No. _____

In The

Supreme Court Of The United States

AVERY DONINGER,
Petitioner,

v.

KARISSA NIEHOFF AND PAULA SCHWARTZ,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH SEPARATELY BOUND APPENDIX

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QUESTIONS PRESENTED

I. Can public school officials, consistent with the first amendment and *Tinker* v. *Des Moines Independent Community School District*, impose discipline on students for posting political messages on the internet from a home computer; and if not, whether the first amendment right was clearly established so that school officials may be held liable for its violation?

II. Can public school officials, consistent with the first amendment and *Tinker,* and in the absence of a content-neutral dress code, ban and censor messages on student clothing that advocate school "free speech" and support for a student's rights; and if not, whether the first amendment right was clearly established so that school officials may be held liable for its violation?

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PETITION FOR WRIT OF CERTIORARI

Avery Doninger respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

INTRODUCTION

This Petition presents a constitutional challenge to the right of public officials at Regional School District Number 10 in Burlington, Connecticut, to punish a high school student for the alleged "disrespectful" nature of written criticism that she posted on a public internet journal from her personal computer inside her own home. It also involves whether these same school officials may ban t-shirt messages that expressed support for the petitioner by name and advocated in favor of high school "free speech" in general, under the guise that such advocacy might lead to disruption. Avery Doninger, the former secretary of the Lewis Mills High School Class of 2008 and an elected member of its student council, hereby petitions the Court for review of the decision of the Second Circuit Court of Appeals, which upheld, on qualified immunity grounds, school-imposed discipline and the banning of non-vulgar politically expressive t-shirts, against a first amendment challenge, and thereby affirmed in part and reversed in part, the summary judgment ruling of the United States District Court for the District of Connecticut.

This petition seeks the resolution of a division between the Second and Third Circuit Court of Appeals whether, consistent with the first amendment, school authorities may punish internet speech by young citizens when they are posting messages on the internet from their own home on matters of some general public concern, even if that concern involves school issues. The petition also seeks to determine whether – or to what extent – school officials can censor political messages printed on students' clothing, based upon an undefined fear of future disruption, despite the clear pronouncement in *Tinker v. Des Moines Independent*

Community School District, 393 U.S. 503, 513 (1969), that they cannot. Thus, this petition also presents this Court with the opportunity to decide a question of first amendment jurisprudence that is important to every citizen, and can arise in every school district (and, thus, in every federal court) in every state and territory in the United States. The present case asks the Court to decide whether public school students must curtail and censor what they write or say "on line" from home, out of fear that school censors will later discover their words, and punish them.

The Questions Presented are:

1. Can public school officials, consistent with the first amendment and *Tinker*, impose discipline on students for posting political messages on the internet from a home computer; and if not, whether that right was clearly established so that school officials may be held liable for damages?

2. Can public school officials, consistent with first amendment and *Tinker,* and in the absence of a content-neutral dress code, ban and censor messages on student clothing that advocate school "free speech" and support for a student's rights; and if not, whether that right was clearly established that school officials may be held liable for damages?

Avery Doninger respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit opinion (App. A-1) is published at *Avery Doninger v. Karissa Niehoff, et al.*, 2011 U.S. App. LEXIS 8441 (2d Cir. 2011). The District Court opinion and order on summary judgment (App. A-40), is published at 594 F.Supp. 2d 211 (D. Conn. 2009). The ruling on motion for reconsideration (App. A-73) is published at 2009 U.S. Dist.

LEXIS 22442 (D. Conn. March 19, 2009). The District Court opinion authorizing the plaintiff's certification pursuant to 28 U.S.C. § 1292(b) (App. A-85) is published at 2009 U.S. Dist. LEXIS 49908 (D. Conn. May 14, 2009). The District Court opinion denying the plaintiff's motion for preliminary injunction (App. A-92) is published at *Lauren Doninger, PPA v. Niehoff,* 514 F. Supp. 2d 199 (D. Conn. 2007). The Second Circuit opinion affirming denial of the preliminary injunction (App. A-129) is published at *Lauren Doninger, PPA v. Niehoff*, 527 F.3d 41 (2d Cir. 2008) (hereinafter "*Doninger I*").

STATEMENT OF JURISDICTION

The Second Circuit ruling was issued on April 25, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of *certiorari*.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states as follows:

> Congress shall make no law . . . abridging the freedom of speech . . .

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . 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. . .

Conn. Const. Art. I, § 4 states:

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 states:

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

Conn. Const. Art. I, § 14 states:

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.

STATEMENT OF THE CASE

This case raises important issues concerning the right of a school official to censor and punish students for what they express in a public "web log" (or "blog) in an internet journal, when writing or speaking from home. It also raises questions about censorship by the same school officials of expressive political messages printed on clothing supporting "free speech" and the rights of the student to engage in expressive activity.

Factual Background

In the spring of 2007, the Petitioner, Avery Doninger, was sixteen years old and in her junior year at Lewis Mills High School (LMHS), a public secondary school

in Burlington, Connecticut. The Petitioner was Secretary of the Class of 2008 and an active member of the Student Council. As a Student Council member (and *not* as a class officer), the Petitioner spent a great deal of time and effort planning Jamfest, a "battle of the bands" event, which was scheduled to occur in the new school auditorium on April 28, 2007. At some point, the Petitioner learned that the teacher responsible for operating the audio equipment in the auditorium, would be unavailable on the scheduled date for Jamfest. The Student Council considered alternate dates for the concert, but with the school year rapidly coming to a close, neither the students nor their advisor believed there were any other dates available. Alternative venues such as the cafeteria were rejected as impractical because several bands required a sound system that was only available in the auditorium.

On Tuesday, April 24, 2007, the Petitioner and three other student council officers asked the student council advisor what steps they might undertake to save Jamfest from cancellation. When the students learned that the principal was not available to meet, the advisor suggested to the students that since the auditorium belonged to taxpayers, they could reach out to taxpayers for support. Presented with that advice, the four student council members, including Petitioner, composed an email to parents and other residents explaining that Jamfest might be cancelled, and urging recipients of the email to contact school administrators to support the event. It is important to note that this email, *which was not the subject of any discipline whatsoever,* circulated widely, resulting in several phone calls and emails to the superintendent of schools and the principal. There is no evidence in the case that a single call or inquiry resulted from Petitioner's blog posting.

The next day, Petitioner encountered Defendant Karissa Niehoff, the school principal, outside her office.

Niehoff appeared agitated, telling Petitioner that both her office and the superintendent's office received numerous emails and phone calls from parents and residents, inquiring about Jamfest, apparently as a result of the email. The principal then informed Petitioner that Jamfest could only be staged in the cafeteria with acoustic sets or it would be cancelled. This position was affirmed by the respondent superintendent of schools, Defendant Paula Schwartz.

At approximately 9:25 p.m. on April 24, 2007, the Petitioner made one last attempt to garner community support to allow Jamfest to proceed. She sat at her personal computer, located in the closet adjoining her bedroom, and accessed her personal internet journal on Livejournal.com. The verbatim text was as follows:

> jamfest is cancelled due to douchebags [sic] in central office. here is an e-mail 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 of phone calls and e-mails and such. we have so much support and we really appriciate [sic] it. however, she got pissed and decided to just cancel the whole thing altogether. Anddd [sic] so basically we aren't going to have it at all, but in the slightest chance that we do it is going to be after the talent show on may [sic] 18th. anddd…[sic] here is the letter we sent out to the parents
>
> [Reposting of e-mail sent earlier by the four student council members]
>
> 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. im [sic] down.--

The Petitioner then reprinted an e-mail her mother, Lauren Doninger, sent to Schwartz earlier that day. That e-mail stated:

> Paula,
> I am disappointed to hear that the LSM students are being denied the auditorium for Jamfest. The student body has tolerated significant disruption and difficult conditions throughout this year and last; they have been patient and cooperative. Last year Jamfest was in the cafeteria as there was no option. This year the auditorium is ready – the students deserve to have the opportunity to use it.
>
> I understand that the problem is that the one person 'certified' to manage the lights is unavailable. Obviously, more than one person in the system needs to be able to manage the lights. It also seems reasonable to expect that the identified person should be capable of teaching some students how to handle them. As you have likely become aware, there is significant parent/taxpayer support for the students being able to hold Jamfest in the auditorium this weekend. I am certain that there are parents who would be willing to attend a training on the lights as backup/supervision for the students.

The Petitioner explained that she was expressing her

frustration that the concert could not proceed and wanted readers of her journal to contact the school administrators in the hope that the administrators might relent. Although an unknown number of people contacted the school after the earlier e-mail was sent, only three people are known to have accessed the Petitioner's internet journal entry, and only one was identifiable as a student at LMHS. Not one person is known to have contacted the school as a result of the blog posting.

Both Schwartz and Niehoff arrived at school the next morning to find that a number of citizens and students in the school district had sent emails and voicemails over night in opposition to Jamfest's possible cancellation. Schwartz called a meeting of the Student Council members, their advisor, and two other faculty members for the morning of April 25th. At that meeting, an agreement was reached for Jamfest to be held in the auditorium on June 8th. Schwartz then requested that the students send out an email alerting the community that Jamfest was rescheduled for June 8, which they did. The controversy was resolved.

On May 7, 2007, Superintendent Schwartz's adult son searched the internet for his mother's name and discovered the Petitioner's journal entry of April 24, 2007. He forwarded it to his mother's attention, who in turn forwarded the link to Niehoff with instructions to deal with the Petitioner. On May 17, 2007, the Petitioner went to Niehoff's office to accept her nomination to run for Class Secretary for her senior year, but Niehoff instead presented her with a hard copy of the blog posting. The phrase Petitioner used to describe school administrators – "douchebags" – was underlined in red ink. Niehoff expressed to the Petitioner that the journal entry was extremely disrespectful because of that word. The Petitioner was told to apologize to the superintendent and offered to remove the journal posting, but Niehoff rejected

this solution and instead informed the Petitioner that she was prohibited from running for reelection as a class officer. Niehoff wrote to the Petitioner's mother expressly stating that the punishment was for posting the "disrespectful" entry.

Although the Petitioner's name was barred from the class officer election ballot, a plurality of students cast write-in ballots in her favor. Nevertheless, defendant Niehoff refused to recognize the election outcome and named the second highest vote-getter to the position of class secretary.

A number of students, including Petitioner, arrived on the day of the assembly with printed t-shirts. On one side was written: "SUPPORT LSM FREE SPEECH," a reference to Lewis S. Mills High School. On the other side it stated: "TEAM AVERY". (App. A-151). Niehoff was stationed outside the auditorium. As the Petitioner joined the group of students entering the auditorium, she witnessed defendant Niehoff chastising a classmate for his own "Team Avery" t-shirt, and heard her say that the shirts were "disruptive" and set a "bad example," and were, therefore, prohibited in the auditorium. Niehoff even confiscated one of the shirts. After witnessing Niehoff's conduct, Avery abruptly hid her own "Team Avery" t-shirt in a backpack, and left it outside the auditorium, despite her original intent to don it once she entered the auditorium. The Petitioner observed this interaction and quickly stashed in a backpack the identical shirt she intended to don inside the auditorium.

Procedural History

The Petitioner, then a minor, commenced an action under Title 42 United States Code § 1983 and the Connecticut Constitution, through her mother, Lauren Doninger, seeking monetary and injunctive relief against

defendants Niehoff and Schwartz, individually and in their official representative capacity, for violations of her civil rights in the Connecticut Superior Court for the Hartford Judicial District. The defendants removed the matter to the United States District Court for the District of Connecticut. After an evidentiary hearing on the Petitioner's motion for a preliminary injunction in 2007, the District Court (Kravitz, J.), denied the Petitioner's motion, finding that *Tinker* did not apply because there was no substantial disruption of school activities, but instead finding that the speech was vulgar under *Bethel School District v. Fraser*, 478 U.S. 675 (1986). The Court of Appeals (Livingston, Sotomayor, JJ. and Preska, D.J.) affirmed that decision in 2008 on the alternate grounds that *Tinker* did apply and that the District Court wrongly concluded that the Petitioner's expression was not likely to cause substantial disruption in school.

The Petitioner graduated from high school and the parties proceeded with discovery and filed cross motions for summary judgment on the underlying claims. The District Court (Kravitz, J.), granted the defendants' motion for summary judgment on qualified immunity grounds with respect to the internet speech, but denied it with respect to the t-shirt censorship issue, finding that the right in question was clearly established and that no reasonable school official would believe the law was otherwise. The defendants then filed an interlocutory appeal challenging the denial of summary judgment with respect to the t-shirts, and the Petitioner, by now 18 years of age and proceeding in her own right, requested certification of review of the internet speech claim pursuant to Fed. R. App. Pro. 5(b), which the District Court granted. On April 25, 2011, the Court of Appeals (Livingston, Cabranes, Kearse, JJ), on qualified immunity grounds, reversed the judgment of the District Court with respect to the t-shirt ban, and affirmed the District Court with respect to the

internet speech claim.

After reviewing the standards for summary judgment, the Court of Appeals concluded that school officials were entitled to qualified immunity because the right of school officials to censor and punish student speech on the internet, even when that speech is created inside the home, was not clearly established. (App. A-3). While acknowledging this Court's holding in *Tinker* that school officals' authority over students ends at the proverbial "schoolhouse gate," the Court of Appeals found that it was objectively reasonable for school administrators to conclude that the blog post was "potentially disruptive" under *Tinker, supra*. (App. A-26). It reached this conclusion because it was "reasonably foreseeable" that the Petitioner's blog post would reach school officials; the subject matter involved the school; it encouraged others (including students) to read the post and contact school officials; at least one student did post a vulgar responsive comment; school officials eventually became aware of the posting; and the use of the term "douchebags" was "potentially disruptive" of efforts to resolve the controversy surrounding Jamfest. (App. A-21). The Petitioner argues that all of these factors are precisely what constitutes the core of protected speech, and that it was objectively *unreasonable* for school officials to punish her when the speech occurred away from school. This right, then, was "clearly established" at the time; if not by *Tinker*, then certainly by the Second Circuit's own opinion in *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979).

With regard to the banning of the "Support LMS Free Speech/Team Avery" t-shirts from the school assembly, the Court of Appeals overruled the District Court, concluding that the defendants were entitled to qualified immunity because of the belief that this message posed an unspecified "threat of disruption" at the assembly.

(App. A-30). The Court of Appeals asserted that it was uncertain whether the *Tinker* rule applied to the banning of the t-shirts. (App. A-32). However, it nevertheless found the administrators' actions objectively reasonable because (1) the Petitioner previously was interviewed on a local TV news program; and (2) her blog posting "demonstrated a willingness to incite confrontation." (App. A-34-35). It also relied on post-censorship evidence that even without the presence of the t-shirts, some of the students at the assembly shouted "Vote for Avery" and had to be admonished. The Petitioner submits that the use of post-censorship developments to justify a violation of the first amendment, is unsupported by any of this Court's qualified immunity jurisprudence. She also asserts that under *Tinker*, the ban violated hear clearly established first amendment rights.

REASONS FOR GRANTING THE PETITION

This case presents important and compelling first amendment issues which impact millions of students and thousands of school officials. The Second Circuit granted summary judgment to the defendant school officials under the theory that it was objectively reasonable to believe, reviewing the facts in hindsight, that the Petitioner's reference to central office personnel as "douchebags" and asking that citizens and taxpayers contact the administration to voice more support because prior expressions of support annoyed them, had the potential to cause substantial disruption to the educational process, despite evidence that school officials' actual purpose was to punish her for the use of disrespectful language. The Circuit Court reached this conclusion on contested facts, despite the fact that school officials did not learn about the blog post until several full weeks after resolution of the controversy and despite admissions by the principal that

the punishment was for the "disrespectful" nature of the posting; not because of any real or imagined fear of disruption. Indeed, it is difficult to square the Circuit Court opinion with *Tinker*, because the defendant admitted that the punishment related to the "disrespectful" content of the speech itself, and demonstrated lack of "good citizenship." Moreover, the type of "disruption" discussed in *Tinker*, can not possibly apply to the democratic process when public officials must read and respond to telephone and email inquiries from the citizenry. *Tinker*, itself, rejected, as inconsequential, the far greater disputes and interruptions – threats, teasing, disruption of lesson plans and diverting students from class work – that resulted from the wearing of black arm bands, than occurred here. *See Tinker, supra*, 517-18 (Black, J., dissenting). The Circuit Court ruling also conflicts with two recent decisions of the Third Circuit Court of Appeals, which held that offensive internet postings about school administrators was protected under the First Amendment.

I. PUBLIC SCHOOL OFFICIALS VIOLATE CLEARLY ESTABLISHED FIRST AMENDMENT RIGHTS WHEN THEY IMPOSE DISCIPLINE ON STUDENTS FOR EXPRESSIVE POLITICAL MESSAGES POSTED ON THE INTERNET FROM A HOME COMPUTER.

1. In contrast to the analysis and holding of the Circuit Court in this case, the Third Circuit, in two recent *en banc* opinions, held that school officials could not punish students for clearly offensive internet messages about school officials because they were created and posted at home. *Layshock v. Hermitage Sch. Dist.*, 2011 U.S. App. LEXIS 11994 (June 13, 2011); *J.S. v. Blue Mountain School District*, 2011 U.S. App. LEXIS 11947 (June 13, 2011). In *Layshock*, a student created a bogus "Facebook" profile of the school principal, referring to him, *inter alia*, as a

"steroid freak," "big whore", and a drug and alcohol abuser. Word of the profile "spread like wildfire" and the principal soon found out about it, believing it to be "degrading," "demeaning," "demoralizing" and "shocking." He complained to the police, but no arrest was made. Subsequently, the school district suspended him for ten days, placed him in an alternative education program for the rest of the year, and banned him from several extracurricular activities, including participation in the graduation ceremony. *Id.* Chief Judge McKee, writing for the majority in Layshock, concluded that because the fake profile "did not cause disruption in the school, we do not think that the First Amendment can tolerate the School District stretching its authority into [Layshock's] home and reaching [him] while he is sitting at [his] computer after school in order to punish him for the expressive conduct that he engaged in there." *Id.* It then held that the school district's response to the "expressive conduct violated the First Amendment guarantee of free expression." *Id.*

The *Layshock* majority also distinguished the first Second Circuit's earlier decision in Petitioner's case (*Doninger I*), noting that disqualification from student office was less serious than a suspension, but added: "In citing *Doninger*, we do not suggest that we agree with that court's conclusion that the student's out of school expressive conduct was not protected by the First Amendment there." *Id.* .

In the separate Third Circuit case of *J.S. v. Blue Mountain, supra*, decided the same day, the plaintiff was an eighth grader who created a bogus MySpace parody of her middle school principal, which likewise was posted on the internet. *Id.* The profile contained "crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family." *Id.* After the principal learned of the profile a few days later, he suspended the

student for ten days, and contacted the police. Id. The principal claimed that the fake profile "disrupted school" in the following ways (which the Petitioner submits were certainly more substantial than anything pertaining to her blog): "rumblings" in the school, two teachers informed the principal that students were discussing the profile and disrupting classes; a school guidance counselor cancelled appointments to supervise student testing while the principal and another counselor met with the plaintiff and her parents. The district court granted the school district's summary judgment motion, but acknowledged that *Tinker* was inapplicable because of the absence of substantial and material disruption. *Id.*

Judge Fisher, writing for six judges in dissent in *J.S.*, declared that the majority opinion "causes a split with the Second Circuit," regarding whether "off-campus hostile and offensive student internet speech that is directed at school officials results in a substantial disruption of the classroom environment." *Id.* In making the claim regarding a circuit split, the dissent cited the instant opinion, the earlier ruling in *Doninger I*, as well as the Second Circuit's earlier decision in *Wisniewski v. Board of Education of Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007). In a footnote in the majority opinion, Chief Judge McKee disagreed that a circuit split existed, arguing that the facts in *Doninger* "differ considerably from the facts presented in this case." *J.S., supra*, n. 8. While the majority in *J.S.* declined to decide whether *Tinker* ever applies to student speech on the internet, see *id.* n. 3 (argument against applicability has "some appeal" but court need not address it to hold that the school district violated student's first amendment rights); Circuit Judge Smith, in a concurring opinion joined by four other judges, addressed the specific question "whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students

engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* (Smith, J., concurring).

The Petitioner submits that these divergent holdings represent an actual concrete split on a fundamental constitutional question between the Second and Third circuits, which this Court should resolve sooner rather than later. The fact that students were exposed to the Petitioner's off-campus political speech and may have reacted to it (although there is no evidence that they did), does not give the school any more right to punish her speech than if it had been uttered by her in the town square. As this Court declared in a first amendment case last term: "The most basic of those principles is this: '[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchs. Ass'n*, U.S. , 131 S.Ct. 2729 (2011), quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

2. This Court has addressed student speech four times. Three of these cases, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988), and *Morse v. Frederick*, 551 U.S. 393 (2007), involved the ability of school officials to punish or censor students for what they say or write on campus or in school-sponsored events and student publications. The petitioner's case clearly does not fall into those categories.

The remaining case is *Tinker, supra,* the only precedent upon which the Circuit Court relied, and which states that "students do not shed their constitutional rights at the schoolhouse gate" and that school officials otherwise may not curtail student speech unless there is a likelihood that the speech will cause substantial disruption to the educational process. *Id.*, at 514. This Court has never veered from the rule that restrictions on student speech do

not apply outside of school, and that school officials do not have the right to punish students for off-campus conduct. *See Morse v. Frederick*, 551 U.S. 393 (2007)("When public school authorities regulate student speech, they act as agents of the State. . .[and] any argument for altering. . .free speech rules in the public schools. . .must. . .be based on some special characteristic of the school setting." (Alito, J. concurring)). This bedrock principle is not altered by advances in technology.

One of the most often cited Second Circuit cases on student speech is *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979), which considered whether school officials could punish a student who published a likely vulgar "underground" newspaper in his spare time and off school grounds. Although the Circuit Court in that case found the newspaper to be in poor taste, it ruled that the school violated the student's constitutional rights because once school officials begin to regulate speech "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.

The Second Circuit opinion in this case also builds on a previous restriction on off-campus speech, when it upheld a school suspension under *Tinker* against a student who created a cartoon image of his algebra teacher's head exploding with a caption suggesting that this teacher be shot. *Wisneiwski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007). Other circuits have similarly found that when off-campus speech arguably encourages criminal activity which can lead to substantial disruption of the school itself, the speech may be evaluated under *Tinker*. *See*, *e.g.*, *Boucher v. School Bd. Of the School Dist. Of Greenfield*, 134 F.3d 821 (7th Cir. 1998) (suspension upheld where student published article in an underground student newspaper instructing and

encouraging classmates to hack into the school's computer systems, potentially exposing the students' and faculty's private information). The Petitioner asserts that even if there are some extreme circumstances where off-campus expression counts as on-campus activity, this rationale does not apply to her case.

Unfortunately, many school districts have interpreted those prior cases to give them *carte blanche* authority to regulate off-campus student speech if it pertains to school. The speech at issue in those cases ranges from benign, *Emmett v. Kent Sch. Dist. 415*, 92 F. Supp. 1088 (W.D. Wash. 2000)(student suspended for creating a website featuring classmates' mock obituaries) to disturbing. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. 2000)(student expelled for creating a website which solicited donations to hire a hit man to kill his teacher). Without a clear line, some of these measures not only stifle creative expression, but negate much of the learning potential the internet offers.

3. Use of the internet among teenagers "is nearly universal" with 93 percent of teenagers using the internet and 61 percent using it daily. Amanda Lenhart, *Pew Internet & American Life Project: Teens and Social Media* 2 (2007), cited in *J.S. v. Blue Mountain School District*, 2011 U.S. App. LEXIS 11947 (June 13, 2011) (Fisher, J., dissenting). A study by the College Board in 2009 found that nearly all college-bound seniors visited social networking sites, and 86% of these students maintain a personal profile on these sites. Richard Hesel and Ryan C. Williams, *Social Networking Sites and College-Bound Students*, StudentPOLL, Vol. 7 Issue 2, http://professionals.collegeboard.com/data-reports-research/trends/studentpoll/social-networking. Facebook and MySpace, the two dominant social networking sites, have become important to the intellectual and social

development of high school students for two reasons. First, these sites represent the primary vehicle for the type of social interaction that had previously been reserved for evening telephone conversations and weekend get-togethers. Kara D. Williams, *Public Schools v. MySpace & Facebook: The Newest Challenge to Student Free Speech Rights*, 77 U. Cin. Law Rev. 707, 708 (2007). Second, the social networking sites allow members to write journal entries in a format similar to the one at issue in the current case. It is no overstatement to assert that nearly every high school student in America now has the ability to speak his or her mind to a willing audience anywhere in the world, but lacks a set of rules by which to operate.

School officials likewise are hampered due to the absence of guidelines. They are historically charged with maintaining order in an educational setting and serving as guardians of their students' safety while on campus. Off-campus activity has traditionally been relegated to parental control. Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 Cap. U. L. Rev. 129, 151 (2007). Ironically, the internet simultaneously allows school officials greater power to monitor off campus speech because it documents, preserves and archives students' interactions and musings that previously remained beyond public scrutiny. *Williams*, *supra*, at 708. The lack of guidance by this Court to address students' internet speech, or indeed any kind of off-campus speech, combined with school officials' inflated fears of school violence, have resulted in improper punishment of many students for otherwise protected off-campus speech. Such incursion by school officials into what was generally acknowledged to be protected speech outside school control has now seriously eroded, if not irreparably eradicated, First Amendment rights, resulting in both *de facto* official censorship and

self-censorship. And fearful of classroom disruption, it seems that lower courts have retreated to the broad language of *Tinker* to solve a complex issue for which its rationale was never intended.

4. Nowhere is the need for clear guidelines more apparent than in the facts presented in the instant case. The Petitioner, an engaged and involved student, used her personal computer at home to post a non-threatening journal entry on a public website concerning a topic of concern to the community at large; not just students. She asked members of that community to petition the public school superintendent to effect a change in a school policy, *albeit* while using a derogatory term to describe the superintendent. Only three persons – one of whom was identified as a student – are known to have read the posting online before it was discovered by the principal, and none contacted the school. The Petitioner was disciplined a month later for this posting, over the express objection of her mother, while the student council leaders who wrote the e-mail at school received no discipline whatsoever. The internet journal entry's use of the word "douchebags" and her observation that parent complaints to that office "pissed off" the superintendent represent the only distinction between the Petitioner's blog posting and the mass email. Plainly, such language could not violate *Tinker*.

More troublesome, from Petitioner's point of view, is that the Court of Appeals decision effectively overrules the central premise of *Tinker*, that "students do not shed their constitutional rights at the schoolhouse gate." The presumption inherent in *Tinker*'s holding is that students have the same constitutional right to freedom of speech outside the school house gate as other citizens. To allow school officials to punish off campus speech just because they find it distasteful under the guise that the subject

matter might portend disruption at the school, effectively strips students of their first amendment rights without walking through those proverbial gates. This is the central tenet of the two Third Circuit cases mentioned above.

Avery Doninger utilized her on-line journal to speak on a matter of public concern; namely, the imminent cancellation of a highly anticipated student-sponsored concert that was open to the public at large. The defendants' motivation in punishing her are grounded in the Petitioner's exercise of the right to free expression – asking the public to express their opinion to public officials – from her own home. Removing Petitioner from a beloved elected post – a position the district court termed a "privilege" – effectively chilled the Petitioner's (and others') ability to engage in public speech. It is worth noting that many of the "privileges" associated with high school, whether attending the junior prom and commencement ceremonies, or participation in extracurricular activities, are what many high school students truly cherish about their educational experience; perhaps more so than a brief out-of-school suspension. Although students may only possess a due process interest in class time, *Goss v. Lopez*, 419 U.S. 565 (1975), depriving students of the opportunity to grow and learn through "privileged" activities probably is a more severe punishment than a short suspension, resulting in a true and lasting chill of activity protected by the First Amendment.

5. While the Court has yet to address with specificity student speech on the internet, the defendant school officials here should have been guided by several principals from existing first amendment jurisprudence. First, students have constitutional rights to speech that school officials cannot arbitrarily take away. Second, school officials may only deprive students of their first amendment rights when those school officials can

reasonably forecast a risk of *substantial and material* disruption to the educational process. Third, the ability of school officials to curtail activity protected by the First Amendment is non-existent when the student is away from the school. *See Tinker,* 393 U.S. at 506. From these principles, officials know that non-threatening, non-disruptive off-campus speech such as the Petitioner's can not lead to sanctions without running afoul of first amendment principles.

The fact that the Court of Appeals expressed some uncertainty about the role of the internet to student speech does not make the defendants' actions more reasonable. The Petitioner asserts that many of the decisions that run counter to her arguments are grounded in a lack of information by courts about the internet and websites that students frequent. Judges are often so far removed from these technologies that it is little wonder they sometimes misapply the law in these situations. *See* Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027, 1035-37 (2008). School administrators in the 21st Century, however, are certainly aware of the internet and its potential. However, advancements in technology offer no reason to deprive the current generation of students of their first amendment rights. As noted above, students use the internet to socialize and communicate in the same way previous generations of students did during evening telephone conversations and weekend get-togethers. If at one such gathering (or, for that matter, at a town meeting) the Petitioner uttered the same words she published in her journal, she would clearly have been protected under long standing First Amendment jurisprudence. The fact that her speech took place on the internet should not change this basic analysis nor alter established law. The age and durability of past precedent does not give way, merely because it is too "ancient" or pre-

dates the creation of the world wide web. As this Court has oft repeated: "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, ___ S.Ct. ___, 131 S.Ct. 2074 (2011), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The advent of the internet does not alter this rule, any more than the invention of the radio, the telephone or the television camera.

II. BANNING EXPRESSIVE T-SHIRTS BECAUSE OF A SPECIFIC MESSAGE SHOULD NOT IMMUNIZE THE DEFENDANTS FROM SUIT BECAUSE THE FIRST AMENDMENT RIGHT IN QUESTION WAS CLEARLY ESTABLISHED.

It is undisputed that the LMHS dress code expressly permitted students to wear shirts with written messages similar to that emblazoned on the Petitioner's t-shirts and that the Region 10 Board of Education expressly allowed students to display even election-related messages. Nevertheless, the principal banned the shirts from a school assembly because of the message on it, and even confiscated one from another student.

1. At its core, this related First Amendment issue is about high school students' rights to peaceably and silently protest an arbitrary decision by administrators who run their school. The messages on the "Support Free Speech/Team Avery" t-shirts are exactly the kind of "expression on public issues [that] has always rested on the

highest rung of First Amendment values." *Bieluch v. Sullivan*, 999 F.3d 666, 671 (2d Cir. 1993), *quoting NAACP v. Clayborne*, 458 U.S. 886, 913 (1982). The expression in the instant case occupies a position no less exalted due to its public school setting. Indeed the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy v. James*, 408 U.S. 169, 180 (1972); and students classically "do not shed their constitutional rights at the school house gate." Tinker, *supra*, 393 U.S. at 506. The last time this Court addressed student speech, it reiterated this axiom while acknowledging that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618 (2007).

2. The Second Circuit opinion has created a split with other circuits, by suggesting that the subject matter (i.e. the message) and history of the controversy determines whether school officials can ban unfavored speech. The Court of Appeals relied, in part, on the fact that Petitioner was interviewed on a local news channel as support for the potential for disruption, thereby differentiating between "newsworthy" events and the mundane. Other circuit courts across the nation take a different view. *See e.g.*, *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008)(student entitled to wear shirt to school with message "Be Happy, not Gay"); *Chandler v. McMinnville*, 978 F.2d 524 (9th Cir. 1992)(student buttons depicting the word "scab" to protest hiring of non-union substitute teachers during teachers' strike protected by the First Amendment). See also *Gillman v. Sch. Bd. For Holmes County, Florida*, 567 F.Supp.2d 1359 (N.D. Fl 2008)(student improperly punished for wearing t-shirts advocating fair treatment for gay students after school

officials treated her cousin unfairly due to her homosexuality); *DePinto v. Bayonne Bd. Of Education*, 514 F. Supp 2d 633 (D.N.J. 2007)(student entitled to injunction preventing school from imposing sanctions for wearing a button protesting a school uniform policy).

3. Schools can only restrict expressive rights in a well-defined and limited set of circumstances. No Region 10 School District policy existed that permitted censorship of messages on clothing, except with respect to cigarettes, alcohol and drugs. *See* App. A-150. Expression of views on items of clothing was prohibited otherwise only if officials could reasonably forecast that the expression could cause material and substantial interference with the requirements of appropriate discipline in the operation of the school (App. A-150). *See Tinker*, 393 U.S. at 513; or if they advocate alcohol and drug use. *Morse v. Frederick, supra*.. Yet vague concerns about potential disruption because of a disfavored message are insufficient to prompt an abridgement of these rights. This is the clear and unequivocal message of *Tinker*, where anti-war students wore black armbands to school to express opposition to the Vietnam War. The record in *Tinker* revealed that other students threatened fights, protesters were mocked by their classmates, and at least one teacher had a lesson period "wrecked" by Mary Beth Tinker's advocacy of her position. *Tinker*, 393 U.S. at 517-18 (*Black, J.*, dissenting). Nevertheless, the majority was unpersuaded that these inconveniences justified censoring student speech:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word

> spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. (internal citation omitted). Thus, pursuant to *Tinker*, the message on the Petitioner's t-shirt was clearly protected by the First Amendment. The defendants' actions were, therefore, objectively unreasonable.

In order to prohibit student speech, school officials must have a well-founded expectation of disruption, and may not curtail speech solely on the emotive impact it may have on others. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 212 (3d. Cir. 2001, Alito, J.). Thus, it was clearly established at the time of the LMHS student election assembly that student expression on t-shirts could only be curtailed in the face of substantial disruption, and that any forecast of disruption must be severe before allowing the abridgement of such expression.

The Petitioner submits that the expression on her t-shirt was categorically protected by the First Amendment and that censoring those messages was a direct violation of the Constitution, as clearly established in *Tinker*. The facts show that the t-shirt messages were political in nature – expressions of support of free speech at the high school on one side and solidarity with the Petitioner on the other. Further, it is undisputed that the ban actually stifled student expression. Avery was prohibited from expressing a particular message during the assembly. This

admitted act of censorship constituted an impermissible chill – if not actual silencing – of protected expression.

Since the "Team Avery" t-shirts clearly conveyed a political message and did not portend disruption, the defendants' ban violated the Petitioner's clearly established First Amendment rights. In sum, the Second Circuit 's qualified immunity analysis turned a "clearly established right" into a nebulous one, by extending qualified immunity to school administrators because the anti-war message in *Tinker* is not directly on point with the public controversy connected to the t-shirt message. Such a holding gives unfettered censorship rights to school officials. Therefore, the defendants were not entitled to qualified immunity and the Court of Appeals erred in reversing the District Court's ruling denying the defendants' summary judgment motion as it pertained to the t-shirt ban.

CONCLUSION

For the foregoing reasons, and in consideration of the millions of potential young speakers and writers living in this country who may lose the first amendment right to express themselves because of a real fear of retribution from school officials "surfing" the internet, and because of the improper application of qualified immunity to permit school officials to ban political expression on student clothing, the Petitioner respectfully requests that this Honorable Court grant this petition.

Respectfully submitted,

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