "their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* at 1050. Accordingly, even though the students' speech reached campus, it enjoyed the full protection of the First Amendment because it originated

(continued...)

(b) The internet does not change the rule that off-campus speech enjoys the full protection of the First Amendment.

A regulation that permits a school to discipline students for comments made off-campus and unconnected with school events is unconstitutionally overbroad. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *United States v. Tykarsky*, 446 F.3d 458, 472 (3d Cir. 2006) (*quoting Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S.Ct. 1389 (2002)).

In *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446 (W.D. Pa. 2001), a student was suspended from school for making crass comments about the school's athletic director – including crude remarks about the size of his genitals – in an e-mail circulated to the non-school e-mail accounts of several classmates. A copy of the e-mail was found in a teacher lounge, but the message otherwise had no physical connection to the school or school events. The court held that the

---

(continued...)

off-campus and was not made in connection with a school class or event. *See also Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972) (First Amendment precluded punishing five high school students for the content of an underground newspaper they created off-campus and distributed after-hours on school grounds); *Klein v. Smith*, 635 F. Supp. 1440, 1441 (D. Me. 1986) (high school student who made offensive gesture toward teacher in restaurant parking lot could not be disciplined by school for expressive conduct in a place "far removed from any school premises or facilities at a time when [the teacher] was not associated in any way with his duties as a teacher").

school district's policy penalizing "verbal/written abuse of a staff member" was unconstitutionally vague and overbroad, because it was neither limited to instances in which the conduct caused or threatened a substantial disruption, nor geographically limited to school premises. *Id.* at 459.

In *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698 (W.D. Pa. 2003), a different judge in the Western District reaffirmed *Killion* in the case of a high school student disciplined for using an online message board to transmit vulgar and insulting messages, including attacks on a student athlete and his mother, in discussing a school volleyball rivalry. The school took the position that it could punish the student because he brought "shame" and "embarrassment" to the volleyball program and the school with his comments. The court disagreed. The court found that a school handbook policy prohibiting "[i]nappropriate language" and "verbal abuse" toward school employees or students was overbroad and vague, "because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity." *Id.* at 706.[3]

---

[3] *See also Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000). In *Emmett*, high school administrators suspended a student who had created a website with "mock obituaries" of his classmates. The District Court enjoined the suspension, finding that the speech in question had no connection to any "class or school project" or was in any way "school-sponsored"; indeed, while

(continued...)

As *Killion* and *Flaherty* establish, it would be unconstitutional to recognize a generalized power for schools to police speech with no physical nexus to the school or to school events or activities. No physical nexus exists here.

The disciplinary sanction issued to J.S. was based purely on the content of her off-campus speech, and not for anything that she or anyone else did on campus. The Disciplinary Notice from the Blue Mountain School District listed two infractions for which J.S was being suspended: "Making false accusations about the school principal" and "Copyright laws." Principal McGonigle's March 23, 2007, letter to J.S.'s parents affirmed that these were the bases for her suspension: "This out of school suspension is for making false accusations against Mr. McGonigle, Middle School Principal and copyright laws in using a photograph of Mr. McGonigle that was property of the Blue Mountain School District." There is no mention of any disruption to school activities, or of any on-campus conduct by J.S. of any kind.[4]

(continued...)

"the intended audience was undoubtedly connected to" the high school, "the speech was entirely outside of the school's supervision or control." *Id.* at 1089.

[4] Amicis' focus in this brief is on the disciplinary sanction for making false statements about the principal, since that is the primary First Amendment issue and the one on which the District Court and the parties focused below. Amici do not believe that there is any colorable copyright infringement case against J.S., since (a) there has been no finding that Principal McGonigle's photo was in fact copyrighted school property (much government property is not) and (b) parody is a

(continued...)

It is undisputed that the MySpace website on which J.S. created her page is blocked from access by school computers. Hence, the site was viewable exclusively by people who were off-campus on non-school time. Notably, this is not a case in which the student "brought" her speech onto campus by, for example, printing out copies of a MySpace profile that originated off-campus and handing them out in the hallways, or calling up the profile on a classroom computer and beckoning her classmates to come and view it. There was no factual finding that any student viewed the parody on school computers – to the contrary, it is undisputed that the MySpace website is blocked on the school's computers – and there is no finding that J.S. herself took part in any of the on-campus discussion that the District Court cites as an on-campus "effect." This is a pure instance of punishment for the content of speech occurring entirely apart from school.

A regulation may not constitutionally punish speech based solely on how others may react to the speech. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357,

---

(continued...)

well-recognized fair use under federal copyright law. Nevertheless, it would be a legitimate disposition of this appeal for the Court to find that the First Amendment prohibited punishing J.S. for the content of her statements about the principal made on an off-campus website on personal time, and then to remand to the District Court for a determination as to: (1) whether any copyright violation occurred; (2) whether there is sufficient jurisdictional nexus with the school so as to permit imposition of school discipline for copyright violations, and (3) whether the alleged copyright violation would by itself have supported the punishment imposed.

369 (M.D. Pa. 2003) ("[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings."). A regulation permitting punishment for the way others react to speech is unconstitutional because it is insufficiently tailored to achieve the goal of maintaining good order in school, and because less speech-repressive means are equally or more effective to accomplish the same goal.[5] If students repeatedly disobey a teacher's order to be quiet in class because they are preoccupied discussing something they read off-campus, the school can and should punish the students whose disobedience is actually disrupting class – not the speaker whose

---

[5] A regulation penalizing false accusations against school officials is a content-based regulation, as it is directed to the message and not to the time, place or manner of its delivery (indeed, the school's position is that it can regulate speech made anytime and anyplace). A content-based regulation is subjected to strict scrutiny and presumed unconstitutional unless proven valid. *United States v. Stevens*, 533 F.3d 218, 232 (3d Cir. 2008). "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829 (1989). In this instance, however, the Court need not decide to apply strict scrutiny in order to find the regulation overbroad as applied to J.S., because the regulation could not be constitutionally applied to purely off-campus speech even under the intermediate level of scrutiny that applies to a content-neutral regulation that incidentally burdens speech. *See Conchatta Inc. v. Miller*, 458 F.3d 258, 267 (3d Cir. 2006) (content-neutral regulation that burdens speech is unconstitutionally overbroad unless it furthers an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms is no greater than necessary to further that interest).

writings they are discussing. To do otherwise would allow a misbehaving few students to deprive the non-disruptive majority of the audience (including non-students) of the speaker's words. Because there is a less restrictive and more effective alternative that does not require penalizing the content of speech, the school must employ that alternative.

2. If off-campus speech is punishable at all, it may not be punished absent a substantial disruption of school affairs.

To the extent that courts *have* permitted schools to exercise authority over off-campus speech, they have upheld discipline only where the speech has an actual or reasonably foreseeable disruptive impact on school substantial enough to satisfy the *Tinker* standard. Amici believe that *Tinker* is an incorrectly low standard to apply to off-campus speech because *Tinker* was uniquely concerned with the ability of schools to maintain order while students are under school supervision during the school day – a concern that is captured in Blue Mountain's own disciplinary handbook ("Maintenance of order applies during those times when students are under the direct control and supervision of school district officials."). Nevertheless, even under an application of *Tinker*, summary judgment in favor of Blue Mountain is unwarranted, because the District Court found that no substantial disruption occurred.

Before the District Court's ruling below, three other district courts in the Third Circuit had confronted the issue of whether a school could constitutionally

punish students for the offensive content of e-mail messages or websites not created with school computers on school time. In each instance, the courts concluded that the speech was protected because the schools failed to demonstrate actual or potential disruption of school affairs.

In *Killion*, 136 F. Supp. 2d at 446, the student's "Top Ten" list of vulgar comments about the athletic director was found not substantially disruptive of school, despite evidence that one staff member "had a hard time doing his job" and another was "almost in tears" after learning of the list. The Court acknowledged that the speech was "rude, abusive and demeaning," but that alone did not equate to disruption: "We cannot accept, without more, that the childish and boorish antics of a minor could impair administrators' abilities to discipline students and maintain control." *Id.* at 456.

In *Flaherty*, 247 F. Supp. 2d at 698, the Court applied *Tinker* and rejected a school administrator's assertion that the school could discipline a student for postings on an online bulletin board that brought "disrespect, negative publicity and negative attention" to the school. "[T]his is simply not sufficient to rise to the level of 'substantial disruption' under *Tinker*." *Id.* at 704.

Finally, in *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007), the Court overturned the suspension of a student who, like J.S., used MySpace to post a mock profile of his principal attributing ridiculously

exaggerated qualities to him and his family. The evidence of disruption to school affairs in *Layshock* was similar to, but more substantial than, the "disruption" the school relies on in this case – an administrator testified that 20 students were sent to her office for discussing the MySpace profile in class, the principal broke down crying at a school assembly, and several students attempted to use school computers to view the profile while on campus, causing one teacher to threaten to shut down classroom computers to maintain order – yet the Court correctly concluded that no "substantial" disruption occurred. The *Layshock* Court called this evidence of disruption "rather minimal" – "no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action" – and observed that the atmosphere at John Tinker's high school in Des Moines was "far more boisterous and hostile," yet still not in a state of substantial disruption. *Id.* at 600.

Even the principal case on which Defendants relied below, *Wisniewski v. Bd. of Educ.*, 494 F.3d 34 (2d Cir. 2007), required that the school demonstrate an actual or potentially substantial disruption in order to justify punishing a student's off-campus, online speech. *See id.* at 38 ("With respect to school officials' authority to discipline a student's expression reasonably understood as urging violent conduct, we think the appropriate First Amendment standard is the one set forth by the Supreme Court in *Tinker*(.)"). In *Wisniewski*, the online speech was a

violent Instant Messaging icon viewed as threatening the life of a teacher; the speech was found to be disruptive because, among other things, it caused the teacher to be so frightened that he had to be removed from teaching the student's class and replaced with a substitute.

Similarly, in *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 803 (Pa. 2002) (hereinafter called "Bethlehem" for clarity), the Pennsylvania Supreme Court held that a school did not violate the First Amendment by expelling an eighth-grade student for creating a web page, "Teacher Sux," that profanely enumerated the reasons his teacher should die and solicited donations for a hit-man. The Court emphasized two facts that distinguish *Bethlehem* from the facts here: (1) that the teacher was so traumatized that she went on antidepressants, was unable to complete the school year, and did not return for the following year, thus establishing that the website substantially disrupted school operations, and (2) that the student creator used school computers at least once to show the site to a classmate.[6]

---

[6] Several other courts, while recognizing that schools may sometimes sanction students' online writings, have declined to permit punishment absent a showing of substantial disruption satisfying *Tinker*. *See Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (student could not be punished for website containing "mock obituaries" of classmates, where school showed no evidence that the obituaries "were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever"); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1178 (E.D. Mo. 1998) (suspension

(continued...)

Wisniewski and *Bethlehem* may well be wrongly decided,[7] in that they required little or no physical nexus to the school – as Blue Mountain acknowledged below is required to make the application of discipline constitutional. Still, this Court need not break from *Bethlehem* and *Wisniewski* to hold that the disciplinary action here violated the First Amendment. Blue Mountain can prevail only if this Court dilutes the standard to lower the censorship bar even further, to apply where there is neither a threat of violence nor any substantial impact on the school.

In this case, the sum total of the "disruption" is that one math teacher was forced to quiet his class twice to get them to pay attention to their work (which the teacher testified was a regular occurrence) and that there was a general "buzz" among students indicating awareness of the website. Mere *discussion* of speech, even animated discussion, is far from the substantial disruption that *Tinker*

(continued...)

of student for off-campus personal web page that called principal an "asshole" and the school "fucked up" violated the First Amendment, where there was no showing that the page substantially disrupted school: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*.").

[7] At least one district court in this Circuit has rejected the First Amendment analysis in *Bethlehem*. *See Layshock*, 496 F. Supp. 2d at 602 (declining to follow *Bethlehem*, "this Court respectfully reaches a slightly different balance between student expression and school authority.").

requires; indeed, the armbands in *Tinker* themselves provoked questions and comments from other students.

There is no finding here that J.S. "brought" the website onto school grounds. There is no finding that it was her wish or intent that the website cause any effect on the school. For all we know from the District Court's findings, she may have intended the website to remain a private joke among her circle of friends (hence her decision to set the website to "private" shortly after creating it, so that only those given her express permission could view it and the general public could not). To hold that an off-campus speaker is subject to punishment for the on-campus discussion of her speech – in particular, with no evidence that the speaker even desired that discussion – would chill vast quantities of legitimate and undeniably protected speech.

II. THE DISTRICT COURT'S *FRASER/MORSE* HYBRID STANDARD DEVIATES FROM ALL ACCEPTED FIRST AMENDMENT JURISPRUDENCE

The District Court plainly erred in holding that schools may discipline off-campus speech under a makeshift standard that borrowed the "lewdness" element from *Bethel School District v. Fraser*, 478 U.S. 675 (1986), and the "illegality" element from the Supreme Court's more recent student speech case, *Morse v. Frederick*. No court has ever applied this crazy-quilt standard ("vulgar, lewd, and potentially illegal speech that had an effect on campus"), and with good reason.

The Supreme Court has flatly foreclosed going down the path that the District Court traveled.

A. *Morse* does not apply to all "potentially illegal" speech.

The District Court held that J.S.'s MySpace page was "akin to the speech that promoted illegal actions in the *Morse* case," reasoning that J.S.'s speech "could have been the basis for criminal charges against J.S." This formulation fundamentally misconceives *Morse* in two respects. As described above, *Morse* was by its express terms a "school speech" case, and nothing in *Morse* suggests the Supreme Court was prepared to grant schools comparable discretion to punish out-of-school speech. Moreover, *Morse* allows for school discipline only in the event of student speech encouraging other students to use illegal drugs, because illegal drug use threatens students' physical safety. *Morse* cannot be strained to apply to all "potentially illegal" speech.

In *Morse*, a 5-4 majority of the Supreme Court held that an Alaska high school principal did not violate a student's First Amendment rights by confiscating the banner that a student waved at a school-sanctioned gathering and suspending him for the message on the banner – "Bong Hits 4 Jesus" – because, the Court majority found, the message was reasonably interpreted as encouraging students to use illegal drugs. *Morse*, 127 S.Ct. at 2629.

To the extent that *Morse* constituted an additional exception to the default *Tinker* standard, the Court unmistakably intended it to be a limited one: "[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 127 S.Ct. at 2622. Indeed, the majority pointedly described the legal principle at stake in *Morse* as "narrow," and phrased it thusly: "whether Frederick's banner constitutes promotion of illegal drug use." *Id.* at 2629.

Were there any doubts about the narrowness of the *Morse* exception, they are conclusively addressed by the concurring opinion in which Justices Alito and Kennedy supplied the decisive votes to create a majority: "I join the opinion of the Court on the understanding that … it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use(.)" *Id.* at 2636 (Alito, J., concurring). Justice Alito went on to explain that the First Amendment would not tolerate a standard under which a school could censor speech merely because it interfered with the school's educational mission – a standard that is actually *more* restrictive of censorship than the standard applied by the District Court here:

> The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' … This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The 'educational mission' of the

> public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Id. at 2637 (Alito, J., concurring).

A small number of subsequent rulings, seemingly dismissing Justices Alito and Kennedy's call for a narrow reading, have nevertheless stretched *Morse* to apply to student speech reasonably interpreted as encouraging violence, on the grounds that violence poses a threat to students' *physical safety* as dire as that of illegal drugs. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 770 (5th Cir. 2007) (finding that "speech advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students arising from the school environment is unprotected"); *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007) (reasoning that the rationale of *Morse* "applies equally, if not more strongly, to speech reasonably construed as a threat of school violence"). These decisions have been roundly criticized as straining the Supreme Court's ruling in Morse.

But even those cases cannot defensibly be read to say that speech which might – but here, did not – give rise to criminal charges equates to promoting illegal conduct that threatens the physical safety of students. This "potentially illegal speech" concept ignores all of the Supreme Court's cautions that *Morse* is to

be narrowly construed. If not repudiated by this Circuit, the District Court's view would risk transforming school officials into roving, 24-hour speech police.

To give one example, copyright infringement is illegal, and in severe cases, punishable by criminal charges. If a student uses his home computer on a weekend to publish an online music magazine widely read by students that reprints song lyrics without the authors' permission, is that student publisher subject to suspension from school for having engaged in speech that is "*potentially* illegal?"

When schools are seeking to maximize their discretion to administer discipline, they have no difficulty arguing that school administrators are untrained in legal niceties and consequently prone to error if called upon to make fine judgments about the law. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 343 (1985) (applying reasonableness standard to searches and seizures by school officials, to "spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense"). To instruct administrators that they are now free to identify and punish "potentially" illegal speech on the internet would result in a torrent of "false positive" suspensions.[8]

---

[8] *See, e.g.*, Gail Stanton, *Silence on lock and load*, WORCESTER TELEGRAM & GAZETTE, May 30, 2008 (10-year-old student suspended for five days for bringing to school an empty blank shell casing that a veteran gave him on Memorial Day as a souvenir); David Biscobing, *School ousts boy; gun sketch a 'threat': Chandler*

(continued...)

Additionally, if told that they will face state sanctions if found to be engaging in "potentially" illegal speech, students will self-censor speech that is merely "potentially potentially illegal" – or, in other words, legal. A government regulation that chills substantial amounts of lawful speech in the name of penalizing unlawful speech is unconstitutionally overbroad. "Under the doctrine of overbreadth, a statute violates the First Amendment if it prohibits a substantial amount of protected expression." *PSINet, Inc. v. Chapman*, 362 F.3d 227, 234 (4th Cir. 2004) (*citing Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244, 122 S.Ct. 1389 (2002)).

We are not dealing in this case with *Morse* speech. J.S.'s website did not urge any student to go out and do anything; the site would not reasonably be expected to incite anyone to commit a crime, nor is there any evidence that it did. Indeed, it did not mention drugs or violence at all. For its misapplication of *Morse* alone, the District Court's ruling is premised on a fundamental error of law and must be reversed.

(continued...)

parents say officials erred with suspension, THE TRIBUNE, MESA, ARIZ., August 27, 2007 (13-year-old boy given five-day suspension for doodling a laser gun in the margin of his school notes); *Zero tolerance takes student discipline to harsh extremes*, USA TODAY, January 2, 2004 (documenting multiple erroneous "zero tolerance" disciplinary decisions, including suspension and arrest of Texas high-school student accused of violating his school's drug policy by loaning his inhaler to a classmate who was having a severe asthma attack).

B. *Fraser* is inapplicable to off-campus speech.

The District Court further erred in applying the Supreme Court's *Fraser* standard – that high schools may punish "offensively lewd and indecent" speech – to an off-campus website unaffiliated with the school.

In *Fraser*, the Supreme Court upheld the authority of a public high school to punish a student who used crass sexual innuendoes in a nominating speech for a fellow student's candidacy. The speech was delivered to a student assembly in a school auditorium during school hours, and students were required to attend or to spend the period in study hall.

In its opinion, the Court pointedly referred to the young recipients of Fraser's discourse as a "captive audience." *Bethel School District v. Fraser*, 478 U.S. 675 (1986). The Court focused on the importance of permitting a school to distance itself from lewd speech that takes place on school grounds at official school functions: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, the Court found, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *See also Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.2d 1530, 1541 (7th Cir. 1996) (applying *Fraser*, "Children in public schools are a captive

audience that school authorities acting in loco parentis may protect.") (internal quotes omitted).

Nothing in *Fraser*, or in any appellate case following *Fraser*, suggests that the same "lewdness" standard would justify a school's interceding in the parental decision whether to punish a child's use of coarse language outside of school. Most notable is the Supreme Court's own recent characterization of *Fraser* in *Morse*. After observing that *Fraser* demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," the Court concluded: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 2626. *Morse* wholly forecloses the use of the *Fraser* "lewdness" standard to permit punishment of off-campus speech, as the District Court did.

Court after court has declined to apply *Fraser* to off-campus speech. For example, in *Killion*, 136 F. Supp. 2d at 446, a court in the Western District of Pennsylvania found that a school district could not rely on *Fraser* to justify its punishment of a student who circulated an e-mail off-campus that made crude remarks about a coach's sex life. The court held that the *Fraser* "lewd and vulgar" standard did not apply to speech that "occurred within the confines of [the student]'s home, far removed from any school premises or facilities." *Id.* at 456-57. A sister court in the Western District agreed in *Layshock*, 496 F. Supp. 2d at 599, a

case also involving vulgar speech on an off-campus MySpace page: "[B]ecause *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech." Similarly, in *Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791 (N.D. Ohio 2002), the court held that *Fraser* did not permit a school to expel a student for indecent language on an off-campus website.

It is important to remember what the *Fraser* case was about: The target of the student's speech was a classmate, the speech was a series of double-entendres in which no profanities were used, the speech was obviously meant as a joke rather than an attack (indeed, it was complimentary toward its subject), and there was no evidence that the classmate ever complained or was offended. If the *Fraser* standard applies to anything, it must necessarily apply to the facts of *Fraser*. In other words, if the District Court is correct that off-campus online speech is punishable under the *Fraser* test, a school could constitutionally punish a student for speech on a web page directed at a classmate, using vulgarities but no profanity, plainly meant in jest, about which the target of the speech does not complain.

It is not hard to envision the administrative nightmare that will result if schools are told to go forth and apply such a standard. Under the District Court's ruling, there would be no constitutional barrier to suspending two 18-year-old

newlyweds who e-mail their classmates with a series of vulgar double-entendres joking about the sex they are having on their honeymoon, so long as some of the recipients talk about the e-mail at school.

To the extent that *Morse* or *Fraser* are at all relevant to this case, they are relevant in support of Appellant J.S.'s position. Recall that in *Morse*, the contention that a school may penalize speech that encourages illegal drug use was not the school's first line of argument. Its first line of argument was that schools may penalize speech that administrators deem "offensive," and the *Morse* Court categorically rejected that sweeping interpretation of *Fraser*:

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Morse, 127 S.Ct. at 2629 (citation omitted).

Amici take the Supreme Court at its word; *Fraser* and *Morse* mean what they say. *Fraser* is about lewd speech on school premises to a captive audience at an official function. *Morse* is about speech at a school-sanctioned event encouraging the use of dangerous illegal drugs. We have neither in this case, and it was error for the District Court to force these ill-fitting facts into an analysis unsuited to independently created, non-school-affiliated speech.

CONCLUSION

Tinker spoke of "the special characteristics of the school environment." One of these "special characteristics" is that students are impressionable and, while at school, unable to escape speech that is thrust upon them. But another of these special characteristics is that school is a place to inculcate respect for the fundamental freedoms on which American society is built. And it is precisely because students *are* a captive audience for the best hours of their day that, when they leave school and school-affiliated events behind, they turn back into American citizens again. If we tell students that off-campus speech that may provoke discussion at school can bring suspension, then we are teaching these young people – most of whom are old enough to drive a car, many of whom are old enough to marry, and some of whom are old enough to vote, or to strap on a gun and fight for their country – that free speech is too dangerous for them, and that it must be parceled out stingily by the same government that the students wish to criticize. What could "disrupt the educational mission" more?

For better or for worse, we live in a society in which coarse language is ubiquitous. A high school student viewing the Academy Awards ceremony on prime-time network television in March 2006 would have seen the rap artists Three Six Mafia take home the Oscar for their gritty song, "It's Hard Out Here For a Pimp," which includes the lyric: "It's fucked up where I live, but that's just how it

is." A high school student whose class takes a trip to see the long-running Tony Award-winning musical *A Chorus Line* will be serenaded with a song whose refrain is: "Tits and ass." Teenagers do not live in a plastic bubble insulated from popular culture, and they must be permitted to talk about it, even if that means using "offensive" language, when they are using their own computers on their own time. While a school can properly stop students from singing Three Six Mafia's award-winning lyrics in the middle of algebra class, it cannot stop them from posting the lyrics on personal MySpace pages or e-mailing the lyrics to their friends. Undoubtedly, there will be some unpleasant excesses (just as there are in adults' speech). But the First Amendment says we must take that risk, for the alternative – that we risk excesses by government censors – is worse.

The online medium of J.S.'s speech does not make the speech so qualitatively different from other media that a reduced level of First Amendment dignity should apply. There is no evidence that the theoretically broad accessibility of her website was anything more than that – theoretical. Off-campus speech has *always* been able to make its way onto campus, whether through copy machines or through the gossip pipeline, and yet courts have not seen fit to penalize speech based on where the audience transports it.

Amici's principal concern is not for speakers like J.S., but for those engaging in more profound journalistic commentary that would be swept up in the

net of censorship. Journalism, when practiced at its best, is meant to be provocative; that is, to cause people to talk. If anecdotal evidence that students talked during school hours about something they had read was enough "effect" on campus to be make the speech punishable, then even the best journalism (in fact, especially the best journalism) would be subject to disciplinary action.

Judge Sippel made the point powerfully in *Beussink*. In that case, as here, a student created an off-campus web page using harsh profanity to attack the principal, which the principal overheard some students discussing at school. Though the Court acknowledged sympathy with the school's position, it recognized that even sharply worded criticism of school officials has value and is entitled to First Amendment protection:

> One of the core functions of free speech 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. Speech is often provocative and challenging. Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection.

Beussink, 30 F. Supp. 2d at 1180-81 (internal quotes and citation omitted).

Principal McGonigle is a public official with enormous power and responsibility. Public officials are expected to withstand questioning and criticism, even harsh criticism, because it is the highest duty of citizenship to hold the government to account for its actions. The Supreme Court has recognized exceptions in the public school setting only where speech causes substantial disorder or encourages illegal drug use. It is undisputed that J.S.'s website neither caused substantial disorder nor promoted drug use.

In the absence of those narrow exceptions, there is no plenary authority for a school principal to use the power of his office to silence criticism of him, any more than there is plenary authority for the Governor of Pennsylvania to use the power of his office to punish citizens who post attacks about him on the internet. To hold otherwise would be to hold that students never enjoy the benefit of the First Amendment – anyplace, anytime – but rather that they labor under the infirmity of second-class citizenship so long as they remain enrolled in school. Such a holding would place this Court in defiance of the *Tinker* standard that the Supreme Court has reaffirmed time and again.

Whatever standard is appropriate to evaluate school discipline of off-campus speech – whether off-campus speech is *per se* beyond the disciplinary reach of schools, or whether *Tinker*'s substantial disruption test may sometimes apply – we know what the standard is *not*: "vulgar, lewd, and potentially illegal speech that

had an effect on campus." The District Court's method of analysis is not one recognized by any court, and if allowed to stand, would eviscerate the well-established distinction between the level of protection afforded to off-campus versus on-campus speech – a distinction reaffirmed in every one of the Supreme Court's student speech cases since *Tinker*.

For all the reasons set forth above, Amici the Student Press Law Center and the Pennsylvania Center for the First Amendment respectfully request that the District Court's judgment be reversed.

Respectfully submitted,

Robert D. Richards (Pa. Id. No. 50077)
Clay Calvert (Cal. Id. No. 155130)
PENNSYLVANIA CENTER FOR
THE FIRST AMENDMENT
The Pennsylvania State University
308 James Building
University Park, PA 16802
(814) 863-1900

Frank D. LoMonte (Ga. Id. No. 456505)
Michael C. Hiestand (Wash. Id. No. 33913)
Adam Goldstein (N.Y. Bar, Admitted Sept. 2003)
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard, Suite 1100
Arlington, VA 22209-2211
(703) 807-1904

February 25, 2009

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this 25th day of February, 2009, an original and nine copies of the foregoing Brief for *Amicus Curiae* The Student Press Law Center were filed with the Clerk's Office of the United States Court of Appeals for the Third Circuit. Also, an electronic copy of the brief was transmitted to electronic_briefs@ca3.uscourts.gov.

I further certify that on this 25th day of February, 2009, two true and correct copies of the foregoing Brief for *Amicus Curiae* were served by mail and an electronic copy was served by electronic mail on the following:

Jonathan P. Riba, Esquire
Sweet, Stevens, Katz & Williams LLP
331 E. Butler Avenue
P.O. Box 5069
New Britain, PA 18901

Mary E. Kohart
A. Kristina Littman
Tara S. Sarosiek
DRINKER BIDDLE & REATH LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996

Mary Catherine Roper
AMERICAN CIVIL LIBERTIES
FOUNDATION OF PENNSYLVANIA
P.O. Box 40008
Philadelphia, PA 19106

Witold J. Walczak
ACLU OF PENNSYLVANIA
313 Atwood Street
Pittsburgh, PA 15213

ROBERT D. RICHARDS

COMBINED CERTIFICATION

Bar Membership: Pursuant to Local Rules 28.3(d), I hereby certify that Robert D. Richards is a member of the bar of the United States Court of Appeals for the Third Circuit.

Identical Briefs: I hereby certify that the text of the electronic and hard copy versions of this brief are identical.

Virus Check: I hereby certify that a virus-check was performed on the electronic version of this brief using Symantac Anti-virus, version 10.0 and no viruses were found.

Word Count: Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief was produced using a 14-point Times New Roman font and contains 8,822 words, excluding the parts of the brief exempted under Fed. R. App. P. 32 (a)(7)(B)(iii).

ROBERT D. RICHARDS