No. 19-1842

In the United States Court of Appeals For the Third Circuit

B.L., A MINOR BY HER FATHER, LAWRENCE LEVY, AND HER MOTHER, BETTY LOU LEVY,
APPELLEES,

v.

MAHANOY AREA SCHOOL DISTRICT,
APPELLANT.

APPEAL FROM AN ORDER GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, DELAWARE SCHOOL BOARDS ASSOCIATION, NEW JERSEY SCHOOL BOARDS ASSOCIATION, PENNSYLVANIA PRINCIPALS ASSOCIATION, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, AND AASA, THE SUPERINTENDENTS ASSOCIATION IN SUPPORT OF MAHONEY AREA SCHOOL DISTRICT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

INTEREST OF *AMICI CURIAE*

Amicus Curiae National School Boards Association (NSBA), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress, as well as federal and state courts, and has participated as *amicus curiae* in numerous cases involving issues of public school authority to impose conditions on student behavior, including certain types of speech, in a variety of school settings.

The Pennsylvania School Boards Association (PSBA), organized in 1895, is a voluntary non-profit association whose membership includes nearly all of the 500 local school districts and 29 intermediate units of this Commonwealth, numerous area vocational technical schools and community colleges, and the members of governing boards of those public school entities. PSBA is dedicated to promoting excellence in school board governance through leadership, service and advocacy for public education, which in turn benefits taxpayers and the public interest in the education of Pennsylvania's youth. PSBA endeavors to assist state and federal courts

in selected cases bearing upon important legal issues of statewide or national significance, by offering the benefit of its statewide and national perspective, experience, and analysis relative to the many considerations, ramifications, and consequences that should inform the resolution of such cases.

The Delaware School Boards Association (DSBA) is a voluntary, non-profit organization of school boards which seeks to further public education and assist board members in carrying out their responsibilities. Founded in 1946, DSBA's current membership consists of 16 local school boards of education and the State Board of Education which, together, represent 96 school board members throughout Delaware. DSBA's members regularly develop and implement district-wide policy on issues related to student extracurricular activities and codes of conduct.

The New Jersey School Board Association (NJSBA) is a body corporate and politic, with corporate succession, established by the New Jersey Legislature in 1914. All boards of education of the various school districts in New Jersey are members of the NJSBA. NJSBA represents nearly 4,800 school board members who govern the 581 public school districts serving 1.4 million public school students. NJSBA's mission is to provide training, advocacy and support to advance public education and promote the achievement of all students through effective governance. NJSBA regularly represents its members' positions regarding education policy before the New Jersey State Legislature as well as *amicus curiae* before the federal

courts and New Jersey State Courts. NJSBA has previously appeared as *amicus curiae* in matters concerning student conduct and off campus behavior and extracurricular activities.

The Pennsylvania Principals Association is one of the largest state principals' association in the nation and is affiliated with the National Association of Elementary School Principals (NAESP) and the National Association of Secondary School Principals (NASSP). It serves principals, assistant principals and other educational leaders throughout the state. The mission of the Pennsylvania Principals Association is to ensure a quality education for every child by comprehensively supporting the educational leaders of our schools. One of its goals is to positively influence the policymaking process at the local, state, and federal levels. The Pennsylvania Principals Associations supports courts' recognition of school leaders' authority to place reasonable limits on student behavior, including student speech, in the extracurricular context.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. As the representative of principals who serve 33 million children, NAESP supports elementary and middle-level principals as the primary catalyst for creating a lasting foundation for learning, driving school and student performance, and

shaping the long-term impact of school improvement efforts. As the national representative for its members at the federal level, NAESP supports, through legislation and *amicus curiae* briefs, school leaders' autonomy to ensure a strong school culture, which includes the enforcement of rules around extracurricular activities.

The National Association of Secondary School Principal (NASSP) is the leading organization of and voice for principals and other school leaders. Reflecting its long-standing commitment to student leadership development, NASSP administers the National Honor Societies and National Student Council. NASSP values student activities and feels that they are a critical component of a student's education, but school leaders must be able to establish reasonable requirements for a student's participation in them. School leaders must also have the ability to place reasonable limitations on student behavior, including student speech.

AASA, The School Superintendents Association represents more than 13,000 school system leaders and advocates for the highest quality public education for all students. Public school officials, including superintendents, rely on their ability to regulate student athletes' offensive and disrespectful speech that interferes with the school's mission in extracurricular activity participation, a practice recognized by an established body of law recognizing that students involved in extracurricular

activities may agree to be bound to a higher degree of regulation as a condition of participation.

This case directly impacts the ability of public school officials to effectively operate extracurricular programs that enrich the experience of students with special opportunities to lead and to learn teamwork, and that are a source of pride to entire communities. The decision below deviates from other case law recognizing school officials' authority to regulate student speech in the context of participation in extracurricular activities. If the District Court's decision is affirmed, public school officials in this circuit will have diminished authority to enforce extracurricular team rules and codes of conduct.

All parties have consented to the filing of this brief.

FRAP 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that (A) no party's counsel authored this brief in whole or in part; (B) Although the activities of *Amici* generally, including judicial advocacy, are supported in part by dues paid by member entities such as the Appellant School District, no party or party's counsel contributed money specifically to fund preparing or submitting this brief; and (C) no person other than *Amici*, its members, or its counsel contributed money to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The undersigned *Amici* urge this Court to reverse the decision below, which questioned the ability of a public school district to regulate and enforce a higher standard of conduct, both in and out of school, for a student participating in extracurricular activities. As an ambassador of her school, this student voluntarily agreed to abide by a higher standard of conduct, including reasonable limitations on speech, in exchange for the special recognition and opportunities afforded by extracurricular activities. Student-participants regularly promise to set good examples, to enhance team and school spirit, and not to discredit or damage a school reputation to the detriment of all students at the school. As the Appellant's Brief discusses, this case arises from the fallout when a student breaks those promises, inside or outside of school. It asks whether the student's First Amendment rights to express herself immunize her from any consequences following her direct and public attacks on that activity and her team in a profane and disparaging Snapchat post, and entitle her to continue to participate on that team as though nothing had happened. In this context, the First Amendment must not be applied to such effect.

More broadly, this case implicates the scope of public school authority to set behavioral standards as a condition of student participation in extracurricular activities, including the regulation of certain types of speech. In the case before the Court, as with most school districts, students are notified of these conditions and

acknowledge acceptance of them when they choose to participate. The District Court's decision to brush aside this tenet of public school jurisprudence should not be upheld. The nature and extent of a student's speech rights in this case must be weighed against the nature of the deprivation – removal from the cheer team. That deprivation simply does not invoke the protections applied in cases where a student has been excluded from his or her education for a period of time. It is crucial, therefore, that this Court take into account the nature of the deprivation here and the students' agreement to an elevated standard of behavior, so that school districts in the Third Circuit may continue to teach respectful behavior, build team morale, and inculcate the responsibilities of leadership for students who participate in extracurricular activities.

The District Court discounted these considerations and found that: (1) a high school student and her parents cannot legally make such commitments and follow a higher code of conduct without an arms-length transaction and the assistance of counsel if the effect would be to waive some degree of the student's expressive rights; and (2) conditioning participation on agreement to somewhat more limited expressive freedom is inherently coercive. Thus, the District Court has ruled that the Constitution prohibits a public school from saying to a student, in essence: "If you want to represent our school and be a member of this extracurricular team, you must promise you will not verbally attack the team or the school in public or do other

things that set a bad example, and if you break that promise you might not be permitted to continue as a member."

Amici urge the Court to adhere to precedent and to consider the ramifications to school leaders throughout this Circuit when it decides this case, and apply a standard recognizing the unique nature of participation in extracurricular activities.

ARGUMENT

I. COURTS RECOGNIZE PUBLIC SCHOOL OFFICIALS' AUTHORITY TO SET BEHAVIORAL STANDARDS AS A CONDITION OF PARTICIPATION IN EXTRACURRICULAR ACTIVITIES

It is widely recognized that public schools may impose behavioral standards for student participation in extracurricular activities. At middle and high schools throughout the nation, student-participants voluntarily agree to codes of conduct more stringent than the discipline codes that apply to their behavior during the school day. Student athletes, debaters, musicians, and robotics team members all understand that when they represent their school in competition or practice, they assume responsibility for respectful speech and sportsmanship during the competitions and practices themselves, and in their free time.

Coaches of many extracurricular activities warn their student-participants not to "trash talk" other teams, to drink, to do drugs, or to make a spectacle of themselves online, or risk losing the privilege of representative status for their schools. Whether these expectations appear in formal behavior contracts, codes of conduct, official

school policies, or informal team guidelines, student-participants understand that their positions on their school squads depend on good behavior. Numerous high school athletes have found themselves dismissed from school teams for after-hours shenanigans, and courts routinely support school officials' authority to do so. *See, e.g., Smith v. Chippewa Falls Area Unified School Dist*., 302 F.Supp.2d 953 (W.D. Wis. 2002) (student disqualified from interscholastic athletic competition for attending a party where alcohol was served); *Butler v. Oak Creek-Franklin School Dist*., 116 F.Supp.2d 1038 (E.D. Wis. 2000) (student suspended from participation on athletic teams for the school year for violations of the school's athletic code); *Jordan v. O'Fallon Township High Sch. Dist.* 203, 302 Ill.App.3d 1070, 706 N.E.2d 137 (1999) (student barred from participating in interscholastic athletics as punishment for violating school's zero-tolerance drug and alcohol policy); *Palmer v. Merluzzi*, 689 F.Supp. 400 (D. N.J. 1988) (student suspended from participating in extracurricular events for 60 days for smoking marijuana and drinking beer on school property).

So, too, courts consistently acknowledge school officials' authority to impose behavioral standards as a condition of extracurricular participation. Because participation in extracurricular activities does not carry the weight of a property interest associated with attendance at public school, the scope of behavior schools may address is broader, and the level of due process required is much lower. *See*,

e.g., *Mears v. Bd. of Educ. of the Sterling Reg. High Sch. Dist*., No. 13–3154, 2014 WL 1309948 (D.N.J. Mar. 31, 2014) (student had no property interest in participation in school extracurricular activity); *Angstadt v. Midd-West Sch. Dist*., 286 F.Supp.2d 436 (M.D. Pa. 2003), *aff'd*, 377 F.3d 338 (3d Cir. 2004) (no fundamental constitutional right to participate or to compete in sports or extracurricular activities); *Marner v. Eufaula City Sch. Bd*., 204 F.Supp.2d 1318 (M.D. Ala. 2002) ("The privilege of participating in interscholastic activities must be deemed to fall ... outside the protection of due process,") (quoting *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155, 1158 (5th Cir.1970)); *see also, Walsh v. Louisiana High School Athletic Association,* 616 F.2d 152, 159 (5th Cir. 1980) ("A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement.").

Although the issue of whether there is a constitutionally protected interest in playing sports has not been considered by the Supreme Court, it has articulated this principle in the Fourth Amendment context, when it validated suspicionless drug-testing of student-participants in sports and other extracurricular activities. *See Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002) (upholding drug testing of students who participate in extracurricular activities, finding the policy effectively served the School District's interest in

protecting the safety and health of its students, noting no criminal penalty for a positive drug test but only removal from extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995) ("By choosing to 'go out for the team,' [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam …, they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any 'rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval.' Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.").

The District Court's decision in this case, finding that the nature of the deprivation was irrelevant to the applicable legal standard, gives short shrift to the body of law recognizing that students who participate in extracurricular activities subject themselves to greater regulation, including limits on First Amendment free speech rights, than other students may enjoy in other contexts. The ruling, if upheld, could set dangerous precedent in this Circuit by restricting public school officials' ability to regulate student-athletes' offensive and disrespectful speech that interferes with the school's educational goals for extracurricular activities.

The Sixth Circuit has recognized this point in a case where members of the football team circulated a petition against the coach. *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). There, the Court found that students do not have a general constitutional right to participate in extracurricular athletics, observing that student speech arising in that context is subject to more restriction than speech occurring in the classroom. *Id*. at 588-589. Other district courts addressing school restrictions on student-athletes' speech have reiterated this proposition. *See Stokey v. North Canton Sch. Dist*., No. 5:18–CV–1011, 2018 WL 2234953 (N.D. Ohio May 15, 2018); *Johnson v. Cache Cnty. Sch. Dist*., 323 F.Supp.3d 1301 (D. Utah 2018). In *Johnson*, a case factually similar to this case, the court upheld a public high school cheerleaders' dismissal from a cheer team for improper social media usage, noting that the student had "**no constitutional right to be a cheerleader**…." *Johnson*, 323 F.Supp.3d at 1320 (emphasis added); *but see, Longoria v. San Benito Consol. Indep. Sch. Dist.*, No. 1:17-cv-160, 2018 WL 6288142 (S.D. Tex. Jul. 31, 2019), *adopted by*, 1:17-CV-00160, 2018 WL 5629941 (S.D. Tex. Oct. 31, 2018) (head cheerleader's "like" was "at best in poor taste," and its "content had absolutely no relationship to the school mission or pedagogical goals").

Students involved in extracurricular activities may agree to be bound to a higher degree of regulation as a condition of participation, including a lower expectation of free speech rights. As the Sixth Circuit stated in *Lowery*, "The contour

of First Amendment protection given to speech depends upon the context." *Lowery,* 497 F.3d at 587.

> This case is not primarily about Plaintiffs' right to express their opinions, but rather their alleged right to belong to the Jefferson County football team on their own terms. The specific question presented by this case is whether Plaintiffs had a right to remain on the football team after participating in a petition that stated 'I hate Coach Euvard [sic] and I don't want to play for him.'"

Id. at 589. In this case, we have a similar yet more profane statement, "fuck cheer," posted on Snapchat rather than circulated in a petition.

A. Extracurricular Coaches in Public Schools Must Be Able to Maintain Team Cohesion and Morale

Recognizing the educational value of hearing and evaluating competing viewpoints, courts recognize that students enjoy First Amendment freedom to express opinions in a variety of school contexts. But many courts have found that the unfettered freedom to speak profanely and disrespectfully in matters related to a school team, even off-campus, can be detrimental to a coach's efforts to develop and execute a strategy to build team cohesion, morale, and success, and thus are subject to greater school regulation. *Johnson*, 323 F.Supp.3d 1301(student dismissed from cheer team for social media post denied injunctive relief); *Stokey v. North Canton Sch. Dist.*, No. 5:18–CV–1011, 2018 WL 2234953 at *5 (N.D. Ohio May 15, 2018) (noting that while in the classroom it is "appropriate for students to learn to express and evaluate competing viewpoints….[,] it can be detrimental to an athletic team

that depends on the coach to develop and execute a strategy to win") (citing, *inter alia*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, (1995)); *Wooten v. Pleasant Hope R-VI Sch. Dist.*, 139 F.Supp.2d 835 (W.D. Mo. 2000) ("coaches must have discretionary decision-making authority to act in the best interests of the team, even if that has a negative effect on an individual team member").

Although a school may be prohibited from suspending a student from the regular academic program for expressing opinions, it is not prohibited from dismissing a student from participation in an activity when his or her actions are insubordinate. "When a student 'fail[s] to comply with the obligations inherent in the activities themselves,' removal from the activity is appropriate." *Johnson*, 323 F.Supp.3d at 1320 (quoting *Doninger v. Niehoff*, 527 F.3d 41, 52 (2d Cir. 2008)). If the Third Circuit affirms here, public school officials in Pennsylvania, New Jersey, Delaware, and the Virgin Islands will have less authority than those in other states to enforce extracurricular codes of conduct. *See, e.g., Nathan G. v. Clovis Unified School Dist*., 302 Ed. Law Rep. 1181 (Ca. Ct. App. 2014); *Mather v. Loveland City School Dist. Bd. of Educ*., 908 N.E.2d 1039 (Ohio Ct. App. 2009); *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556 (Tex. 1985); *Bailey v. Truby*, 321 S.E.2d 302 (W.Va. 1984).

Extracurricular student conduct codes regularly require a higher standard of behavior than that expected of the student body at large. Cheerleading squads, in

particular, are subject to high levels of regulation regarding their social media activity. As representatives of, and at times spokespersons for, their schools, cheerleaders are taught to put a positive message forward, and to lift up and to celebrate accomplishments rather than "trash talking" other teams or their own – to cheer, not to denigrate. In this case, as would be expected with a post lambasting the cheer and softball programs at her school, B.L.'s post created an untenable situation on the team, such that team morale and cohesion were disrupted. The Appellant's Brief explains that after B.L. posted the Snapchat, cheerleaders approached the cheerleading coach to "express their concerns that the Snaps were inappropriate" and "[s]tudents were visibly upset and voiced their concerns to [the coach] repeatedly for several days." Appellant's Br. at 6 (citing J.A. 210-11, 480). Coaches frequently discipline athletes for this type of disrespectful conduct, as it sends the message to teammates that a player who disrespects the team is not entitled to the privilege of membership on it.

B. Students Who Participate in Extracurricular Activities Represent the School in Competition and to the School Community at Large

Student athletes and other extracurricular participants are held to a higher standard than other students in other contexts because they are the visible embodiment of their respective schools in interscholastic competition. Their behavior and performance are highly publicized and scrutinized – far more than students at large -- by the school community, the general public, and the media.

Given the unique status student-participants possess as ambassadors of their respective schools, it is not unreasonable for schools to seek and expect a higher standard for their speech in order to best represent the school to the community. In this case, the cheerleading team rules (signed by B.L. and her mother) state, "Please have respect for your school, coaches, teachers, other cheerleaders and teams. . . . Good sportsmanship will be enforced, this includes foul language and inappropriate gestures." Appellant's Br. at 5 (quoting J.A. 438-49). "The Cheerleading Rules are intended, in part, to teach students to follow rules of society.… [they] and rules for other extracurricular activities also teach students that certain privileges come with responsibilities." *Id*. at 5-6 (citing J.A. 193-194, 481).

Should there be any doubt about the value students place upon these privileges in exchange for which they gladly accept heightened behavior standards, one need only look at the prayer for damages due to lost scholarship opportunities pleaded in nearly every civil action brought by students complaining about being removed from extracurricular activities. And, as it is widely recognized that sports and other extracurricular activities are important because they build character and teach teamwork, this case also is necessarily about whether the dedicated coaches, advisors, and other school staff who are responsible for building that character and forging those teams can actually enforce the standards and expectations they know are so essential.

There is nothing new about the idea that minors can make knowing and voluntary waivers of constitutional protections, including waiver of their *Miranda* rights and consent to searches of their persons and belongings, even without parents present. The First Amendment is not different in this regard; expressive conduct is not beyond the reach of a person's voluntary acceptance of reasonable limits on expression and other behavior reflective of a particular privileged status.

As illustrated by the more limited free speech protection government employees must accept on or off the job as a condition of enjoying the benefits of government employment, the waiver need not be particularly knowing. It is a condition that simply comes with the territory whether or not employees realize it when they voluntarily accept government employment. *Werkheiser v. Pocono Tp*., 780 F.3d 172 (3d Cir. 2015); *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010); *Alderman v. Pocahontas Cnty. Bd. of Educ*., 675 S.E.2d 907 (W.Va. 2009); *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998). Thus, even absent affirmative assent to written behavior standards governing students voluntarily holding positions of special privilege and status in extracurricular activities, the application of the First Amendment to them should not be the same as when students enrolled only in the compulsory academic program are concerned.

II. OFF-CAMPUS ONLINE STUDENT SPEECH THAT IS LEWD, OBSCENE, DISRESPECTFUL, AND TARGETED AT THE SCHOOL COMMUNITY CAN LEAD TO "DISRUPTION" OR A REASONABLE FORECAST THEREOF

Even if this Court decides to limit the authority of school officials to impose behavioral standards on student-participants in extracurricular activities, it should recognize that when students violate the conditions and behavioral standards attached to extracurricular programs, that conduct damages the programs and their value to all students in a way that substantially disrupts an important part of the school experience under the generally applicable student standards. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969). Such rules and standards are necessary to the value of extracurricular programs, and students participating in them can and must be held accountable to abide by the rules to protect those programs from damage and disruption.

Fifty years ago, the Supreme Court recognized in *Tinker* that students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, and held that school leaders could not prohibit students' silent peaceful protest in the form of black armbands without material disruption of classwork, substantial disorder, or invasion of the rights of others. *Id*. at 509, 512. Since then, federal courts have applied *Tinker* and its progeny in nearly every student speech case brought against a public school district. Courts have invoked *Tinker* in cases where the student speech at issue originated off-campus, including online

speech, and often have required a connection to the school environment in order for *Tinker* to apply.

Even *Tinker*, the seminal pronouncement of student free speech rights in the school context, contemplated wide latitude for school officials to regulate speech outside of nondisruptive, silent political statements:

> A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. … **But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.**
>
> As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred.

Id. at 512, 514 (citations omitted) (emphasis added).

With the explosion of social networking among youth, more and more courts must decide whether and how to apply *Tinker* to student speech in platforms like Snapchat, where students exchange commentary and photos among groups of followers, often associated with their school, at all hours. The federal courts of

appeals that have decided these cases diverge somewhat on the precise standard to apply, but they all apply or refer to *Tinker* in some form. Although every case depends on its unique facts, courts generally tend to recognize school officials' authority to address student online, off-campus speech if it disrupts the school environment, or school officials reasonably forecast such disruption. Courts are more inclined to find disruption when the speech at issue targets the school community.

This Court has determined, in the disciplinary context, that when there is relatively little actual or forecasted disruption, such as when a post affects only a staff person, the school's action could not be sustained. *Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011); *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (school districts could not suspend students for expression that originated outside school and did not create a substantial disruption of the school environment). However, this court's sister circuits have found that off-campus online speech with some nexus to, or foreseeability of reaching, the school community or that is directed at it, could be restricted by the school. *See, e.g., Bell v. Itawamba Cty. Sch. Bd*., 799 F.3d 379 (5th Cir. 2015); *Wynar v. Douglas Cty. Sch. Dist*., 728 F.3d 1062, 1067 (9th Cir. 2013); *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771 (8th Cir. 2012); *Kowalski v. Berkeley County Schs*., 652 F.3d 565 (4th Cir. 2011); *Doninger*, 527 F.3d 41.

Where district courts have applied the *Tinker* disruption standard in disciplinary contexts in cases involving off-campus online student speech, the subjective intent of the student is usually found to be irrelevant. *E.g.*, *Shen v. Albany Unified School District,* Nos. 3:17-cv-02478-JD (lead case), 3:17-cv-02767-JD, 3:17-cv-03418-JD, 3:17-cv-03657-JD, 2017 WL 5890089 *7 (N.D. Cal. Nov. 29, 2017); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,* 650 F.3d 915, 948 (3d Cir. 2011) ("The intent of the speaker is of no consequence. What determines the permissibility of the School's response under the First Amendment is whether it was reasonable to foresee substantial disruption."). In *Shen*, the district court upheld the discipline of students who "liked" a racially denigrating online post created by another student:

> As an initial matter, none of the Fourth, Eighth, or Ninth Circuit's decisions have focused on a student's subjective intent for speech to remain private. And the record does not support a finding that maintaining privacy was an essential element of plaintiffs' conduct…. In addition, it is common knowledge that little, if anything, posted online ever stays a secret for very long, even with the use of privacy protections.
>
> ….
>
> Some of the plaintiffs have tried to minimize their culpability by saying that their likes were made casually and thoughtlessly. …. But a plaintiff's subjective state of mind is irrelevant. Under *Tinker*, **the inquiry is whether the speech at issue interfered with the rights of other students to be secure and let alone.** The District has established that it did.

Shen, 2017 WL 5890089 at *7, *10 (citation omitted) (emphasis added).

There is nothing about the concept of establishing such behavioral conditions on student participation in extracurricular activities that is hostile to the First Amendment protections accorded to students generally. These enhanced conditions and standards exist to protect the programs endorsed and supported by the general school community and the reputation of the school itself. A breach of established protocols constitutes a substantial disruption to those programs and serves to diminish the value of the program. The imposition of discipline for the breach of these rules, such as separating the offender from the team, minimizes the public embarrassment and scrutiny, redeems the school's public stature, and serves as a deterrent to future misconduct. The message to participants, parents, and the general public is that the integrity of the program survives; it will not accept such behavior. Allowing such misconduct to go unaddressed in any visible way exacerbates the harm to the program and school and suggests to the general public and students alike that the behavior is condoned regardless of the detriment to the school.

The First Amendment's protections have never been deemed absolute in all contexts. For example, in the public employment arena, courts have applied a balancing approach to workplace speech and matters of public concern. In *Pickering v. Bd. of Educ. of Twp. High Sch. Dist*. 205, 391 U.S. 563 (1968), and further developed in *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court recognized the importance of "team" morale in

the workplace context. If an employee is speaking in his or her role as employee, there is no First Amendment protection. If she speaks as a citizen, her speech may still be regulated when necessary to preserve workplace efficiency and morale:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Connick, 461 U.S. at 151-152.

Courts have extended similar deference to coaches in public school extracurricular programs. When a student-participant is speaking as a member of the extracurricular team, that speech – like other conduct – is subject to heightened regulation. The protection of student speech in the extracurricular setting may be limited in a reasonable manner to preempt disruption to the team and to prevent the undermining of team morale. School districts should not have to wait for the disruption to undermine extracurricular programs before addressing profane and harmful speech.

CONCLUSION

The First Amendment provides a right to speak, but does not insulate all speech from all consequences that may result. Indeed, the body of law interpreting free speech rights addresses to what extent consequences for a given instance of speech amount to a deprivation of constitutional freedoms, and to what extent such

deprivations may be justified. One is likely to be subject to liability for defamation if one posts false accusations about a public official. One is likely to be prosecuted for a hate crime if one defaces a person's home with racial epithets. And one may reasonably expect to be dismissed from the cheerleading squad if one directs offensive online comments to the team.

The District Court's ruling disregarded the nature of the deprivation (dismissal from an extracurricular activity), saying it had no bearing on whether the student's First Amendment rights were violated. That position is antithetical to the body of law addressing extracurricular activities and its underpinnings: that public school officials may regulate student-participant conduct to a greater extent than that of other students. Students voluntarily subject themselves to higher regulations for the privilege of participation in activities that instill team pride, discipline, and leadership status in the student body. Public school coaches must not be made to wait for on-field fistfights stoked by late-night, online trash-talk before they can enforce their rules against such online baiting. Violation of such sensible rules is disruption enough.

Based on the foregoing, and the reasons explained in the Appellant's Brief, *Amici* respectfully request that this Court overturn the decision below.

Respectfully submitted,

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July 3, 2019

CERTIFICATE OF COMPLIANCE

1. Pursuant to L.A.R. 28.3(d), I hereby certify that the attorney for Amicus Curiae is a member of the bar of the U.S. Court of Appeals for the Third Circuit.
2. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5691 words.
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Dated: July 3, 2019

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I hereby certify that on July 3, 2019 I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I further certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system in accordance with Fed. R. App. P. 25(a)(2)(D) and L.A.R. 25.1.:

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