No. 11-502

IN THE
Supreme Court of the United States

Blue Mountain School District, *Petitioner* v.
Terry Snyder, *et al., Respondents*

Hermitage School District, *Petitioner* v.
Justin Layshock, *et al., Respondents*

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

Amici Curiae Brief of National School Boards Association, American Association of School Administrators, American School Counselor Association, Gay, Lesbian, and Straight Education Network, National Association of Elementary School Principals, National Association of Secondary School Principals, Pennsylvania School Boards Association and School Social Work Association of America In Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association is a federation of state associations of school boards representing the school board members governing approximately 15,000 local school districts serving more than 46.5 million public school students.

The American Association of School Administrators represents 13,000 professional educational leaders throughout the United States and the world. These school system leaders help shape and implement education policy.

The American School Counselor Association represents over 28,000 school counseling professionals. ASCA empowers school counselors with the knowledge and skills to promote student success.

The Gay, Lesbian and Straight Education Network is a membership organization that seeks to develop K-12 school climates where difference is valued for the positive contribution it makes in creating a more vibrant and diverse community.

The National Association of Secondary School Principals is the preeminent organization of middle level and high school school leaders throughout the United States and the world. NASSP promotes excellence in school leadership.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief and have consented. Letters of consent are on file with this Court. No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to this brief's preparation or submission.

The National Association of Elementary School Principals serves elementary and middle school principals throughout the United States and other countries. NAESP members advocate for children by ensuring them access to an excellent education.

The Pennsylvania School Boards Association is a nonprofit statewide association of public school boards, pledged to the highest ideals of local lay leadership for public schools.

The School Social Work Association of America is dedicated to promoting the professional development of school social workers in order to enhance the educational experience of students and their families.

Amici share a commitment to encouraging safe and effective learning environments that reinforce the academic lessons and civic values that schools impart. *Amici* strongly believe that local school officials and school staff are best situated to make and enforce reasonable and appropriate policy decisions to fulfill this duty. Given the exploding role of technology in the lives of students, clear guidance from this Court on how schools may regulate student speech that originates away from the traditional school campus but dramatically affects the learning environment is imperative.

SUMMARY OF ARGUMENT

Social networking has fundamentally changed the nature of communication in our society and radically altered how students interact with their peers and the school community. The ubiquity and power of this electronic forum make jurisprudential concepts such as "off- and on-campus" analytically

anachronistic. The difficulty of applying these and other principles from this Court's student speech precedents in this context is reflected in the confusing array of decisions issued by courts in cases challenging school officials' regulation of student online speech. The Third Circuit's decisions in the instant cases have added to the confusion, especially in light of federal and state legislative and agency initiatives emphasizing school districts' responsibilities to address student bullying regardless of its place of origin. This Court's guidance is critical to assisting school officials in understanding how they may regulate the student expression that now pervades social networking forums without contravening the time-honored principles of the First Amendment.

ARGUMENT

I. The Explosion of Social Networking Has Changed the Nature of Communication So Completely and So Quickly for Today's Youth That There Is an Urgent Need for This Court To Resolve the Courts' Confusion as to Whether and When Public Schools Can Regulate Student Speech Originating Off Campus.

A. This Court's decisions on student expression do not directly address online communication or other forms of speech originating off-campus, leaving a jurisprudential chasm heaped with confusion.

Since *Tinker v. Des Moines Indep. Comm. Sch. Dist.*[2], lower courts have had difficulty determining whether and how public school officials may regulate student speech originating off campus. *Tinker* and its progeny[3] all involved on-campus student speech. *Morse v. Frederick,*[4] which school officials had hoped might yield a legal standard applicable to student off-campus speech, did not. This Court found Mr. Frederick's banner to be speech "at a school sanctioned activity."[5]

In the 1990s, when the internet first became widely accessible, lower courts began hearing cases involving online student speech originating off campus but disrupting, or reasonably foreseen to disrupt, the school environment. In the past decade, nearly 20 student online speech cases have

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[2] 393 U.S. 503 (1969).

[3] *Bethel Sch. Dist. v. Fraser*, 468 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 261 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

[4] 551 U.S. 393.

[5] *Id.* at 401. Federal courts have decided cases involving "underground" student newspapers written off campus but brought on campus. *E.g., Baker v. Downey City Bd. of Educ.*, 307 F. Supp. 517 (C.D. Cal. 1969); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 1071 (5th Cir. 1972); *Thomas v. Granville Central Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979); *Boucher v. School Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998). Courts also have addressed cases involving violent messages written at home but brought on campus. *E.g., Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004).

proceeded through the federal courts.[6] Most of the recent cases have involved students creating profiles or posting messages on social networking websites. Due to the lack of Supreme Court precedent, courts have developed several disparate tests to determine whether and when a public school could regulate this speech within the confines of the First Amendment's Free Speech Clause. In the last several months, this disparity has been vividly illustrated by four rulings handed down by the U.S. Courts of Appeals, two of which are consolidated here. These rulings have left school administrators more confused than ever as to what standard applies.

This confusion is understandable when one considers the varying approaches courts have adopted with respect to off-campus online speech. A few early district court opinions simply applied *Tinker* without explanation.[7] A number of courts applied *Tinker* because other courts had.[8] At least

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[6] *See* cases cited in notes 7-27, *infra* and *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779 (E.D. Mich. 2002); *Latour v. Riverside Beaver Sch. Dist.,* No. 05-1076, 2005 WL 2106562 (W.D. Pa. Aug. 24, 2005); *Barnett v. Tipton County Bd. of Educ.*, 601 F. Supp. 2d 980 (W.D. Tenn. 2009); *Mardis v. Hannibal Public Sch. Dist.*, No. 10-1428, 2011 WL 3241876 (8th Cir. Aug. 1, 2011).

[7] *E.g., Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180-81 (E.D. Mo. 1998); *Flaherty v. Keystone Oaks Sch. Dist.,* 247 F. Supp. 2d 698, 704 (W.D. Pa. 2003).

[8] *E.g., Killion v. Franklin Regional Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) ("The overwhelming weight of authority has analyzed speech cases (whether on or off campus) in accordance with *Tinker*."); *Neal v. Efurd,* No. 04-2195, at *19 (W.D. Ark. Feb. 18, 2005), http://www.splc.org/pdf/nealvefurd.pdf.

one court explicitly recognized that as a practical matter, online speech originating off campus can have a disruptive or potentially disruptive impact on school.[9] The Second Circuit, in *Wisniewski v. Board of Educ. of Weedsport Central Sch. Dist.*,[10] concluded that *Tinker* applies if it is reasonably foreseeable that speech originating off campus will end up on campus. The Fourth Circuit in *Kowalski v. Berkeley County Sch.* appears to rely on the "nexus"[11] of the student's speech to the school. The Third Circuit and a district court in Indiana[12] "assume[d] without deciding" that *Tinker* applies to speech that starts off campus. Finally, an early district court decision suggests *Tinker* does not apply to speech originating off campus.[13]

Even where courts apply *Tinker* as the "default" standard in off-campus student speech cases, whether a court will accept a school district's forecast of substantial disruption appears arbitrary to many school officials and their attorneys. In *Wisniewski*, where a student sent 15 people an

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[9] *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1104 (C.D. Cal. 2010) (citation omitted) ("'[O]ff-campus conduct can create a foreseeable risk of substantial disruption within a school.'").

[10] 494 F.3d 34, 38-39 (2d Cir 2007).

[11] *Id.* at 577.

[12] *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, No. 1:09-CV-290-PPS, 2011 WL 3501698, at *20 (N.D. Ind. Aug. 10, 2011).

[13] *Emmett v. Kent Sch. Dist.*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *but see LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2000).

instant message icon drawing of a pistol firing at a person's head with the message "Kill [English teacher] Mr. VanderMolen," the Second Circuit approved of the school's forecast of a substantial disruption, saying: "[T]here can be no doubt that the icon, once made known to the teacher and other school officials, would foreseeably create a risk of substantial disruption within the school environment."[14] In *Kowalski*, the Fourth Circuit approved of the school's forecast of disruption where the plaintiff created a MySpace page that became a forum for insulting a classmate. It cited the victim's absence from one day of school "to avoid future abuse" and concern that, had the school not intervened, more serious harassment or a "copycat" incident or retaliation might have occurred.[15] It is difficult to discern why the fake MySpace profile in *J.S. v. Blue Mountain Sch. Dist.*[16] (listing her principal's general interests as "f***ing in my office, hitting on students and their parents,") is so different from the icon in *Wisniewski* or the MySpace group web page in *Kowalski*.

Courts have aggravated the jurisprudential confusion in this area by their disparate conclusions about whether *Bethel Sch. Dist. v. Fraser*[17] applies to off-campus speech that is sexually explicit, indecent, lewd or vulgar. The Second Circuit has yet to rule whether *Fraser* applies to plainly offensive speech

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[14] 494 F.3d at 40.

[15] 652 F.3d at 574.

[16] 650 F.3d 915 (3d Cir. 2011).

[17] 478 U.S. 675.

beginning off campus.[18] The Fourth Circuit[19] and the Pennsylvania Supreme Court[20] have concluded that *Fraser* might apply to speech originating off campus. The Third Circuit has held that *Fraser* does not apply in these cases.

The lower courts' reasoning is thin as to why *Fraser* does not apply in cases involving speech beginning off campus. The Third Circuit relies on the following language from *Morse* to reject *Fraser*'s standard: "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[21] It seems clear that this Court would come to the same conclusion about the black arm bands in *Tinker* had they been worn off campus. Courts often note that the speech in *Fraser* occurred on campus.[22] Indeed, Fraser's nomination speech occurred on campus, just as Tinker's armbands were worn on campus. Yet lower courts readily apply *Tinker* to speech originating off campus, but have not adequately explained why the general "substantial disruption" standard in *Tinker* applies to off-campus speech, while the narrower "lewd or vulgar" standard in *Fraser* does not.

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[18] *Doninger v. Niehoff,* 527 F.3d 31, 50 (2d Cir. 2008) (*Doninger I*); *Doninger v. Niehoff*, 642 F.3d 334, 348 (2d Cir. 2011) (*Doninger II*).

[19] *Kowalski*, 652 F.3d at 573.

[20] *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (Pa. 2002).

[21] *J.S. v. Blue Mountain Sch. Dist*., 650 F.3d at 920; *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011).

[22] *E.g.*, *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1374 (S.D. Fla. 2010); *J.C.*, 711 F. Supp. at 1109-10.

In their struggle to apply on-campus student speech precedent to off-campus internet speech cases, courts have created a final source of confusion: whether and when to characterize online speech beginning off campus as on-campus speech. At least one court declared speech originating off campus is on-campus speech.[23] Another court implied the same.[24] One district court said, "[t]he geographic origin of the speech is not material; *Tinker* applies to both on-campus and off-campus speech."[25] The Fourth Circuit[26] and a Florida district court[27] concluded that in some circumstances online speech originating off campus may be characterized as on-campus speech. Finally, in *Layshock v. Hermitage School Dist.*, the Third Circuit rejected the argument that Layshock's speech which began off campus became on-campus speech.[28]

School administrators, who must regularly apply this disparate precedent to a wide variety of factual situations, are understandably confused.

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[23] *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d at 865 ("We find there is a sufficient nexus between the website and the school campus to consider the speech as occurring on–campus.").

[24] *Coy v. Board of Educ. of North Canton City Schs.*, 205 F. Supp. 2d 791, 799-800 (N.D. Ohio 2002).

[25] *J.C.*, 711 F. Supp. at 1108.

[26] *Kowalski*, 652 F.3d at 574.

[27] *Evans*, 684 F. Supp. 2d at 1371-1372 ("This is not to suggest that speech made off-campus and accessed on-campus cannot be handled as on-campus speech.").

[28] 650 F.3d 205, 219 (3d Cir. 2011).

They have no clear, cohesive body of law to guide their regulation of student online speech originating off campus that disrupts or reasonably could be forecasted to disrupt, the school environment, or interferes with the rights of others. *Amici* implore this Court to rectify this untenable situation by ruling definitively on this question.

B. The ubiquitous use of social networking and other forms of online communication has resulted in a stunning increase in harmful student expression that school administrators are forced to address with no clear guiding jurisprudence.

Today's youth live and interact in a world dominated by electronic communication generally and by the social networking platform particularly. The most well-known and ubiquitous social network, Facebook, registered its 500- millionth user in 2010, sparking a *Washington Post* reporter to note: "This means that more people are on Facebook, which got its start a mere six years ago, than live in the United States, Canada and Mexico combined."[29] Facebook now reports 800 million users.[30]

A social network is defined as "an online community of individuals who exchange messages, share information, and, in some cases, cooperate on

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[29] Monica Hesse, *Status symbol: Facebook is ubiquitous, but is it really an antisocial network?*, Washington Post, July 23, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072206154.html.

[30] http://www.facebook.com/press/info.php?statistics.

joint activities."[31] Social networking is quick, easy, free, readily available to most students, and provides a huge audience. To engage in social networking, a student simply types a message on a device connected to the internet, to which most students have access,[32] and with a click, the message may be seen by the world of internet users. Social networking is wildly popular among students. It is so pervasive that the majority of Americans age 12 and over are now using Facebook, up from 8% in 2008.[33]

Unfortunately, as internet access, smart phones and social networking become more intertwined with youth's lives, some experts believe, and public school administrators' experience bears out, that online bullies are exhibiting increasingly complex and malicious behavior.[34] Experts suggest that the impersonal nature of posting messages on social networking sites, the lack of adult supervision,

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[31] *Encyclopedia Britannica*, http://www.britannica.com/EBchecked/topic/1335211/social-network.

[32] The majority of American households have two or more computers, and 31% of Americans over 11 years old have smart phones. Press release, PR Newswire, *Smartphone Ownership Doubles Year Over Year to Nearly One-Third of Americans, Says New Arbitron/Edison Research Study* (Apr. 5, 2011), http://www.prnewswire.com/news-releases/smartphone-ownership-doubles-year-over-year-to-nearly-one-third-of-americans-says-new-arbitronedison-research-study-119268264.html.

[33] *Id*.

[34] Jason Koebler, *Cyber Bullying Growing More Malicious, Experts Say*, U.S. News & World Report, June 3, 2011, http://www.usnews.com/education/blogs/high-school-notes/2011/06/03/cyber-bullying-growing-more-malicious-experts-say.

and the ability to post anonymously contribute to the freedom students feel to make vicious postings.[35] The public nature of the postings and their permanence[36] also makes this speech vastly different from insulting a classmate in the hallway.

Statistical and anecdotal evidence also indicates that the factual scenario presented in the instant cases is neither theoretical nor rare. Today, school administrators have to deal with outrageous, inappropriate online student speech originating off campus constantly. A recent U.S. Department of Education report found that about 19% of middle school administrators said they had to deal with cyberbullying daily or at least once per week.[37] Recent research indicates approximately 20 percent

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[35] Nancy Willard, *Cyberbullying, Sexting, and Predators, Oh My* (Center for Safe and Responsible Internet Use, July 2011), http://csriu.org/documents/documents/IssueBrief.pdf.

[36] *Didn't You Know? Facebook is Forever*, Red Tape Chronicles Blog (Feb. 20, 2009), http://redtape.msnbc.msn.com/_news/2009/02/20/6345783-didnt-you-know-facebook-is-forever.

[37] U.S. Department of Education, *Crime, Violence, Discipline, and Safety in U.S. Public Schools* at 12 (May 2011), http://nces.ed.gov/pubs2011/2011320.pdf. *See also* Michelle Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, Education Week, Feb. 4, 2011, http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html; Nirvi Shah, *Anonymous Bullying on Social Networking Seeps Into Schools; Educators say Formspring has Become a Battlefield in Cyberbullying Wars*, Education Week, March 30, 2011, at 12. Donna St. George & Daniel deVise, *Slur-Filled Web Site Harmful but Not Illegal; Some Call Teen Forum "Toxic" Free Speech*, Washington Post, May 17, 2009, at C01, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/16/AR2009051602191.html?sid=ST2009051700575.

of the youth ages 10-18 in a sample of 4441 reported experiencing cyberbullying.[38]

The proliferation of malicious, inappropriate online student speech also affects school officials. It ruins careers, wastes valuable district resources, and undermines the authority of school administrators charged with student discipline. For examples, one need look no further than the decided cases in which student messages, icons, and posts threatened, insulted, falsely accused, and often emotionally traumatized school employees. Profiles like those created in the instant cases amount to false accusations against a school employee, regardless of how seriously people take them. The teacher threatened with death in *J.S. v. Bethlehem Area Sch. Dist.* was unable to complete the school year and took medical leave for the next year.[39] In a media report, a school board member described what happens when false accusations are made against a teacher: the teacher is convicted before going to court even if the accuser admits to lying; news reports focus on the charges, not the acquittal; and the false reports impact the teacher's ability to get another job.[40] In the Third Circuit, students now arguably have a First Amendment right to ruin a school employee's career.

The current confused state of the jurisprudence addressing off-campus student

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[38] Sameer Hinduja and Justin W. Patchin, *Cyberbullying Victimization* (2010). http://www.cyberbullying.us/research.php.

[39] 807 A.2d 847, 869 (Pa. 2002).

[40] Jessica Hanthorn, *Board Calls for Review of Policy for False Accusers*, Daily Press, May 18, 2004, at C1.

expression impedes school administrators from disciplining student's online speech no matter how extreme, thus significantly undermining their authority. It seems incongruous that school administrators can discipline students for minor infractions such as tardiness, but cannot stop a student—at least in the Third Circuit—from making a vicious, fake profile of a school employee or student that could lead to severe emotional trauma, or even suicide, of the victim or substantial disruption to the school.[41] To avert these serious consequences, school administrators have to make decisions quickly. But if they make the wrong call in deciding to discipline a student, immunity may not be available, thus putting personal assets at risk in some cases.

Much of the problem under current law stems from court decisions grappling with the distinction between off-campus and on-campus speech, when arguably it is a distinction without a difference. In virtually every decided case, the student's off-campus online speech was an extension of his or her on-campus interactions and relationships. The students in these cases typically communicated with and about classmates or school employees,[42] somehow used school resources,[43] and hoped,[44] or at

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[41] *See* Davis, *supra* note 36 (recounting suicides of Phoebe Prince and Megan Meier—both linked to cyberbullying).

[42] *See, e.g., Kowalski v. Berkeley County Sch. Dist.*, 652 F.3d 565, 567-568 (4th Cir. 2011).

[43] The students in the instant cases both used pictures of their principals from the districts' websites. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207.

least understood[45] that their speech would make its way onto campus or would cause disruption at school. In most of the cases, the speech in fact makes its way to school and its effects are felt there. The Supreme Court of Pennsylvania's decision in *J.S. v. Bethlehem Area Sch. Dist.* pointed to a sufficient nexus between student's online speech and the school campus to find the speech on-campus, and noted the author's aim at the school community.[46] It seems illogical for courts to draw an arbitrary line between on-campus and off-campus speech in the face of this type of precedent, and the reality that the schoolhouse gate is now an obsolete boundary.[47]

The distinction between off-campus and on-campus speech is becoming quite blurry for school districts themselves. School districts routinely operate in online forums. In a 2007-2008 survey, three quarters of the responding districts offered

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[44] *Doninger I*, 527 F.3d at 50 ("[T]he district court found that her posting, although created off-campus, 'was purposely designed . . . to come onto the campus'").

[45] *Wisniewski,* 494 F.3d at 39 (student's transmission of an icon depicting and calling for the killing of a teacher was conduct with reasonably foreseeable risk it would come to attention of school officials and materially and substantially disrupt the school).

[46] 807 A.2d at 865.

[47] With no relevant physical boundary affecting a school district's regulation of student speech, the nexus to the school may be a crucial factor, that his Court could address if it accepts *certiorari*.

online or blended courses.[48] Florida requires high school students to take at least one virtual course.[49] Anecdotal evidence indicates school employees engage in social networking on behalf of districts. In a recent *District Administration* article, one principal describes how he communicates daily with over 5,000 parents, students, teachers, and staff members via Facebook; and a superintendent describes how he uses Twitter to communicate information about district and school functions to almost 1,000 followers.[50]

Courts that remain committed to the on-campus/off-campus fiction risk discouraging school boards from using off-campus forums that benefit student learning. Public school districts have been able to expand educational opportunities for students and to increase communication between school districts and their constituencies with their online presence. But school boards may be less inclined to expand educational opportunities online if their authority does not also expand. Imagine if a court held that a virtual school student who engages in lewd speech during a group online project cannot be disciplined because the conversation did not

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[48] Anthony Picciano & Jeff Seaman, *K-12 Online Learning*, at 1 (Sloan Consortium, Jan. 2009), http://sloanconsortium.org/publications/survey/pdf/k-12_online_learning_2008.pdf.

[49] Fla. Stat. Ann. § 1003.428 (c) (West 2011). The Idaho State Board of Education recently approved an administrative rule requiring two credits of online instruction for graduation. http://www.boardofed.idaho.gov/communications_center/press_releases/archive/2011/09_09_11.asp.

[50] Ron Schachter, *Social Media Dilemma*, District Administration, July 1, 2011, at 27-32.

happen "on campus." Such a ruling would not be a stretch under the Third Circuit's narrow view of on-campus speech. This Court needs to resolve the question of when and whether off-campus speech exists in an online world populated by students and schools alike.

II. The Nation's Public Schools Need Authority To Regulate Student Speech that Originates Off Campus To Further Their Educational Mission.

This Court has long recognized the authority, indeed the duty, of public schools to maintain a safe and orderly learning environment,[51] and to "inculcate the habits and manners of civility as values in themselves . . . and as indispensable to the practice of self-government."[52] The *Tinker* holding itself affirms this authority: "[C]onduct 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."[53]

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[51] *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985)(noting school officials' legitimate need to maintain environment in which learning can take place).

[52] *Fraser,* 478 U.S. 681. *See also Zamecnik v. Indian Prairie School Dist. No. 204*, 636 F.3d 874, 877-878 (7th Cir. 2011); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996); *Sapp v. School Bd. of Alachua County*, No. 09-242 (N.D. Fla. Sept. 30, 2011).

[53] 393 U.S. at 512.

Often citing the need for schools to further their educational mission by maintaining order and protecting the physical well-being of students, lower courts have upheld public schools' authority to regulate extreme off-campus student behavior that clearly impacts the school, such as physical intimidation or threats,[54] hazing,[55] harassing speech directed at teachers or school officials,[56] drinking and drugs,[57] dangerous or criminal behavior,[58] and behavior that violates athletic codes of conduct.[59]

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[54] *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011); *Ponce v. Socorro Ind. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007); *Doe*, 306 F.3d at 616.

[55] *Gendelman v. Glenbrook North High Sch.*, 2003 WL 21209880 (N.D. Ill.)(finding ten-day suspension of senior girls for hazing behavior at off-campus "powder puff" football game manifestly within district's authority, given egregious nature of behavior, nexus of game to high school, and relationship of all participants to school).

[56] *Doninger I*, 527 F.3d 41 (student's online posting urging students to call superintendent to "piss her off more"); *Fenton v. Stear*, 423 F.Supp. 767 (W.D. Pa. 1976) ("fighting words" directed at teacher in public place).

[57] *Board of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie County. v. Earls*, 536 U.S. 822, 834 (2002)(upholding suspicionless drug testing for students in extra-curricular activities); *Clements v. Board of Educ.*, 478 N.E.2d 1209 (Ill. 1985)(upholding student suspension from athletic team for presence at party where alcohol was served, per athletic code).

[58] *Pollnow v. Glennon*, 594 F.Supp. 220 (S.D.N.Y. 1984), *aff'd* 757 F.2d 496 (2d Cir. 1985); *Howard v. Colonial Sch. Dist.*, 621 A.2d 362 (Del. Super. 1992); *Durso v. Taylor*, 624 A.2d 449 (D.C. App. 1993); *Doe v. Superintendent of Sch. of Sloughton,* 767 N.E.2d 1054 (Mass. 2002).

This Court should grant review in this case to address the loophole created by the Third Circuit that allows egregious off-campus speech directed at the school community to go unpunished simply because it is "speech" and not conduct. The distinction seems artificial when the emotional, psychological, and reputational damage inflicted by words, broadcast to countless people with access to social media sites, can be as or more devastating than an incident of physical aggression or attendance at a drinking party.

A. Schools will not be able to address bullying effectively if they are unable to take into account online off-campus speech.

School districts are under state and federal statutory and regulatory obligations to protect students harassed by peer bullies. The Third Circuit's decisions in the instant cases essentially force school districts, in some situations, to choose between complying with the First Amendment and other laws that allow or require school districts to discipline bullies regardless of where their bullying originates. This Court should grant review in this case to clarify student First Amendment rights that

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[59] *See Earls*, 536 U.S. 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)(upholding random urinalysis testing for student athletes); *Bush v. Dassel-Cakato Bd. of Educ.*, 745 F.Supp. 562, 564-72 (D. Minn. 1990)(noting highly compelling goal of deterring alcohol use by students in upholding extra-curricular policy prohibiting participating students from attending parties where alcohol or other drugs were present).

conflict directly with other federal and state legal obligations.

Public awareness of student bullying has never been higher. The Administration has paid unprecedented attention to the harmful effects of bullying, holding White House and Department of Education conferences on the subject,[60] establishing the "stopbullying.gov" web site, and instituting an inter-agency approach to research and prevention. In a "Dear Colleague" letter issued to schools in October 2010, the Department of Education stated that a school district's failure to address bullying adequately can be a violation of numerous federal laws, and emphasized schools' responsibilities to take prompt and effective steps reasonably calculated to end harassment of which they know.[61]

Nearly all states have passed legislation requiring schools to have anti-bullying policies and procedures,[62] many of which specifically impose a

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[60] http://www.whitehouse.gov/blog/2011/03/10/add-your-voice-white-house-conference-bullying prevention; http://www.whitehouse.gov/the-press-office/2011/03/10/president-and-first-lady-call-united-effort-address-bullying; http://www.ed.gov/news/press-releases/federal-partners-celebrate-anti-bullying-efforts-and-pledge-continue-work-second.

[61] Dear Colleague Letter: Harassment and Bullying, United States Department of Education Office for Civil Rights (Oct. 26, 2010),http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. In addition, the Department of Education issued a fact sheet, http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.html, and a letter from Secretary Duncan to state officials and examples of provisions in state anti-bullying laws, http://www2.ed.gov/policy/gen/guid/secletter/101215.html.

[62] Forty-six states have anti-bullying statutes. The states without statutes have state agency directives or guidance

duty upon schools to address off-campus bullying.[63] Significantly, in New Jersey and Delaware, both in the Third Circuit, school districts must address by policy and provide for appropriate responses to, and/or consequences for, the discipline of students who bully their peers off campus.[64] The Third Circuit's decisions in *J.S.* and *Layshock* may lead to confusion among school administrators as to whether these anti-bullying policies are constitutional.

As the Department of Education reminded school districts in its 2010 "Dear Colleague" letter, they may be liable for bullying that constitutes harassment under federal civil rights statutes, including Title IX, Title VI, Section 504 and the Americans with Disabilities Act, if the district is found to have been deliberately indifferent.[65] A school district may be liable for money damages regardless of whether the bullying began on or off campus and regardless of the bully's First Amendment rights.

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addressing the need for school district policies on the subject. *See* National School Boards Association, "State Anti-Bullying Statutes July 2011," http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf; National School Boards Association, "State Educational Agency Model Anti-Bullying Policies and Other Resources," http://www.nsba.org/SchoolLaw/Issues/Safety/State-Educational-Agency-Model-Anti-Bullying-Policies-and-Other-Resources.pdf.

[63] *E.g.,* Md. Educ. Code § 7-424.1 (2011); N.J.S.A. 18A:37-15.3 (2011); 14 Del.Code § 4112D(f)(1) (2011).

[64] *Id.*

[65] Dear Colleague Letter, *supra* note 50.

A school district's obligations under these federal laws arise when it has actual knowledge of severe, pervasive and objectively offensive harassment and is deliberately indifferent.[66] This Court has determined that, at that point, harassment rises to a level that effectively bars the victim's access to an educational opportunity or benefit.[67] These statutes do not distinguish between whether bullying happened on or off campus. Even if schools have no responsibility for bullying that begins off campus, common sense indicates if a student is bullying a peer off campus, he or she is probably bullying the student on campus too. It is exceedingly difficult for a school or court to parse out which bullying happened off campus (and can be ignored so as to protect the bully's First Amendment rights) and which bullying happened on campus, to

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[66] *E.g., Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 633 (1999); *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009) (in Title IX case, where peer harassment occurred over years, and district repeatedly used same ineffective method to address it, deliberate indifference could be found); *Bryant v. Independent Sch. Dist. No. I*-38, 334 F.3d 928 (10th Cir. 2003) (when administrators are made aware of egregious forms of intentional discrimination and do nothing, they can be held liable under Title VI); *D.T. ex rel. J.L. v. Somers Cent. Sch. Dist.*, 348 Fed.Appx. 697 (2d Cir. 2009)(under Title VI, plaintiff may sue school district for money damages based on alleged student-to-student harassment if school district acts with deliberate indifference to known acts of harassment); *T.K. v. New York City Dept. of Educ.*, 2011 WL 1549243 (E.D.N.Y. 2011)(discussing problem of bullying in U.S. and legal responsibility of school districts to prevent and remedy it; finding Individuals with Disabilities Education Act imposes affirmative duty to address bullying and harassment of students).

[67] *Davis,* 526 U.S. at 633.

determine what response would not be deliberately indifferent. This is especially true if the bullying occurs online.

It is, therefore, unclear how school districts can comply with federal and state statutes to address bullying that begins off campus without violating the First Amendment. The Fourth Circuit has found *Tinker* to support the conclusion that school districts have a compelling interest in regulating student speech that "interferes with or disrupts the work and discipline of the school, including discipline for student harassment or bullying."[68] But the Third Circuit's rulings in the cases at hand suggest that even if the students in these cases had directed their abuse at students instead of staff, the district would be hard-pressed to discipline them within the strictures of the First Amendment without a showing of actual substantial disruption or a reasonable forecast thereof.

The Seventh Circuit recently recognized that more extreme bullying or harassment situations may justify school regulation. "Severe harassment, however, blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth. School authorities are entitled to exercise discretion in determining when student speech crosses the line between hurt feelings and substantial disruption of the educational

[68] *Kowalski*, 652 F.3d at 572 (citation omitted).

mission, because they have the relevant knowledge of and responsibility for the consequences."[69]

B. Although school officials should not be legally required to monitor students' online activities, they must have authority to act on egregious online speech that affects the school environment and is brought to their attention.

Public school officials are charged with numerous duties in addition to their main duty of educating children. Very few would voluntarily assume the additional burden of policing student online speech, or, "regulating *adult* speech uttered in the community."[70] If they were required to do so, they would have to monitor innumerable websites, and would reasonably fear legal liability for failing to find a crucial piece of offending speech, or for failing to act if they do find that speech and do not respond. School administrators also do not want to spend time disciplining students for speech that does not affect the school environment. If, however, egregious speech that affects the school community is brought to their attention, they need to be able to act to preserve the learning environment and individual rights.[71]

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[69] *Zamecnik*, 636 F.3d at 877-878.

[70] 650 F.3d at 940 (concurring opinion).

[71] Even the New Jersey anti-bullying law, the most prescriptive in the nation, recognizes school officials should address off-campus bullying "in cases in which a school employee is made aware of such actions." N.J.S.A. 18A:37-15.3.

The oft-repeated fact scenario in student off-campus online speech cases involves a third party bringing to the attention of school administrators a web site, blog, email exchange, instant message exchange, or chat, in which a student or staff victim has been taunted, ridiculed, or impersonated. The parents or the victim demand that the school "do something."[72] School officials, recognizing the overlap of students' online and school lives, evaluate the situation, determine its impact on the school community and the individual, and take appropriate action. But the increased frequency of "cyberbullying" and other online speech has left school administrators, who could spend hours each week investigating such matters, asking for legal standards.[73] They need guidance from this Court on the bounds of their authority, so that fewer of their decisions will be second-guessed by families and advocacy groups willing to sue them, as well as courts hearing these cases.

CONCLUSION

In *Tinker* and its progeny, this Court has guided public schools on the limits of student free speech rights for a half century. But, "[s]ince *Tinker*, courts have struggled to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to

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[72] *See also Online Bullies Pull Schools Into the Fray*, New York Times, June 28, 2010, http://www.nytimes.com/2010/06/28/style/28bully.html?ref=jan_hoffman.

[73] *See id.;* Davis, *supra* note 36.

maintain an appropriate learning environment."[74] Today, schools respectfully ask the Court to guide them through the 21st century with a clear standard delineating the parameters of First Amendment protection when a student's speech begins off campus through communication tools surely not contemplated in 1969. Only this Court can remedy the legal confusion felt by school boards and administrators across the country as they attempt to draft and implement policy that adheres to legal and community expectations regarding bullying and harassing speech, and fulfill their duty to teach students the bounds of civil discourse, without running afoul of the First Amendment.

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November 2, 2011

[74] *J.S. v. Blue Mountain Sch. Dist.,* 650 F.3d at 926.