07-3885-CV

To Be Argued By:
JON L. SCHOENHORN

In The
United States Court of Appeals
FOR THE SECOND CIRCUIT

LAUREN DONINGER, P.P.A. as Guardian and Next Friend of AVERY DONINGER, a minor,
Plaintiff - Appellant,

v.

KARISSA NIEHOFF and PAULA SCHWARTZ
Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
(HON. MARK R. KRAVITZ, U.S. District Judge)

BRIEF OF PLAINTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 4(c)(1), plaintiff submits the following docketing statement under Circuit Rule 28(a):

1. The plaintiff's action was originally filed in the Connecticut Superior Court for the New Britain Judicial District, and removed by the defendants to the United States District Court for the District of Connecticut pursuant to the provisions of Title 28 United States Code §§ 1441 with federal questions arising under Title 28 United States Code, §§ 1331 and 1343(3), and the first and fourteenth amendments to the United States Constitution.

2. Jurisdiction in the Court of Appeals is conferred by Title 28, United States Code, §1292(a)(1) from denial of a preliminary injunction.

3. The ruling of the District Court for the District of Connecticut, denying the plaintiff's motion for preliminary injunction, was entered by Judge Mark R. Kravitz in a Memorandum of Decision filed on August 31, 2007 (Doc. No. 37) (2007 U.S. Dist. LEXIS 64566). No motion to alter or amend the ruling was filed. Notice of appeal was filed on September 10, 2007.

STATEMENT OF ISSUES

1. Whether the District Court erroneously concluded that school officials did not violate the first amendment rights of a high school student by disciplining her for an off-campus posting to a public internet website, in the absence of any foreseeable disruption to the educational process.

2. Whether the District Court erroneously concluded that public school officials could sanction a high school student for an off-campus posting to a public internet website as school speech, because the speech contained an offensive or "vulgar" reference to school officials, and was likely to reach those officials.

3. Whether the District Court erroneously concluded that a student seeking election to a class officer post possesses fewer first amendment rights outside the school environment than other students, because her extracurricular activity is a "privilege" rather than a "right."

4. Whether the District Court erred in not reaching the plaintiff's claim that students' speech rights under the Connecticut Constitution are broader than rights under the first amendment.

5. Whether the District Court erred in rejecting the plaintiff's claim that she was treated differently than other "similarly situated" students, in violation of the equal protection clause of the fourteenth amendment.

STATEMENT OF THE CASE

The plaintiff, Lauren Doninger, as Guardian and Next of Friend of her 17-year-old daughter, Avery Doninger, brings this interlocutory appeal from the August 31, 2007 ruling by the Honorable Mark R. Kravitz, United States District Court Judge for the District of Connecticut, denying her motion for a preliminary injunction. The plaintiff asserts that the defendant school officials violated her daughter's constitutional right to free speech by banning her from an elected class

post as punishment for the off-campus posting of a message to a public internet website that was critical of school administrators.

STATEMENT OF FACTS

In the Spring of 2007, Avery Doninger (hereinafter "Avery") was a junior year at Lewis Mills High School (hereinafter "LMHS") in Burlington, Connecticut. Preliminary Injunction Hearing (hereinafter "Tr.") p. 243. LMHS is part of Regional School District No. 10, which encompasses the northwestern Connecticut towns of Burlington and Harwinton. Tr. pp. 479, 488. The court described Avery as "a poised, intelligent, and articulate senior." *Memorandum of Decision*, p. 1; Joint Appendix (hereinafter "J.A.") 28 . She was enrolled in several advanced placement courses. During the 2006-2007 school year she was involved in several extra-curricular activities, including student council representative, band secretary, and a member of the crew and volleyball teams. Tr. p. 308. Of particular significance to this case is the fact that Avery was also secretary of the Class of 2008, a position to which she had been elected by her peers annually since her freshman year. Tr. p. 243.

As a representative of student council, Avery planned and was co-organizer of an evening in-school event for students and local citizens, known as "Jamfest," an annual event, which involved competing performances by various local student musicians. The event had long been scheduled for April 28, 2007. Tr. pp. 246-248. On April 24, 2007, Avery and other student council representatives were

informed that "Jamfest" could not be held, as planned, in the auditorium on April 28, 2007, because a teacher responsible for operating the lighting and sound system, had other plans. Tr. p. 250. A suggestion that the event be held in the cafeteria was rejected as impractical. Tr. p. 469. Avery and three other student representatives, accompanied by their faculty advisor, Jennifer Hill, sought a meeting with LMHS Principal Karissa Niehoff, only to learn that she was unavailable. Tr. pp. 96, 251, 470.

One student, P.A., testified that holding "Jamfest" in the cafeteria would create problems because of the need to rent sound equipment and pay someone to operate it. Tr. pp. 19-20. Hill suggested that they contact parents and taxpayers to get their support. Tr. p. 35. According to P.A., the students told the advisor they were planning on sending an e-mail to parents from the school that day. Tr. p. 35. P.A. obtained a pass from another teacher to go to the computer lab where he, along with three other student council members, including Avery, composed the e-mail. Tr. pp. 38-39.

Another class officer and student council member, J.E., testified that the students were offered no alternative dates before the end of the year to accommodate "Jamfest." Tr. p. 94. The students informed the school council advisor, that they were planning to go to the computer lab to draft an e-mail, and recalled that Hill recommended that they draft a list of reasons why "Jamfest" should be held in the new auditorium. Tr. pp. 96-97.

T.F. , a student council officer, testified that the assistant principal advised him that "Jamfest" could not be held in the auditorium because it belonged to taxpayers, not the school. T.F. Deposition, p. 28; [J.A. 135]. T.F. said that Hill then recommended that "we get the message out. They said it was the taxpayers, we'll get the taxpayers involved and have them work to get the situation corrected . . .." *Id.* pp. 29-30. "After the student council meeting we were in the hallway, [the advisor] said 'Get the word out,' it was the four of us together, we said, 'Hey, let's meet at the computer lab and work on getting the word out." *Id.* p. 33. "In retrospect," he added, "It might not have been the most effective way; but at that time we felt it was the best way to handle the situation. We felt that it went beyond student leadership and into an issue of citizenship, et cetera." *Id.* p. 82. In explaining why the students decided to send out an e-mail to citizens, he said: "[W]hen the term 'taxpayers' became involved we thought, you know, that it was really beyond something we could control at that point, that an executive decision had been made, command decision by central office, and that any attempts student leadership made would not be effective due to the command decision made. And I felt that pressure from taxpayers . . . would be the ones to resolve the issue for us." *Id.* p. 82.

Consequently, T.F., J.E., P.A. and Avery obtained passes and met in the computer lab. Tr. pp. 38-39, 98, 254. T.F. accessed his father's e-mail account and typed an e-mail, with the other three students providing various levels of

input. T.F. then sent the e-mail to several parents and local taxpayers, and sent a copy to Hill. Pl.'s Exhibit 1 [J.A. 64]; T.F. Deposition, p. 26; [J.A. 135]. The students' intended that taxpayers contact the administration to convince them that "Jamfest" needed to be held in the auditorium on April 28, 2007 and not the cafeteria. T.F. Deposition, pp. 28-30; [J.A. 128]; Tr. pp. 40, 251-253. The full text of the e-mail message read as follows:

> Recently the Central Office decided that the Student Council could not hold its annual Jamfest/battle of the bands in the auditorium. The students who are planning the event were informed of the change of venue this morning (4-24) when the event is supposed to be this Saturday. Many of the bands have said that they will not play anywhere but in the auditorium. The date has already been changed 3 times due to the constant pushing back of the auditorium's opening. Two bands have already dropped out and the others are very frustrated, as is the whole student body. There are very few dates left on the calendar to change the date. The reason that the students are not allowed to hold the concert is the one Region 10 Staff Member who is 'certified' to run the new lighting and sound system can not attend. This staff member has however, trained students to use the lights and the Jamfest has its own sound system. Mills administration has said even if we rent [our] own lights the event can not occur in the auditorium. The Central Office says that the auditorium is the taxpayers', not the school's. We the students are asking you, the taxpayers, to please contact central office and ask that we be let to use our auditorium. The number for Central Office is (860) 673-2583. Please forward this to as many people as you can.
>
> Thank you very much,
>
> Tim Farmer, Jackie Evans, Pat Abate, Avery Doninger and all The Students of Lewis Mills

Pl.'s Exhibit 1 [J.A. 64].

After being informed on April 24, 2007 that none of the suggested alternatives were acceptable, Hill suggested that students contact taxpayers and get

them involved. Tr. pp. 251-252. Avery obtained a hall pass from the band teacher and met the other students in the computer room. Tr. p. 254.

Jennifer Hill testified that she met on April 23, 2007 with defendant Niehoff, and learned that the sound equipment supervisor was unavailable. Niehoff suggested that "Jamfest" be held in the cafeteria; but no alternative dates for the auditorium were given. Tr. pp. 465, 469. Few dates remained before the end of the school year, and Hill, herself, believed that "Jamfest" was in danger of being canceled. Tr. pp. 477-478. On April 24, 2007 Hill suggested that the students speak with their parents. Although she knew the students planned to draft a list of grievances in the computer lab, she was uncertain whether her suggestion may have led the students to believe that they should send the e-mail. Tr. p. 475. Later on April 24, 2007 T.F. showed Hill the e-mail, and she noted she was one of the recipients. Tr. pp. 473, 476; Pl.'s Ex. 1; [J.A. 64].

At noon on April 24, 2007, Avery went to Niehoff's office to arrange an appointment, where she encountered the principal. Niehoff was angry. She told Avery that the central office received numerous telephone calls and e-mails, that the superintendent, Defendant Schwartz, was very upset, and that "as of now, 'Jamfest' is cancelled." Niehoff told Avery that the students should convert the list of grievances they were drafting to Schwartz into an apology, which might convince the superintendent to allow the students to hold "Jamfest" later in the academic year. Tr. pp. 259-261, 272.

Around 9:30 p.m. the same evening, while at home, Avery posted a blog entry on her on "Livejournal.com" regarding the cancellation of "Jamfest." Pl.'s Exhibit 2 [J.A. 66]. Livejournal.com is an online social and political networking website, that allows registered members to post their own blog entries and comment on the entries of others. One need not be a registered member of the community to view the website, unless a member adjusts her access settings to "private," which is restricted only to an identified list of "friends." Pl.'s Exhibit 3 [J.A. 69]. At the time Avery posted her blog, her livejournal.com settings were open to public view. Tr. p. 240.

In her April 24, 2007 blog, Avery wrote the following message:

> " 'Jamfest' is cancelled due to douchebags [sic] in central office. Here is an email that we sent out to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON [sic] of phone calls and emails and such. We have so much support and we really appreciate it. However, she got pissed off and decided to just cancel the whole thing all together. Anddd [sic] so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. Anddd [sic]...here is the letter we sent out to parents."

Avery then copied and inserted the earlier e-mail. Avery ended her blog with the following comment: "And here is a letter my mom sent to Paula and cc'd Karissa to get an idea of what to write if you want to write something or call her to piss her off more. [I']m down." Avery then inserted into her blog a copy of an

e-mail that her mother had sent to the superintendent's office earlier that day. Pl.'s Exhibit 2 [J.A. 66].

Avery hoped her blog would encourage citizens to contact the central office to express concern about the cancellation of "Jamfest." She wrote these comments because she believed it was the responsibility of the school system's central office to address taxpayers' concerns. Tr. pp. 394-395. In fact, Niehoff and Schwartz both testified that this was part of their respective duties. Tr. pp. 568-569, 637. When asked why she suggested that citizens contact the superintendent to "piss her off more," she replied that she thought that responding to taxpayers' concerns was part of Schwartz's job, and therefore, she had no basis to be annoyed. Tr. pp. 394-395.

On April 25, 2007 the four authors of the April 24th e-mail met with Hill, Niehoff, Schwartz, the sound equipment advisor and building supervisor, to reschedule "Jamfest." A new date of June 8, 2007 was set. Niehoff asked the students to send out another e-mail from school explaining that the previous message resulted from a "miscommunication." Tr. pp. 26 and 276-277; Pl.'s Exhibit 7 [J.A. 78]. Niehoff also drafted a letter for the school newsletter to parents explaining that the mater was resolved. Def's. Exhibit M [J.A. 163].

The district court found that Niehoff and Schwartz informed the students on April 25th – after Avery posted her on-line blog – that appealing directly to the public was not an appropriate means of resolving student complaints with school

administrators. Memorandum of Decision, p. 10; [J.A. 37]. T.F. stated that Schwartz was "upset" that students did not contact her directly before sending the e-mail. T.F. Deposition, p. 44-45; [J.A. 139]. P.A. stated that there was no criticism voiced at the meeting for sending the e-mail. Tr. pp. 27-29. Students were not told that sending the e-mail violated any school policy. Tr. pp. 124-126. At no time during the meeting were any of the students told that there would be disciplinary consequences as a result of the e-mail. Tr. pp. 27 and 112. In verbal and written communications with the plaintiff, Niehoff denied that Avery was disciplined for the e-mail. Pl.'s Exh. 20, 21 [J.A. 97, 98].

The administration did not become aware of Avery's livejournal.com entry until May 7, 2007 when Schwartz's 36-year-old son searched the internet and found it. He then forwarded it to Schwartz, who sent it on to Niehoff. Tr. pp. 644-645.

Niehoff waited until May 17, 2007 to address the blog entry with Avery. When Avery came to the office to accept the nomination for class secretary, Niehoff handed a printed copy of the blog to Avery, with the word "douchebag" underlined in red ink, and demanded she do three things: apologize to Schwartz in writing; show a copy of the blog entry to her mother; and withdraw her candidacy for the position of 2008 class secretary. Tr. pp. 281, 510. Although Avery complied with the first two demands, Def.'s Exhibit I [J.A. 159]; Tr. p. 284. she refused to withdraw her nomination for 2008 class secretary. Niehoff thereupon

banned her from running for the position in the election scheduled for May 25, 2007. Tr. pp. 281-282, 515.

On May 25, 2007, the day of class officer elections, several students decided to express their solidarity with Avery by printing and wearing t-shirts emblazoned with "Team Avery" on the front and "Support LSM Freedom of Speech" on the back. Pl.'s Exhibit 13 [J.A. 88]; Tr. pp. 118-119 and 220. Niehoff confiscated one of the shirts and informed several students that they could not wear them in the auditorium. Tr. p. 517. Avery arrived with one of these shirts and planned to wear it during the elections, but was fearful that Niehoff would impose further sanctions against her, so she hid it in a backpack. Tr. p. 295. The "Team Avery" shirts did not violate Region # 10's school dress code policy. Pl.'s Exhibit 4 [J.A. 74]; Tr. pp. 218 and 298.

All candidates for class officer present speeches to the assembled class prior to the vote. In addition, senior class officers' names appear near the top of the printed commencement program and each addresses the class and guests during the graduation ceremony. Pl.'s Exhibit 29 [J.A. 124]; Tr. pp. 445 and 654-657. On May 25, 2007, Avery was prohibited from presenting a speech in the auditorium in front of the assembled class, teachers and administrators because of the disciplinary sanction. Tr. pp. 12-13, 298; T.F. Deposition p. 18 [J.A. 133]. Although Avery's name was excluded from the class secretary ballot, a plurality of students wrote in her name, and Niehoff admitted that she received the most votes.

Tr. pp. 115-116 and 588. Nevertheless, Niehoff disqualified the write-in ballots and declared that another student, Alicia Kennedy, was the winner, in contravention of the actual tally. Tr. pp. 588-589.

The plaintiff attempted to resolve the issue involving her daughter by both meeting with and writing to Niehoff and Schwartz. Tr. pp. 309-315. Despite those efforts, the defendants refused to rescind the punitive sanction. The defendants admit that Avery was punished for her online journal entry and that none of the students whose names appeared on the April 24, 2007 e-mail were disciplined. Pl.'s Exhibit 15 [J.A. 92]; Pl.'s Exhibit 21 [J.A. 98]. The defendants acknowledged that the other three students who wrote the e-mail were all allowed to stand for office during student elections, and that one of them, T.F., received the superintendent's May 2007 "student of the month" award. Tr. pp. 635-36.

THE DISTRICT COURT RULING

In addressing the plaintiff's claims for injunctive relief, Judge Kravitz first noted that restoring Avery to the position of class secretary and allowing her to give a speech to her class, would alter the *status quo* because the principal had installed another student in that post, who was now acting in that position. *Memorandum of Decision, p.*15; [J.A. 42]. Judge Kravitz then examined the type of sanctions imposed on Avery, by distinguishing between the "privilege" of participating in extracurricular school activities – such as class office – and the "right" to attend class. *Id.*, p. 22. Relying on *Vernonia School District 47J v.*

Acton, 515 U.S. 646 (1995), he reasoned that a school principal could restrict a student's first amendment right to seek or become a class officer because the position was merely a "privilege".

The court then compared Avery's blog to the actions of the school football team members in *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007), who circulated a petition in school seeking the ouster of the team coach, and proclaimed that they would not play for him. In that case, the Sixth Circuit held that students could be removed from the team because their actions interfered with the important working relationship between coach and player. Judge Kravitz held, "Avery does not have a First Amendment right to run for a voluntary extracurricular position as a student leader while engaging in uncivil and offensive communications regarding school administrators." *Memorandum, pp*. 25-26; [J.A. 52-53]. The court further ruled that Avery could be barred from extracurricular activities because the language she used in her blog was "vulgar" and because "teaching students the values of civility and respect for the dignity of others is a legitimate school objective." *Id*.

The court further held that Avery's blog constituted "school speech," despite the fact that Avery posted the entry from home, adding that "the blog itself clearly violates the school policy of civility and cooperative conflict resolution."

Id., p. 23.[1] It then proceeded to examine the law under each of the three "branches" of school first amendment cases. It rejected review under *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988), involving a school-financed student newspaper, because "there was no risk that anyone would consider Avery's blog to be speech sanctioned by or otherwise attributable to the school." *Id.* It then decided that *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), rather than *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), provided the appropriate basis for analysis, conceding its uncertainty in this regard, because the "calculus is less than entirely clear." *Id*., p. 26.

Relying on this Court's recent decision in *Wisniewski v. Board of Education of the Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), Judge Kravitz then concluded that Avery's blog constituted on-campus speech for the purpose of the first amendment because it was "purposely designed by Avery to come onto the campus"[2]; because it "related to school issues"; and because it was "reasonably foreseeable that school administrators and other LMHS students

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[1]The district court failed to cite any authority for this finding. Indeed, the plaintiff disputes that there is any evidence in the record that any such "school policy" existed, and that this finding is, therefore, clearly erroneous.

[2] This finding is clearly erroneous, as well, as there is no evidence that Avery intended her posting to "come onto the campus," that it was ever accessed on campus by anyone other than defendants, or that it was addressed to anyone other than friends, citizens and taxpayers of the two towns that comprise Region #10. Defendant Schwartz only learned of the blog from her adult son, after she instructed him to search the internet. Tr. pp. 644-45.

would view the blog and that school administrators would become aware of it." *Memorandum*, p. 28 [J.A. 55].

Ultimately, Judge Kravitz held that the defendants did not run afoul of the first amendment by sanctioning Avery for her "offensive speech in the blog, which interfered with the school's 'highly appropriate function . . . to prohibit the use of vulgar and offensive terms in public discourse,' and to encourage the values of civility and cooperation within the school community, by removing her from the ballot for Senior Class Secretary." *Id. p.* 28.

The judge also rejected the plaintiff's equal protection claim, holding that she "failed to identify a single prima facie identical comparator who was not similarly punished." *Id.*, p. 33. He held that Avery "was not singled out for punishment among the students who disagreed with the administration's decision; rather, she was punished not for her disagreement but for the *manner in which she*, and she alone, *chose to express that disagreement*." *Id. p.* 33 (emphasis supplied)

SUMMARY OF ARGUMENT

1. The district court erroneously concluded that the defendants did not violate plaintiff's daughter's first amendment rights, after she posted comments on a public internet website from her home. Because this was not "school speech," the defendants acted without authority by punishing for her protected speech.

2. Even if the posting to the internet were to be treated as "school speech," the defendants violated Avery's first amendment rights because her

speech contained a political message that neither caused, nor was likely to cause, substantial disruption to the educational process, in violation of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

3. The district court also improperly concluded that candidates for high school class officer may be punished for speech that occurs outside the school environment, because such extracurricular activity is a "privilege" rather than a "right."

4. The Connecticut Constitution's protections for free speech are broader than those contained in the first amendment, and would prohibit the censorship of student expression that occurred here.

5. The plaintiff's daughter was treated differently than other similarly situated student leaders and sanctioned because the school principal disagreed with the constitutionally protected political message that she posted on a public internet website, in violation of the equal protection clause of the fourteenth amendment.

I. STANDARD OF REVIEW OF THE DENIAL OF A PRELIMINARY INJUNCTION.

While the plaintiff's varied claims for injunctive relief were directed at several aspects of the defendants' censorship, the primary claim in this appeal involves the decision of the school principal to ban Avery from running for reelection as Class of 2008 Secretary, or counting the write-in ballots that resulted

in her *de facto* election. Thus, Avery was denied the right to give a speech to her class, and will be prohibited from giving a speech at her graduation next June.

> To obtain a preliminary injunction the requesting party must demonstrate: (1) irreparable harm, and (2) either (a) the likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the parties requesting the preliminary relief.

LaForest v. Former Clean Air Holding Co., 376 F.3d 48, 54 (2nd Cir. 2004); *Bronx Household of Faith v. Board of Education*, 331 F.3d 342, 348-49 (2d Cir. 2003). When an appellant seeks vindication of rights protected under the first amendment, the Court eschews its normal "abuse of discretion" review of the denial of a preliminary injunction and, instead, conducts an independent examination of the whole record without deference to the factual findings of the trial court. *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996), citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557(1995) and *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984). Furthermore, the district court's use of facts to find that governmental action is constitutional involves conclusions of law that are subject to *de novo* review. *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1343 (2d Cir. 1991).

The plaintiff agrees with the district court below that she is seeking a mandatory – rather than prohibitory – injunction to change the *status quo*, because

the principal installed someone other than Avery as Class Secretary, and she seeks either a new election in which Avery may participate, or an order granting Avery the same authority and title as the person named to the post. "A mandatory injunction . . . is said to alter the *status quo* by commanding some positive act." *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc*., 60 F.3d 27, 34 (2d Cir. 1995). Therefore, the plaintiff must demonstrate a "clear" or "substantial" likelihood of success on the merits. *Beal v. Stern*, 184 F.3d 117, 122-23 (2d Cir. 1999); *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996).

The plaintiff also agrees with the district court finding that she established the first prong of the preliminary injunction requirement since Avery was "chilled" in the exercise of first amendment rights after being sanctioned for the content of her on-line journal. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion); *Paulsen v. County of Nassan,* 925 F.2d 65, 68 (2d Cir. 1991); *see also, Green Party v. New York State Bd. Of Elections,* 389 F.3d 411, 418 (2d Cir. 2004)

Furthermore, the court may review the denial of a preliminary injunction if the district court abused its discretion, "which usually consists of clearly erroneous findings of fact or the application of an incorrect legal standard." *Lopez Torres v. New York State Board of Electors*, 462 F.3d 161, 183 (2nd Cir 2006).

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT SCHOOL OFFICIALS DID NOT VIOLATE AVERY DONINGER'S FIRST AMENDMENT RIGHTS BY BANNING HER FROM RUNNING FOR A CLASS SECRETARY.

In 1969, the Supreme Court strongly endorsed the principle that public school students possess a first amendment right to free expression, by declaring that "students in the public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District, supra*, 393 U.S. at 506. Only on a few occasions since then, has that court revisited the subject of student speech in its opinions and in none of them, has it ever suggested that school officials possess broad powers over what students say or write in their personal lives, or that they may censor off-campus student speech as if it occurred on school grounds. *See, Fraser, supra; Hazelwood, supra*.

Last term, in *Frederick v. Morse*, 551 U.S. ___, 127 S.Ct 2618 (2007), the Court reiterated *Tinker*'s central holding that students possess constitutional rights to freedom of speech and expression in school while at the same time acknowledging that "the constitutional rights of students *in public school* are not automatically coextensive with the rights of adults in other settings," *Morse, supra*, 127 S.Ct. at 2622, *citing Fraser, supra*, 478 U.S. at 682 (emphasis supplied). The *Morse* Court expressly acknowledged the limited jurisdiction of school authorities to control student expression on school property and at school-

sponsored events: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been [constitutionally] protected." *Id*. The Court emphasized that restrictions on student speech were only permissible "in light of the special characteristics *of the school environment*." *Id*. at 2622, quoting *Hazelwood, supra,* 484 U.S. at 266 (emphasis supplied).

The Supreme Court has never suggested that students who attend public school, may lose their right to freedom of expression while at home and outside the school environment, in order to instill in them the qualities of "good citizenship." Certainly, such intangibles as "good citizenship" and "civil discourse" are laudable goals to instill in young adults as part of the school curriculum. However, these are measures properly left to the exclusive realm of parents and guardians outside the school environment, whether students are at home, in the park or "on line." The only way to guarantee that the speech rights of young adults outside the school environment are protected, is to prohibit school officials from regulating them, since school officials cannot play the role of police officer or censor in both places. As this Court aptly stated in *Thomas v. Board of Education, Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979), cert denied, 444 U.S. 108 (1980), "Our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Id*. at 1052.

Nevertheless, as this Court recently stated in *Wisniewski, supra*, the fact that expression on the internet "occurred away from school property does not necessarily insulate [the student] from school discipline." *Id* at 39. That case involved the creation by a student of an Instant Messaging (IM) icon with the image of a shooting gun aimed at a cartoon head, and a caption calling for the killing of a named teacher. This Court, applying *Tinker,* held that the student's subsequent discipline did not violate the first amendment because "it was reasonably foreseeable that the IM icon would come to the attention of school authorities . . . [a]nd there 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." *Id.*

The district court here did not find that Avery's blog created any foreseeable disruption, yet relied on *Wisniewski* to expand the reach of school censors under *Bethel School District No. 403 v. Fraser, supra,* to Avery's internet posting, just because it related to school events, and it was foreseeable that the speech would reach school officials. This case, therefore, squarely addresses whether, and to what extent, public school officials may censor and control off-campus speech by students, merely because that speech was posted on a public internet site, and referred to school officials in an impolite or even vulgar manner. For the district judge, that was sufficient to circumvent parental control and allow school punishment. In denying the plaintiff's claim for injunctive relief, the district court

concluded that the internet posting – known as a web log or "blog" – was offensive "school speech", subject to regulation and censorship by the school administration, regardless of the fact that it was written at night in the privacy of the plaintiff's home.

The district court failed to address *Thomas'* stringent restrictions on a school officials' ability to regulate off-campus speech, and instead found that *Wisniewski* was "the more appropriate precedent." Thus, the district court's opinion essentially erases the on-campus/off-campus boundary when addressing students' first amendment claims. The plaintiff submits that there is nothing in *Wisniewski* to justify the broad and virtually limitless powers of censorship over off campus internet postings by students that the district court granted to school officials. The opinion subjects not only Avery, but all public school students, to the ever present fear – the dreaded unconstitutional "chill" – that anything they say on line, may be used against them.

What is utterly lacking in this case is evidence of foreseeable school disruption – substantial or otherwise. Indeed, the district court opinion below begs the question: Has the advent of personal computers and access to the worldwide web transformed the schoolhouse gate into a quaint anachronism? The plaintiff urges this Court, in the strongest possible terms, to reject such a notion.

Wisniewski, of course, analyzed a student's arguably threatening instant messaging icon under *Tinker* and not "uncivil" or potentially "offensive" language

under *Fraser*. *Wisniewski* created a narrow expansion of the censorship boundary of school officials, by concluding there a reasonable likelihood of disruption under *Tinker* existed.[3] No potential disruption has been demonstrated here, and, indeed, the district court declined even to consider Avery's blog under *Tinker*. Moreover, *Wisniewski* does not suggest that its holding would apply to bad manners, bad citizenship or "uncivil discourse" by students outside of school. Such a substantial extension of school authority would not only be unwarranted, it would be impossible to regulate. Furthermore, "[w]here the first amendment is implicated, the tie goes to the speaker, not the censor." *Federal Elections Commission v. Wisconsin Right to Life*, 551 U.S. ___, 127 S.Ct. 2652, 2669 (2007).

Recent cases that address first amendment claims of students in the age of electronic communications suggest the analysis remains the same. Because the internet "provides relatively unlimited low-cost capacity for communication of all kinds" as a "dynamic multifaceted category of communication" through which "any person with a phone line can become a town crier," its use justifies full first amendment protection. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). *See, Coy v. Board of Education of North Canton City Schools*, 205 F.Supp. 2d 791, 799-800

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[3] Judge Newman's opinion was consistent with the view he expressed earlier in his concurring opinion in *Thomas*, *supra*, that school authority may extend to off-campus student activity, "whenever publication or other speech-related activity satisfies the *Tinker* test..." *Id.* at 1057 n. 13.

(N.D. Ohio 2002) (school may not discipline student for vulgar and offensive content of materials posted on student's personal website).

Whether or not Avery Doninger's blog posting was rude or inaccurate, it clearly sent a message addressing a matter of public concern. It was a call for citizens to contact public officials. Even if the plaintiff agreed in an e-mail that the term "douche bag" was "offensive," it was not "plainly offensive" within the meaning of first amendment jurisprudence. See *Guiles v. Marineau*, 461 F.3d 320, 325-26 (2d Cir. 2006) (punishing middle school student for wearing t-shirt that lampooned President Bush as a "chicken hawk" who snorted lines of cocaine and drank alcohol, violated the first amendment). To justify censorship, "it is certainly not enough that the speech is merely offensive to some listener." *Saxe v. State College Area School Dist*., 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); see also, *Morse, supra*, at 2636 (Alito, J., with Kennedy, J. concurring) (majority opinion provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue).

However, none of these cases are applicable here since the plaintiff maintains that the blog posting was non-school speech. "A school need not tolerate student speech that is inconsistent with its basic educational mission, *even though the government could not censor similar speech outside the school." Hazelwood , supra,* 484 U.S. at 266 (emphasis supplied), *quoting Fraser, supra*, at 685.

The first amendment's prohibition against the abridgement of speech, freedom of association and petition "creates a preserve where the views of the individual are made inviolate." *Schneider v. Smith*, 390 U.S. 17, 25 (1998). Restrictions imposed on any citizen after expression of views on matters of public interest, concern or controversy must be scrutinized with great care because such speech "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (internal citations omitted). Avery clearly "petitioned" local citizens and taxpayers to contact the school system's central office to protest what appeared at the time to constitute an arbitrary decision to cancel a major student-organized event. In *Bieluch v. Sullivan*, 999 F.2d 666 (2d Cir. 1993), for example, this Court held that both the plaintiff's public speech at town meetings and his involvement in community taxpayer organizations, "contributed to debate on public issues, the very kind of speech the first amendment was designed to protect;" *Id.* at 671; and therefore, "must be afforded the highest degree of protection offered by the first amendment." *Id.* at 673.

Off-campus student speech should receive no less protection. Avery Doninger's blog did not create any foreseeable danger of disruption or unrest. It sought to accomplish, perhaps in an impolite, adolescent way, what has long been considered the most basic and fundamental purpose of the first amendment: to

rally citizens to speak out against real or perceived injustice perpetrated by persons in power.

The school principal cannot simply highlight certain words or phrases in red ink in the text in order to remove its inherent political message. Niehoff admitted that even if Avery used asterisks or substituted "meanies," "jerks" or "expletive deleted" for the term "douchebags," it would not have met her standard for "good citizenship" or changed her reaction. Tr. pp. 570-71. Indeed, both Niehoff and Schwartz admitted that the blog conveyed a message with which they disagreed.

The plaintiff submits that the World Wide Web is the modern technology-driven equivalent of a park or public square and has progressed to become a forum in which all citizens may express their opinions and beliefs.

> [The internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought."

Reno v. ACLU, 521 U.S. 844, 870 (1997).

"Indeed, the interactive element of the [internet] may make logging on the electronic equivalent of throwing on a coat and walking to the town square. Although public discourse will shift from physical spaces to cyberspace, its protection under the First Amendment will be equally vital." Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107

Harv. L. Rev. 1062 (1994) Avery's journal entry was posted on an internet site dedicated to public discourse – a forum for protected speech as much as the town green in Burlington, Connecticut. Even if the livejournal.com site were not a public forum, the defendants' actions here were still unconstitutional because the restrictions on Avery's speech constituted "an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc,* 473 U.S. 788, 800 (1985).

There is no evidence in this case that anyone other than the defendants accessed the livejournal.com blog from school property, and Niehoff did so weeks after it was posted. Other than Schwartz's testimony that her 36-year-old son "serendipitously" found it when she asked him to "Google" internet blogs; Tr. 644-45 [J.A. 209-212]; only three people responded to Avery's blog, and only one was identified as a LMHS student. Avery testified that she did not know who would read her comments, because she did not think anyone was interested in her viewpoint, and was "surprised" that it came to the attention of the school administration. Tr. 375. [J.A. 204-208]. When individuals, such as the defendants, are exposed to speech only as a consequence of their voluntary efforts to seek it out, the speaker has certainly not invaded the rights of others.

The district court seemingly placed great emphasis on the fact that the plaintiff agreed in some of her e-mails to the defendants, that her daughter's language was "offensive." That does not undermine the fact that the plaintiff in

those e-mails strongly opposed the defendants' right to punish Avery for what she wrote by disqualifying her from class secretary, and ultimately went to court to stop it. The e-mails also make clear that she believed that her daughter's language, while "inappropriate," was clearly entitled to first amendment protection. Moreover, the chill on Avery's speech that such discipline caused is undisputed, making her afraid to speak or write on subjects of interest to her. Tr. p. 305 [J.A. 204].

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976). "[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). The same is true for students, both inside and outside of the school environment.

> 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 regarded as closed-circuit recipients of only that which the State chooses to communicate. They 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.

Tinker, supra, at 511.

Wherever lies the boundary of a school's authority, officials do not possess the power to censor political discourse in an off-campus setting. As the Supreme Court stated many years ago, "[School] boards are numerous and their territorial jurisdiction often small, but small and local authority may feel less sense of responsibility to the Constitution. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond the reach of the Constitution." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637-38 (1943).

Avery possessed a constitutional right to express her opinion in a public on-line forum off campus and outside school-sponsored activities, without fear that she would be sanctioned because her words "disappointed." In *Thomas, supra*, a group of high school students published a "satirical publication addressed to the school community" on their own time after school, although some of the materials was apparently prepared at school. "The paper's contents are aptly described by the banner across its cover as 'uncensored, vulgar, immoral.' Its thirteen pages are saturated with distasteful sexual satire, including an editorial on masturbation and articles alluding to prostitution, sodomy, and castration." *Id.* 1045. The students sold the newspaper after school at a nearby store. Copies of the newspaper inevitably found their way onto campus through students who

purchased them. The school subsequently imposed sanctions on the student-publishers.

Expressly finding that school administrators violated students' first amendment rights by punishing them for publishing a satirical and vulgar "underground" newspaper, former Chief Judge Kaufman held that school officials lacked authority under the constitution to take action against the students:

> [B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.

Id. at 1050. In rejecting school officials' authority over the newspaper, this Court explained:

> We may not permit school administrators to seek approval of the community-at-large by punishing students for expression that took place off school property. Nor may courts endorse such punishment because the populace would approve. The First Amendment will not abide the additional chill on protected expression that would inevitably emanate from such a practice. Indeed, experience teaches that future communications would be inhibited regardless of the intentions of well meaning school officials.

Id. at 1051. Expressly rejecting the notion that school officials can impose "sanctions for off-campus expression," the Court also stressed the harmful effects that could flow from allowing school officials to regulate student expression outside of school settings, *id*. at 1052:

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day

> ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.

This Court also expressed the fear that state regulation of the student publication at issue would chill students' first amendment rights, despite its vulgar and crude tone.

> Indeed, we have granted First Amendment protection to much speech of questionable worth, rather than force potential speakers to determine at their peril if words are embraced within the protected zone. To avoid the chilling effect that inexorably produces a silence born of fear, we have been intentionally frugal in exposing expression to government regulations.

Id . at 1047. In rejecting the notion that administrators could sanction students for what they said away from the school, the *Thomas* court added: "Although we are resigned to condone an added increment of chilling effect when school officials punish strictly limited categories of speech within the school, *we reject the imposition of such sanctions for off-campus expression*." *Id.* at 1050 (emphasis supplied).[4]

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[4]Judge Newman's concurrence in *Thomas, supra,* noted that while schools have a right to maintain reasonable efforts towards the maintenance of on-campus standards of civility and decency, courts have a first amendment responsibility to insure that robust rhetoric in student publications is not suppressed by prudish failures to distinguish the vigorous from the vulgar. *Id.* at 1057-58.

Thus, the defendants here had no right to enforce their own stuffy notions of good citizenship and civility on a student's activities while at home. The district court's finding that Avery's blog "violate[d] the school policy of civility and cooperative conflict resolution" is clearly erroneous. *Memorandum of Decision*, p. 23 [J.A. 50]. The student handbook references the following *objective of student council* – not a requirement of class officers: "Direct student in the duties and responsibilities of good citizenship, *using the school environment as the primary training ground*." Pl.'s Exhibit 10 [J.A. 81-84]. The handbook says nothing about what students may say or write at home. Although Niehoff claimed that these student council "objectives" were actually prerequisites that likewise applied to class officers (Tr. pp. 581-84), there is nothing to support this statement other than her self-serving testimony, and certainly nothing that was ever conveyed to parents or the affected students to give them prior notice that their constitutional freedoms were in jeopardy. [5]

Moreover, once a student enters the home, it is parents alone who have the right to direct their children's upbringing against unnecessary governmental

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[5]The district court stated: "As a student leader, Avery had a particular responsibility under the school handbook and school policy to demonstrate qualities of good citizenship at all times." *Memorandum*, p. 23 [J.A. 50]. While the school district's policy talks about maintenance of "good citizenship records;" Def. Ex. J; [J.A. 160]; this phrase is not defined, and it is preposterous to suggest that school administrators should be the arbiters of what that means off campus, or that Avery's blog did not, in fact, meet that test.

intrusion. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (Liberty interest of parents in the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by this Court.") "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our rights this Court has ranked as of basic importance in our society . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996). "While children are at all times in the custody of either their parents or the state, we cannot accept the assumption . . . that the state's right to control children is coextensive with that of fit parents." *Ramos v. Town of Vernon*, 353 F.3d 171, 183 n. 5 (2d Cir. 2004) (internal quotation and citation omitted) (striking down youth curfew ordinance as interference with fundamental right to parental control).

Nor can the defendants justify their actions based upon their own notions of good citizenship and civility. What constitutes good citizenship is a question of personal philosophy, as much as Avery's unsophisticated opinion that unnamed administrators of Region #10 were "douche bags." "[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all." *Hodgson v. Minnesota*, 494 U.S. 417, 452 (1990). Whether or not Lauren Doninger considered her daughter's comments to be inappropriate or offensive, it

remained her decision whether or not to mete out discipline; not the defendants. Once public school officials censor off-campus speech, they have violated the first amendment. See *Eisner v. Stamford Board of Education,* 440 F. 2d 803, 808 (2d Cir. 1971) (school policy censoring publication of literature on campus may violate first amendment, if it goes further than *Tinker* would allow and interferes with parent responsibility). In his concurring opinion in *Morse, supra*, for example, Justice Alito, joined by Justice Kennedy, expressly rejected the claim that public schools could censor speech that interferes in some way with their "educational mission" adding: "This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs." *Id*. at 2637.

Consequently, Avery Doninger's internet blog was protected speech under the first amendment, not subject to any censorship by Region # 10 officials.

III. EVEN IF AVERY DONINGER'S INTERNET BLOG CONSTITUTED ON-CAMPUS SPEECH, THE SANCTIONS IMPOSED ON HER VIOLATED THE SUPREME COURT'S RULE IN *TINKER*

Even assuming *arguendo* that Avery's off-campus internet posting was the functional equivalent of on-campus speech – a position with which the plaintiff disagrees – then the district court erred by analyzing the speech under *Fraser* rather than *Tinker*. The plaintiff submits that if Avery used the term "douche bags" during a conversation in a hallway between classes, she could not be disciplined if overheard by a teacher, in the absence of foreseeable disruption of

school operations. *Id.* at 509. [6] Even *Fraser* does not suggest that the isolated use of a vulgar term by a student may lead to punitive measures. Since "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,'" *Hazelwood, supra*, 484 U.S. at 266, *quoting Tinker, supra*, 393 U.S. at 506, any restrictions on student expression, even in on-campus settings, require the greatest amount of scrutiny. "While public schools are not run as democracies, neither are they run as Stalinist regimes." *Lowery, supra*, 497 F. 3d at 588.

> 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 regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of constitutionally valid reasons to regulate their speech, students are entitled to freed of expression of their views.

Tinker, supra, 393 U.S. at 511.

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[6]Under Conn. Gen. Stat. § 10-233d(a)(1), a Connecticut public school may expel a student for, *inter alia*, conduct that is "seriously disruptive of the educational process." In *Packer v. Board of Education of the Town of Thomaston,* 246 Conn. 89, 109, 717 A.2d 117 (1998) the Connecticut Supreme Court defined the statutory term to mean conduct that "markedly interrupts or severely impedes the day-to-day operation of a school." The word "disrupt" was defined as "to throw into disorder or turmoil; to interrupt to the extent of stopping, preventing normal continuance of or destroying." *Id.*

Furthermore, "[w]hen [a student] 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 . . . if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 512-13.

Under *Tinker*, the defendants' claim would necessarily fail. "There is no evidence whatever of [Avery's] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.* at 508. Moreover, as here, when "there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Id.* at 509.

Derogatory references to principals, superintendents and teachers are commonplace in student discourse, and while administrators may try to enforce respect for authority within the school, they have no business extending it off campus. In fact there are entire websites dedicated to student commentary about faculty. *See* www.rateyourteacher.com. Reactions of shock, outrage, revulsion or hurt feelings by teachers or administrators do not constitute "substantial disruption" of pedagogical interests. See *Thomas*, *supra*, 607 F.2d at 1052 n. 17.

The anticipated disruptive effect must be severe enough to threaten "academic discipline" to the point where the school cannot "operate normally." *Id.*

Avery Doninger's blog – a call for political action by citizens and taxpayers – did not interfere in any way with the operations of LMHS and was not substantially disruptive of the educational process. No classes were cancelled. No campus events were delayed. While the defendants felt compelled to answer telephone inquiries and e-mails from concerned taxpayers, they admitted that it was part of their job. Significantly, Judge Kravitz made no finding that the blog resulted in a single inquiry to the superintendent, or was disruptive to the school, which would trigger an analysis under *Tinker*. On April 25, 2007, when Schwartz and Niehoff met with the students and resolved the "Jamfest" rescheduling, they knew nothing of the blog's existence. Even when it was called to Schwartz's attention weeks later by her 36-year-old son, Niehoff waited until May 17, 2007 to confront Avery with a copy.

The district court ignored the full content of Avery's journal entry, by focusing on the pejorative but undirected term "douche bags," and by suggesting that exhorting citizens to contact Schwartz to "piss her off" displayed bad citizenship characteristics, deserving of discipline. To the contrary, Avery's journal entry sent a clear political message, seeking public support for the musical event, by asking taxpayers to contact the superintendent. Thus, Judge Kravitz engaged in the very type of uncritical dissection of the message that this Court in

Thomas held school officials could not do: " Indeed, if an off-campus publication includes criticism of the school itself, we assume the foreseeability of distribution within the school increases. Thus, in this no infrequent situation, this standard invites school officials 'to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views." *Id.* at 1053.

This Court's recent opinion in *Wisniewski v. Board of Education of the Weedsport Central School District, supra,* did not extend *Tinker's* analytical framework to all student-authored off-campus internet speech, as the district court apparently held. It merely upheld a student's punishment for an on-line icon that "crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that [it] would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 39, citing *Tinker, supra*. Judge Newman's opinion pointedly notes that the "potentially threatening content" of the icon made it more likely that it would be discovered by the school and create a risk of substantial disruption, as "there 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." *Id.* at 40.

If there is one core principle of first amendment jurisprudence that *Wisniewski* did not change, it is that most speech and opinion by students outside the school environment remains protected from government interference. In the

absence of any evidence that Avery's blog created a risk of disruption to school functions, the punitive sanctions against her violated the first amendment.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPLYING *BETHEL SCHOOL DISTRICT NO. 403 V. FRASER* TO AVERY DONINGER'S INTERNET SPEECH.

By analyzing Avery's blog under *Bethel School District v. Fraser, supra,* instead of under *Tinker, supra*, Judge Kravitz created an unjustified and ultimately unworkable justification for school censors to sanction students for their use of protected speech inside their own home, without the need to show the likelihood or risk of any disruption whatsoever.

In *Fraser,* the Supreme Court upheld disciplinary action against a student who delivered a speech at a school assembly that was laced with "pervasive sexual innuendo." The Court agreed that it was appropriate for school officials to conclude that a "vulgar and lewd speech such as respondent's" delivered at an assembly, "would undermine the school's basic educational mission." *Id.* The court distinguished between vulgar speech in school as opposed to off-campus, quoting approvingly from Judge Newman's concurring opinion in *Thomas, supra*, that "the First Amendment gives a high school student the right to wear Tinker's armband, but not Cohen's [profane] jacket." *Fraser, supra*, 478 U.S. at 682,

quoting *Thomas, supra*, 607 F.2d at 1047 and *Cohen v. California*, 403 U.S. 15 (1971). [7]

In the Supreme Court's view, "school authorities, acting *in loco parentis*" have the right "to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech." *Fraser, supra*, 478 U.S. at 684. By rejecting *Tinker* and relying on *Fraser*, Judge Kravitz improperly equated Avery's blog with Fraser's sexually-charged speech during a school assembly. The comparison is unfair and inapposite. For one thing, "unlike the armbands at issue [in *Tinker*], Fraser's speech was not political in nature; it was merely lewd and indecent." A.D.M. Miller, *Balancing School Authority and Student Expression,* 54 Baylor L. Rev. 623, 630 (2002). See, *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 282 (2d Cir. 1997) (merely lewd speech contains no "viewpoint" against which the government may not discriminate). The use of the term "douchebags" in Avery's blog was neither lewd nor indecent, and was part of a longer communication containing a clear political viewpoint. Second, the defendants here admit that, even with the substitution of other less offensive descriptive terms, they disagreed with Avery's message.

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[7]Justice Brennan expressed his "understanding of the breadth of the Court's holding" in *Fraser* by emphasizing that if Fraser gave his speech "outside of the school environment, [the student] could not have been penalized simply because government officials considered his language to be inappropriate…" *Id*. at 688 (Brennan, J., concurring).

Finally, since the defendants were not acting *in loco parentis* when Avery wrote her blog, they had no right to usurp her mother's authority over what language was proper for her to utilize on the internet.

Even in *Morse, supra*, the Supreme Court held that the banner, "Bong Hits 4 Jesus," was "school speech" that conveyed a prohibited pro-drug message because it occurred during a school-sponsored event that was "subject to district rules for student conduct." *Id.* at 2624. Justice Alito's concurring opinion emphasized that the decision "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . .." *Id.* at 2637.

In a footnote in *Wisniewski*, Judge Newman emphasized that school officials did not violate the student's first amendment because, "As in *Morse*, the student in the pending case was not disciplined for conduct that was merely 'offensive,' or merely in conflict with some view of the school's 'educational mission.'" *Id*. at 40 n. 4 (Internal citations omitted). However, that is *precisely* the type of speech – offensive or somehow in conflict with the school's "good citizenship" mission – for which Avery Doninger received punishment.

Judge Kravitz created an unwarranted broad restriction on off campus student speech, by allowing sanctions for speech merely because it pertains to the school, as long as it is reasonably foreseeable that a posting will be seen by school officials. The holding is so broad, that it not only chills Avery's first amendment

rights, but will certainly cast a chill on virtually all student internet communications.

While the plaintiff submits that *Thomas* remains dispositive of her claim, there are several district court opinions from other jurisdictions that support the idea that "offensive" off-campus internet postings are not subject to school discipline if they are unlikely to cause in-school disruption. In *Beussink v. Woodland R-IV School District*, 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998), for example, the court enjoined school administrators who disciplined a student for the content of a personal internet "homepage", that was admittedly disrespectful and critical of school officials and teachers, stating: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech . . .." See also, *Emmett v. Kent School District No. 415*, 92 F.Supp. 2d 1088 (W.D. Wash. 2000) (student-created website containing mock obituaries of school personnel deemed protected speech); *Killion v. Franklin Regional School District*, 136 F. Supp. 2d 446 (W.D. Pa. 2001) (school could not demonstrate likelihood of substantial disruption from posting of satirical "top ten" list about school's athletic director); *Mahaffey v. Aldrich*, 236 F.Supp. 2d 779, 781-785 (Mich. 2002) (student website was protected speech, in the absence of foreseeability of disruption at school); *Flaherty v. Keystone Oaks School District*, 247 F. Supp. 2d 698, 702(W.D. Pa. 2003) (student's obscenity-laced message on

website from home, referencing volleyball game with another school, was protected speech).

Finally, the plaintiff submits that the isolated use of the term "douchebags" in conjunction with a broader message, does not fall within the type of language that even *Fraser* prohibits in the school environment. In *Guiles v. Marineau,* 461 F. 3d 320 (2006), cert. denied, 127 S.Ct. 3054 (2007), involving a t-shirt that was critical of President Bush, this Court held that *Fraser* only applied to on-campus "lewd," "indecent," "vulgar," and "plainly offensive speech." *Id.* at 326. The court then defined each of these terms. It held that "[l]ewdness, vulgarity and indecency normally connote sexual innuendo or profanity." *Id.* Quoting from *Merriam-Webster's Third New Int'l Dictionary*, 1147, 1301, 566 (1st ed. 1981), the Court defined "(a) 'lewd' as 'inciting to sensual desire or imagination,' (b) 'vulgar' as 'lewd, obscene, or profane in expression,' and ©) 'indecent' as 'being or tending to be obscene.'" *Id.* at 326. *Guiles* interpreted *Fraser* to apply only to "plainly offensive" speech, "meaning speech that is something less than obscene but related to that concept, that is to say, speech containing sexual innuendo and profanity." *Id.* While Avery's reference to the term "douchebags in central office" may be intemperate, insulting or offensive to some, it is not "plainly offensive" as sexual innuendo, nor was it "vulgar" within the meaning of *Guiles*. The fact that Principal Niehoff opined that it was "vulgar" to call a person a feminine hygiene product, Tr. 571, only highlights the difficulty in regulating

student vocabulary as the district court did here. Niehoff also believed that in order to become good citizens, students should "follow the role of their leaders." Tr. 572. Yet, as the plaintiff noted in argument, even the president and vice president have utilized plainly offensive terms to describe persons with whom they disagree.

Unlike *Fraser*, Avery's speech did not occur in school; nor was it presented to a captive audience of students. Defendant Schwartz went out of her way to find and access the blog, and then forwarded it to Niehoff. Every student who testified, Avery included, believed the term "douche bag" had a common slang meaning equivalent to "jerk" or someone not well-liked. Where school authorities act *in loco parentis* to protect children from exposure to sexually explicit, indecent or lewd speech, they may act as censors. *Fraser, supra,* 478 U.S. at 684, citing *Board of Education v. Pico* 457 U.S. 853, 871-72 (1982) (recognizing school's authority to remove vulgar material from school library). When those same children are at home and under their parents' authority, school officials have no such role to play. "[T]he fact that children are in the 'custody of the state' in some metaphysical sense does not mean that the state may arbitrarily exert physical control the way that parents can without adequate justification." *Ramos v. Town of Vernon, supra*, 183. "Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *parens patriae*." *Thomas, supra*, 607 F.2d at 1050.

V. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT AVERY DONINGER POSSESSED FEWER FIRST AMENDMENT RIGHTS THAN OTHER STUDENTS, BECAUSE HER POSITION AS CLASS SECRETARY WAS A "PRIVILEGE" RATHER THAN A "RIGHT."

In addition to creating a constitutional chill by applying *Fraser* censorship to all off campus speech that relates to school issues, solely if it is "reasonably foreseeable that other students would view the blog and that school administrators would become aware of it, " *Memorandum of Decision,* p. 28 [J.A. 55], the district court also created second-class treatment for students' first amendment claims, when the school's punitive measures involve so-called "privileges" and not "rights." Thus, according to Judge Kravitz, those who participate in extracurricular activities have fewer rights of free expression under the first amendment, and must submit to greater censorship by school officials, just as student athletes have reduced privacy rights under the fourth amendment "[b]y choosing to 'go out for the team.'" *Vernonia School District 47J v. Acton, supra* (school may require student athletes to submit to drug testing).

Neither the Supreme Court nor this Court has ever suggested that students involved in extracurricular activities must give up their *first* amendment speech rights as a condition of participation in such activities. The privilege versus right dichotomy is simply inapposite in the first amendment setting. For one thing, the Supreme Court has often "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"

Graham v. Richardson, 403 U.S. 365, 374 (1971). See, also, *Jones v. State Board of Education for State of Tennessee*, 397 U.S. 31, 34 (1970)("It is far too late to suggest that since attendance at a state university is a 'privilege,' not a 'right,' there are no constitutional barriers to summary withdrawal of the 'privilege'"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (liberties of religion and expression may be infringed by the denial of a benefit or privilege).

The defendant's position suggests that a school is free to punish students by suspending such "privileges" as parking passes, participation in field trips, membership in the National Honor Society, or even attendance at the commencement ceremony, for engaging in otherwise protected speech that is not favored by the administration, simply because the school characterizes the punishment as withdrawal of "privileges." Even the materials sent to the plaintiff rejects that idea. Granting such broad censorship powers to school administrators surely chills the free exercise of ideas and speech to the same extent as – if not greater than – a brief suspension from school. Simply proclaiming that polite discourse is a prerequisite of "good citizenship" does not make it so. Indeed, there is a certain irony in this case, that the district court failed to acknowledge, that a "good citizenship record" requires the sacrifice of one of the most fundamental rights of citizens under the constitution.

The district court's reliance on *Lowery v. Euverard*, *supra,* is misplaced. In that case, the Sixth Circuit held that removing students from the high school

football team for signing a petition calling for the firing of the team coach, did not violate the students' first amendment rights. Aside from the fact that the petition was circulated on school grounds, the court held that the document caused a substantial disruption to the working relationship between coach and players, which is inapposite to the present case. Avery had no such day-to-day relationship with the superintendent, and any comparison with the coach/player relationship is fanciful, at best.[8]

In *Vernonia School District, supra,* 515 U.S. at 657, cited by Judge Kravitz as support for the position that constitutional protections are reduced when the sanction only involves "privileges," the Supreme Court made clear that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, *are different in public schools than elsewhere* . . .. *Id*. at 656 (emphasis supplied).

The *Vernonia* Court held that a school district possessed a legitimate government interest in requiring student athletes to submit to drug testing because of the rise of drug use in the community and the interest in students' health and safety while participating in sports activities under the auspices of the school

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[8] Even on the subject of first amendment rights of school employees, the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 569 (1968), noted: "Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent, are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." Students usually have no working relationship with the superintendent of schools.

acting *in loco parentis*. *Id.* at 654-56. The Court justified this intrusion because of the concern that students' health could be affected during competition, and that, in any event, "students within the school environment have a lesser expectation of privacy than members of the population generally," *Id.* at 657, *quoting New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)(Powell, J., concurring).

Of course the students in Vernonia were given the choice up front whether to submit to the urine test or not. They were not surprised by random urinalysis without prior notification, that could lead to a humiliating dismissal from the team. Wholly aside from the question whether a school can ever justify the surrender of first amendment rights as a prerequisite for participation in the "privilege" of extracurricular activities, using it as a *post hoc* punishment for speech that is disfavored by authorities, cannot survive constitutional scrutiny.

VI. THE DISTRICT COURT FAILED TO ADDRESS THE PLAINTIFF'S CLAIM THAT AVERY'S RIGHTS WERE VIOLATED UNDER THE CONNECTICUT CONSTITUTION.

The plaintiff's complaint brings claims under three different provisions of the Connecticut Constitution. [J.A. 21] In her proposed findings of law, the plaintiff also claimed that the state constitution was broader than its federal counterpart. [J.A. 189-90] Nevertheless, the district court did not address any of the state constitutional claims.

There are three provisions of the Connecticut Constitution that plaintiff claims demonstrate a broader right to expression and protest, than any limitations

on the rights contained in the first amendment to the United States Constitution. The text of Conn. Const. Art. I, § 4, for example, differs markedly from the first amendment, in its clear pronouncement that "[e]very citizen may freely speak, write and publish his sentiments *on all subjects* **. . .**" Article I, § 5 goes further stating, *"No* law shall ever be passed to curtail or restrain the liberty of speech . . .." Finally, Article I, § 14 protects the citizens' right to "apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address or remonstrance." The Connecticut Supreme Court has expressly acknowledged that this last provision protects more robust language than what may be acceptable under the first amendment. *State v. Linares,* 232 Conn. 345, 383-86, 655 A.2d 737 (1995). *Accord*, *Ramos v. Town of Vernon,* 254 Conn. 799, 761 A.2d 705 (2000) ("Connecticut constitution bestowed greater expressive rights on the public than the federal constitution;" court recognized important value of freedom of speech under the state constitution and that state provisions "not subject to the same stringent limitations as would be required under a federal first amendment analysis").

Since "[e]ffect must be given to every part and each word in [the state] constitution, unless there is some clear reason . . . for not doing so," *Cahill v. Leopold*, 141 Conn. 1, 21, 103 A.2d 818 (1954), it is clear that state constitutional rights to speak and write are broader than those set forth in the first amendment. Identical provisions were contained in the original Connecticut Constitution of

1818, adopted less than 30 years after Connecticut's ratification of the federal Bill of Rights. The framers of the state constitution were, consequently, well aware of the language of the federal provision contained in the first amendment, when they chose to use more expansive language. Thus, when a state constitutional right provides more protection for its citizens than its federal counterpart, Connecticut courts are not bound by any limitations of the federal provision and may offer broader rights to its citizens. *Fasulo v. Arafeh*, 173 Conn. 473, 475, 378 A.2d 553 (1977). While "decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration . . . they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law." *Horton v. Meskill*, 172 Conn. 615, 641-42, 376 A.2d 359 (1977).

In *State v. Linares, supra*, the court applied various "tools of analysis" to conclude that the state constitutional provisions dealing with free speech bestow "greater expressive rights on the public than that afforded by the federal constitution." *Id.* at 379. The analysis principally utilized the textual distinctions between the first amendment and the Connecticut provisions, and particularly the right to free speech "on all subjects." *Id*. at 381. In addition the use of the word "remonstrance" in Article I, § 14 "sets forth free speech rights more emphatically than its federal counterpart." *Id*. The Connecticut Supreme Court adopted an analysis by then Judge (now Connecticut Supreme Court Justice) Schaller from the

intermediate Connecticut Appellate Court, where he concluded from the historical events surrounding the adoption of the Connecticut Constitution, "that the framers of our constitution contemplated vibrant public speech, and a minimum of governmental interference . . .." *Id.* at 386.

While the plaintiff finds no Connecticut cases that expressly find broader speech rights for students than are available under the federal constitution, the expansive language in the state constitution and its interpretation in such cases as *Linares* suggest that Connecticut students would retain the ability to engage in "vibrant public speech" that may exceed even that permitted under *Tinker, supra*.

Plaintiff asserts that the first amendment protects her daughter's speech. However, should this Court determine that the state constitutional claims raised herein predominate, ultimately controlling the outcome of this appeal and requiring direction from the Connecticut Supreme Court, then the plaintiff requests that the matter be referred to that court for certification pursuant to Section 0.27 of the Second Circuit Rules of Court.

VII. THE DEFENDANTS VIOLATED AVERY'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW

Judge Kravitz denied the plaintiff's claim under the Equal Protection Clause, finding that there was no individuals comparable to Avery, who were treated in a disparate manner. The plaintiff submits that the district court failed to use the proper analysis.

The standard for reviewing a claim under the Equal Protection Clause depends on the right or classification involved. If the law disadvantages a fundamental right, it must be analyzed under strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). In *Willowbrook Condominium Association v. Olech*, 528 U.S. 562, 564 (2000), the Supreme Court "recognized successful equal protection claims brought by a 'class of one' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." "[T]he plaintiff must establish that [s]he, compared with others similarly situated, was selectively treated ... and ... that such selective treatment was based on impermissible considerations such as race, religion, *intent to inhibit or punish the exercise of constitutional rights*, or malicious or bad faith intent to injure a person." *LeClair v. Saunders,* 627 F.2d 606, 609-10 (2d Cir. 1980). See, also, *Wayte v. United States*, 470 U.S. 598, 608-09 (1985) (applying equal protection clause to claim government selectively prosecuted defendant to retaliate for first amendment activity). The punishment imposed upon Avery impinged specifically on her speech rights under the first amendment. As set forth elsewhere in this brief, minors such as Avery are entitled to the protection of the bill of rights. See, Sections II and III, *supra*. The evidence here demonstrates that Avery was singled out for punitive measures precisely because she exercised her first amendment rights, and was otherwise in the same

situation as T.F., J.E. and P.A., the other signatories to the e-mail, who all held either student council or class officer positions.

Under a strict scrutiny analysis, the defendants had the burden of demonstrating that Avery's punishment was narrowly tailored to serve a compelling state interest. *Able v. United States*, 155 F.3d 628, 631-32 (2d Cir. 1998). The defendants clearly did not meet that burden. Moreover, Avery's punishment was not narrowly tailored to the specific end of encouraging good citizenship and civility, even assuming that such interests, when off campus, are compelling ones. The punishment imposed upon her – depriving her of the right to run for and assume an office to which she was elected and thereby denying her the right to give a speech at assembly and at graduation– had nothing to do with the student council event she planned or her position as a student council member. She was specifically targeted for punitive measures because the defendants disagreed with the message in her blog, whether it contained an offensive word or not.[9]

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[9]Judge Kravitz found that Avery "was punished not for her disagreement but for the manner in which she . . . chose to express that disagreement." *Memorandum*, p. 33. The flaw in this reasoning is that the "manner" of speech here has independent and direct communicative value that is entitled to full first amendment protection. Normally, Supreme Court restrictions on "manner" of speech, such as anti-noise regulations, have not addressed the essence of the communication. See, e.g. *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding ordinance banning "loud and raucous noises" including sound trucks)

Based upon what she knew at the time, Avery was justified in believing that "Jamfest" would be cancelled either because of the superintendent's anger over the mass e-mail appeal to parents and taxpayers, or because no other dates appeared to be available for the event. She, therefore, possessed a constitutional right to state her opinion on a public website and seek out public support. Taking punitive measures against her because of disagreement with that message, violated her right to equal protection of the law.

CONCLUSION

The plaintiff respectfully requests that this Court reverse the decision of the district court, and direct that court to enter a preliminary injunction against the defendants.

THE PLAINTIFF-APPELLANT,
LAUREN DONINGER, P.P.A., as Guardian and Next Friend of AVERY DONINGER, a minor

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Jon L. Schoenhorn
Attorney for Plaintiff

Dated: October 24, 2007

ADDENDUM
(Statutory and Constitutional Provisions)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Conn. Const. Art. I, § 4

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

Conn. Const. Art. I, § 5

No law shall ever be passed to curtail or restrain the liberty of speech or of the press.

Conn. Const. Art. I, § 14

The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.

Title 42 U.S.C. § 1983. Civil action for deprivation or rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

CERTIFICATION

This is to certify that two copies of the plaintiff-appellant brief and one copy of the joint appendix were sent the 24th day of October 2007, by U.S. Mail, postage prepaid, to the following counsel:

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