# 09-1452-cv (L)

## 09-1601-cv (XAP), 09-2261-CV (CON)

**IN THE**
**UNITED STATES COURT OF APPEALS**
FOR THE SECOND CIRCUIT

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**AVERY DONINGER,**
Plaintiff-Appellee-Cross-Appellant,

v.

**KARISSA NIEHOFF AND PAULA SCHWARTZ,**
Defendants-Appellants-Cross-Appellees.

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On Appeal from the United States District Court for the District of Connecticut
No. 07-cv-1129
Honorable Mark R. Kravitz

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**BRIEF OF *AMICUS CURIAE* STUDENT PRESS LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT**

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OF COUNSEL:

Frank D. LoMonte
(Ga. Bar No. # 456505)
Michael C. Hiestand
(Wash. Bar # 33913)
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard - Suite 1100
Arlington, Virginia 22209-2211
(703) 807-1904
(703) 807-2109

Joseph P. Esposito
(2d Cir. Bar # 88-502)
William E. Potts, Jr.
(D.C. Bar # 945824)
Edward Avery Wyatt
(N.C. Bar # 31888)
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 955-1500
(202) 778-2201

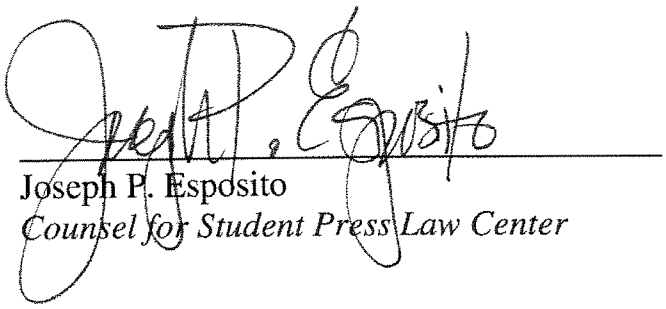
*Counsel For Amicus Curiae Student Press Law Center*

**RULE 26.1 DISCLOSURE STATEMENT OF**
**THE STUDENT PRESS LAW CENTER**

Pursuant to Federal Rules of Appellate Procedure 26.1, 28(a)(1), and 29(c), the Student Press Law Center ("SPLC") files the following statement:

SPLC is a nonprofit, 501(c)(3) corporation devoted to protecting the First Amendment rights of the student news media. SPLC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in SPLC.

Respectfully submitted,



Joseph P. Esposito
*Counsel for Student Press Law Center*

Dated: September 4, 2009

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MISCELLANEOUS

This case has sweeping and profound implications beyond one high school student in Connecticut who used her home computer to post a blog venting about school events. Rather, in an era when mainstream journalism has expanded into blogs and other new media, the ruling below poses a serious threat to the First Amendment rights of student journalists throughout this Circuit and the nation. Accordingly, the Student Press Law Center ("SPLC") respectfully submits this *amicus curiae* brief in support of Plaintiff-Appellee Avery Doninger.

The court below framed a controlling question of law: "Whether a school may discipline a student for inappropriate comments made off campus on a blog . . . ." (J. App. A-379). The SPLC urges reversal of the lower court's decision, which held that the First Amendment did not protect Ms. Doninger from being punished for posting a blog entry from her home that used a colloquial term for "jerk" to criticize a decision made by her school's administrators.

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

The SPLC is a national, nonprofit, non-partisan organization established in 1974 to provide information about and advocate for the free expression rights of student journalists and newspapers. As the only national legal assistance agency devoted exclusively to defending the rights of the student press, the SPLC has collected and analyzed student press cases nationwide, and has submitted

numerous *amicus* briefs to federal courts of appeals and to the United States Supreme Court.

Because the SPLC focuses on issues relating to the First Amendment rights and responsibilities of students and their parents, and the authority and constitutional limits imposed on school and other government officials, the SPLC has a special interest in the potential consequences of the District Court's decision, which imperils the rights of students to engage in off-campus speech.

The parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

## INTRODUCTION

This appeal presents the question of whether a public high school may punish a student for exercising two of the most fundamental rights guaranteed to American citizens — the right of free speech and the right to petition government officials for redress of grievances.

The SPLC is submitting this brief because the District Court's decision constitutes a dangerous intrusion into the protections afforded by the First Amendment. The speech at issue occurred entirely outside of school property, from a computer in the student's home. It was conveyed through a medium (a blog) that could only be read by individuals who deliberately sought access by entering specific search terms into a computer. And the student's words themselves were quintessential political speech, criticizing the decision of school

officials in contemporary, colloquial terms and inviting others to petition for redress if they, too, disagreed with the decision. Although this is precisely what the First Amendment is intended to protect, the District Court nonetheless held that the Constitution did not protect Ms. Doninger from being punished for her off-campus speech.

The District Court's ruling would move this Circuit toward a standard under which anything posted online is regarded as having been distributed on campus, based on its potential (even if unrealized) to be read or acted upon on campus. This is a drastic and dangerous move that the Court should resist. Because it is established that schools may prohibit the on-campus distribution of materials their officials have not reviewed,[1] the District Court's standard would permit a principal to enforce a rule against writing anything online about the school unless an administrator has pre-approved it.

Ms. Doninger was punished for using slang to express her views — to her own peers, on her own time, and outside of school property — about a decision made by school administrators. By concluding such punishment was permitted by the First Amendment, the District Court has, in the words of the Supreme Court,

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[1] *See, e.g., Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803 (2d Cir. 1971) (striking down overbroad prior-review policy but indicating that narrowly tailored policy with brief deadline within which reviewer can act would be constitutional).

"'discount[ed] important principles of our government as mere platitudes.'"[2] The District Court's decision is contrary to governing law and should be reversed.

## ARGUMENT

In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 511 (1969), the Supreme Court explained:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students . . . may not be confined to the expression of those sentiments that are officially approved. *In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.*

(emphasis added). Indeed, the fact that schools "'are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" *Id.* at 507 (*quoting West Virginia State Bd. of Ed. v. Barnett,* 319 U.S. 624, 637 (1943)). *See also Guiles v. Marineau,* 461 F.3d 320, 324 (2d Cir. 2006) ("[W]e are mindful that the 'vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools.'" (*quoting Healy v. James,* 408 U.S. 169, 180 (1972)).

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[2] *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507 (1969) (*quoting West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 637 (1943)).

The Supreme Court has recognized that school authorities also have a need to "prescribe and control conduct in the schools." Accordingly, certain limitations may be imposed on student speech "in light of the special characteristics of the school environment." *Tinker,* 393 U.S. at 506, 507. However, those limitations are exceedingly narrow, and have largely been restricted to what is necessary to prevent threats of violence (*Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007)), promotion of illegal drug use at school events (*Morse v. Frederick,* 551 U.S. 393 (2007)), and the use of lewd and sexually explicit speech at school assemblies (*Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986)). Those narrow exceptions are inapplicable here.

## I. THIS CASE HAS SIGNIFICANT IMPLICATIONS FOR THE FIRST AMENDMENT AND FOR STUDENT JOURNALISTS

This case has far-reaching ramifications for student journalism and for First Amendment protections. This is not merely a case about Avery Doninger and the colloquialism she chose to describe her principal. While some may find the term used to be less than tasteful, First Amendment protections should not be diminished because the speaker chose a word that may be unappealing. The decision in this case will set forth the rules for student journalists throughout the Circuit, and will surely influence the rules that will be applied throughout the nation. If allowed to stand, the lower court's decision will chill the exercise of First Amendment rights, for it suggests that off-campus speech may be punished if

it is designed to "influence fellow students," or if it encourages communicating with school administrators to challenge their decisions. Student journalists would be placed in the uncomfortable (and constitutionally impermissible) position of having to weigh what punishment they might suffer if they express opinions outside school grounds. This is particularly the case as journalism, including student journalism, increasingly migrates toward the web and blogging. As the Columbia Journalism Review noted a few years ago, "Blogs . . . are an increasingly critical element in the business of disseminating the news."[3] And the lower court's decision could, if upheld, be the death knell for student investigative journalism disseminated over any media, including the Internet.

Finally, the decision on appeal strikes at the heart of free speech, and the right to petition the government for redress, two sacred cornerstones of American democracy. The lower court's decision would send the wrong message to civics classes, for it unmistakably says that a student may not exercise her First Amendment rights to encourage others to challenge a governmental decision.

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[3] *See* Paul McLeary, *Blogs Ain't Everything, But They're Something,* COLUMBIA JOURNALISM REVIEW, Nov. 17, 2006, http://www.cjr.org/behind_the_news/blogs_aint_everything_but_.php.

## II. STUDENTS MAY NOT BE PUNISHED FOR ALLEGEDLY "OFFENSIVE AND UNCIVIL" STATEMENTS MADE OFF CAMPUS

In granting Appellants' summary judgment motion, the District Court recognized that evidence in the record suggests the school administrators "may have punished Ms. Doninger because the blog entry was offensive and uncivil and not because of any potential disruption at school." (J. App. A-336). However, the court concluded that the First Amendment did not protect Ms. Doninger from being punished for "an offensive blog entry that was clearly designed to come on to campus and influence fellow students." ( J. App. A-329). This conclusion ignores the critical distinction between on-campus and off-campus speech, and is contrary to governing precedent regarding allegedly "offensive" language.

### A. The Decision Below Ignored the Critical Distinction Between On-Campus and Off-Campus Speech

A school's authority to regulate allegedly offensive speech depends on whether the speech occurs on- or off-campus. Where allegedly offensive speech occurs on school grounds, school administrators have been permitted to regulate and punish the speech. *See Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 678 (1986) (school authorities could punish a student for using "elaborate, graphic, and explicit sexual metaphor" in a speech to school assembly). However, where student speech occurs off-campus, the fact that it may be considered offensive does not provide a constitutionally valid reason for regulating or punishing it. *See*

*Morse,* 551 U.S. at 405 (the sexually explicit speech in *Fraser* would have been protected had it been delivered "in a public forum outside the school context"); *Thomas v. Board of Education,* 607 F.2d 1043, 1046 n.3 (2d Cir. 1979) (school had no authority to punish students for off-campus publication addressed to school community that was "saturated with distasteful sexual satire, including an editorial on masturbation and articles alluding to prostitution, sodomy and castration.").

Moreover, whether published in a blog or an off-campus newspaper, a student's allegedly offensive off-campus speech does not lose its First Amendment protection simply because it targets school personnel and students or because it may find its way onto campus. The "distasteful sexual satire" in *Thomas* was specifically "addressed to the school community," it lampooned the student authors' teachers and classmates, and a copy was confiscated from a student on the school grounds. 607 F.2d at 1045. Nevertheless, this Court held that the publication was protected off-campus speech. The Court stated that school officials do not have the authority to "punish off-campus expression simply because they reasonably foresee that in-school distribution may result." *Id.* at 1053 n.18.

The blog here was off-campus speech, and was even more "off-campus" than the publication in *Thomas,* which was partially prepared on school grounds.[4] The record shows that Ms. Doninger's blog was prepared entirely outside school grounds, outside of school hours, on a private computer, in her home. Aside from the fact that Ms. Doninger's blog, like the off-campus publication in *Thomas,* addressed issues of interest to students, no evidence supports the District Court's belief that it was "clearly designed to come on to campus." Indeed, the record contains no evidence to suggest that any student ever accessed the blog from campus, and instead indicates that the only way the blog reached the campus was because Appellant Niehoff took it there herself.[5] If these facts were sufficient to subject Ms. Doninger's blog to the standards governing on-campus speech, any school administrator would be able to convert off-campus speech into on-campus

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[4] In *Thomas*, this Court found that "all but an insignificant amount of relevant activity" was designed to take place off-campus, even though some initial preparation for the publication occurred in a school classroom, some of the articles were composed or typed within the school building, and copies of the publication were stored in a classroom closet. 607 F.2d at 1045, 1050. The blog entry here had even less of a connection to the school: all of the activity associated with it occurred off-campus.

[5] The record shows only that three individuals accessed the blog outside of school hours on April 25, 2007, and that, after a relative told her about the blog, Appellant Schwartz sent Appellant Niehoff a link to the blog on May 7. (J. App. A-168, 169). Appellant Niehoff then printed a copy of the blog and gave it to Ms. Doninger when they met in Appellant Niehoff's office at the school. (J. App. A-87).

speech simply by repeating or publishing it inside the school. This would effectively transform the entire country into a regulated classroom environment, and would give school administrators unprecedented authority to suppress and punish speech uttered outside the school. No legal basis exists for giving school officials such power.

### B. The Blog Was Not "Plainly Offensive"

Neither the Supreme Court nor this Court has ever held that school administrators may regulate or punish off-campus speech on the ground that it is offensive. Even when allegedly offensive speech was actually uttered on school grounds, school administrators have been permitted to punish the use of such speech only in narrow circumstances. In *Fraser*, the Supreme Court held that a student could be punished for using "elaborate, graphic, and explicit sexual metaphor" in a speech to a school assembly. 478 U.S. at 677-78. The Court stressed the need "to protect children — especially in a captive audience — from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684. Twenty years later, the Supreme Court refused to extend *Fraser* to non-sexual speech that was alleged to be offensive, stating that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.'" *Morse,* 551 U.S. at 409.

This Court has similarly held that *Fraser* did not extend to offensive, non-sexual speech displayed on a T-shirt that a seventh grader repeatedly wore to school. *Guiles v. Marineau,* 461 F.3d 320, 330 (2d Cir. 2006). The T-shirt accused then-President Bush of being a "Crook," a "Cocaine Addict," an "AWOL, Draft Dodger," and a "Lying Drunk Driver," and included images of cocaine and a martini glass designed to "to impugn [Mr. Bush's] character." *Id.* at 322. This Court held that the T-shirt was not "plainly offensive." *Id.* at 329. The Court stated:

> What is plainly offensive for purposes of *Fraser* must . . . be somewhat narrower than the dictionary definition. Courts that address *Fraser* appear to treat "plainly offensive" synonymously with and as part and parcel of speech that is lewd, vulgar, and indecent -- meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity. . . . In fact, the Supreme Court deemed Fraser's speech could be freely censored because it was imbued with sexual references, bordering on the obscene.

*Id.* at 328.

The District Court characterized Ms. Doninger's blog entry as "offensive" and "inappropriate"[6] because it used the slang term "douchebags" to refer to school officials. However, "douchebag," as defined in The Online Slang Dictionary,

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[6] In its order certifying questions for appeal, the District Court characterized the blog as containing "inappropriate comments," rather than "offensive" speech. (J. App. A-379).

merely means "a jerk or a pompous person."[7] This relatively innocuous term is a far cry from the type of speech that courts have previously permitted schools to regulate, such as speech that threatens violence or encourages drug use. Moreover, it would be extraordinarily dangerous — as the Court recognized in *Morse* — to give government officials a license to stifle criticism of their own job performance because they find the critic's words to be hurtful. If "douchebags" is an unacceptably harsh criticism, may a student submit an online letter-to-the-editor to her local newspaper in which she says the district's busing policies "suck," or complains that officials are being "butt-headed"? The fact that we cannot answer with confidence exposes the fatal failing of the district court's ruling — a speaker *must* know distinctly where the outer boundaries are located, and cases in the gray judgment-call zone *must* be decided in the speaker's favor.

The speech at issue here was not "plainly offensive" within the meaning of *Fraser* and *Guiles*, and should enjoy First Amendment protection.

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[7] *See* http://onlineslangdictionary.com/definition+of/douchebag. The terms "douchebag" and "douche" have been used frequently on popular network prime time television programs, including The Office and 30 Rock. *See, e.g., 30 Rock: The Fighting Irish* (NBC television broadcast Mar. 8, 2007); *The Office: The Traveling Salesman* (NBC television broadcast Nov. 11, 2007); *30 Rock: Jack Meets Dennis* (NBC television broadcast Nov. 30, 2006).

## III. THE ALLEGEDLY "DISRUPTIVE" NATURE OF THE SPEECH AT ISSUE DOES NOT JUSTIFY PUNISHMENT

The District Court concluded that there is a genuine issue of fact as to whether Ms. Doninger was punished because her blog entry created a potential for disruption. (J. App. A-255, 256). However, the potential for disruption alleged below falls far short of what is necessary to justify punishment of student speech under the *Tinker* "substantial disruption or material interference" standard, which is generally satisfied only when speech threatens violence or incites physical disruption.

Several courts have found a risk of substantial disruption when the speech urges the killing of teachers or students. In *Wisniewski*, 494 F.3d 34 (2d Cir. 2007), for example, this Court upheld the punishment of a middle school student who distributed an instant messaging icon that suggested "a named teacher should be shot and killed." *Id.* at 35.[8] Courts have also found a risk of substantial

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[8] The Eleventh Circuit reached a similar result when it rejected a challenge to discipline imposed on a student who had written a story in her notebook, which she had shown to a student at school, that "describe[d] taking a gun into her sixth period classroom and shooting her teacher in front of other students." *Boim v. Fulton County School District*, 494 F.3d 978, 983 (11th Cir. 2007). *See also D.F. v. Board of Education*, 386 F. Supp. 2d 119, 125-26 (E.D.N.Y. 2005) (student could be disciplined for writing a story that included "graphic depictions of the murder of specifically named students and sex between named students"), *aff'd*, 180 Fed. Appx. 232 (2d Cir. 2006); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002) (upholding punishment of a student whose website included reasons why a named teacher should die and soliciting contributions for a hit man).

disruption when student speech calls for or is likely to provoke violence.[9] Further, both before and after *Tinker,* courts have found that threatened interruptions of class instruction or threatened damage to school property pose the type of disruption that justifies restrictions on student speech.[10]

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[9] One court in this Circuit, for example, found that a principal could withhold a student newspaper containing a letter, purportedly from the school's lacrosse team, in which the team threatened to "kick [the sports editor's] greasy ass." *Frasca v. Andrews*, 463 F. Supp. 1043, 1046 (E.D.N.Y. 1979). Because *Frasca* preceded *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which recognized a school's right to exercise certain control over the content of school-sponsored newspapers, the court applied *Tinker*'s material and substantial disruption test.

Courts have also upheld limits on student expression when administrators could link substantially similar forms of expression to past disturbances. *Compare Scott v. School Board of Alachua County*, 324 F.3d 1246, 1249 (11th Cir. 2003), *and West v. Derby*, 206 F.3d 1358, 1366 (10th Cir. 2000) (upholding bans on display of Confederate flags based on previous racial conflicts), *with Castorina v. Madison County School Board*, 246 F.3d 536, 544 (6th Cir. 2001) (students' suspensions for displaying Confederate flags would not satisfy *Tinker* if officials singled out Confederate flags from other racially divisive symbols and could not show evidence of previous altercations related to the flag).

[10] *See Blackwell v. Issaquena County Board of Education*, 363 F.2d 749, 751-53 (5th Cir. 1966) (holding that officials could bar the wearing of "freedom buttons" on school grounds when their distribution had caused actual disruptions); *Dodd v. Rambis*, 535 F. Supp. 23, 25 (S.D. Ind. 1981) (upholding school's punishment for distribution of fliers listing a date, time and meeting place for a walkout); *Boucher v. School Board of the School District of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) (upholding punishment of a student who wrote an article in an underground newspaper — distributed on campus — that "purport[ed] to be a blueprint for the invasion of [the school's] computer system along with encouragement to do just that.").

By contrast, this case does not involve speech that incited harm to people or property, or student walk-outs. The speech here merely encouraged people to contact school officials to express their views — "to petition the Government for a redress of grievances." If calls and emails from parents and students are deemed sufficient to establish "substantial disruption or material interference," then school officials will have free rein to suppress any off-campus student newspaper or speech that challenges their decisions, and public school students will no longer enjoy protection under the First Amendment. Indeed, the more substantive and hard-hitting the student's journalism, the more likely its censorship will be lawful. If a student may not safely speak off-campus about the school if the speech is expected to cause the public to contact the school with complaints, then provocative investigative reporting — or whistle-blowing to the news media — will become a punishable offense.

## IV. THE ALLEGEDLY "MISLEADING" NATURE OF THE BLOG IS IRRELEVANT TO FIRST AMENDMENT PROTECTIONS

The District Court found that "there may be a factual dispute about whether the blog entry was false," and that "there is conflicting evidence about whether the students were given the option of rescheduling Jamfest in the auditorium at a later date." (J. App. A-334). However, the court nevertheless concluded that the blog entry was "misleading" because it stated that Jamfest had been cancelled. *Id.*

That speech may be "misleading" does not deprive it of First Amendment protection. Even "[f]alse speech, as well as hyperbole, is . . . entitled to First Amendment protection, as long as it is not made with knowledge or reckless disregard of its falsity." *Reuland v. Hynes*, 460 F.3d 409, 413-14 (2d Cir. 2006) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)). This is "a longstanding principle of First Amendment law because 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Id.* (citations omitted).

There has been no finding that Ms. Doninger knowingly made false statements or acted in reckless disregard of the truth. Thus, even if her blog were "misleading," Ms. Doninger's speech was fully protected by the First Amendment. *See Reuland*, 460 F.3d at 413-14.

## V. THE NATURE OR SEVERITY OF THE PUNISHMENT IS IRRELEVANT TO FIRST AMENDMENT PROTECTIONS

The court below defined the "constitutional right at issue" to be "the right not to be prohibited from participating in a voluntary, extracurricular activity because of offensive off-campus speech . . . ." ( J. App. A-359, 360). This formulation misconstrues the issue. The issue is whether the First Amendment protected Ms. Doninger from being punished for expressing her opinions in an off-campus blog. The nature or severity of the punishment is not controlling, since

"even minor punishments can chill protected speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Because even supposedly minor punishment would discourage students, and student journalists, from exercising their constitutional right of expression, the school cannot punish them for exercising this right simply because punishment is deemed lenient.

Moreover, prohibiting a student from running for class office has potentially negative ramifications for future educational opportunities. In the competitive environment of college admissions, a student's leadership positions, such as serving as a student council officer, can be a significant factor in how colleges evaluate applicants.[11] Thus, prohibiting a student from running for student council office would deprive the student of a credential useful in gaining admission to college. The threat of such punishment has the real potential to chill student speech and student journalism.

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[11] For example, in its admission process, the University of Connecticut considers "evidence of [the student's] interest in extracurricular activities such as community service, the arts, cultural activities, athletics, politics and *leadership positions*." http://www.admissions.uconn.edu/apply/apprequirements.php (emphasis added). Fordham University also values leadership roles in evaluating applicants:

> Extracurricular involvement demonstrates commitment to interests outside of the classroom. . . . Students who have been involved in activities such as clubs, athletics and community service, *particularly in leadership roles, are viewed more favorably in the process.*

http://www.fordham.edu/faq/ (emphasis added).

## CONCLUSION

The SPLC respectfully urges the Court to reverse the District Court's ruling that the First Amendment did not protect Ms. Doninger from being punished for her off-campus blog.

Dated: September 4, 2009

Respectfully submitted,

Joseph P. Esposito
(2d Cir. Bar # 88-502)
William E. Potts, Jr.
(D.C. Bar # 945824)
Edward Avery Wyatt
(N.C. Bar # 31888
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 955-1500

OF COUNSEL

Frank D. LoMonte
(Ga. Bar # 456505)
Michael E. Hiestand
(Wash. Bar # 33913)
STUDENT PRESS LAW CENTER
1101 Wilson Boulevard - Suite 1100
Arlington, Virginia 22209-2211
(703) 807-1904

*Counsel For Amicus Curiae Student Press Law Center*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because said brief contains 4,254 words, excluding the parts of the brief otherwise exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because said brief has been prepared in a proportionally-spaced typeface using Word 2003© in 14-point Times New Roman font.

Edward Avery Wyatt

Edward Avery Wyatt
Counsel for Amicus Curiae

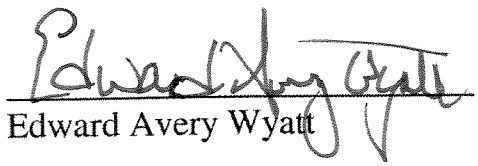
Dated: September 4, 2009

## CERTIFICATE OF SERVICE

In accordance with Rule 25(a)(2) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that the original and ten copies of the foregoing Brief of *Amicus Curiae* Student Press Law Center in Support of Plaintiff-Appellee-Cross-Appellant were mailed to the clerk, postage prepaid, and that two copies of the brief were mailed, postage prepaid, this 4th day of September, 2009, to the following:

Thomas Gerarde, Esq
Howd & Ludorf, LLC
65 Wethersfield Avenue
Hartford, CT 06114

Jon L. Schoenhorn, Esq.
Jon L. Schoenhorn & Associates, LLC
108 Oak Street
Hartford, CT 06106



Edward Avery Wyatt