Nos.

In the Supreme Court of the United States

BLUE MOUNTAIN SCHOOL DISTRICT,
Petitioner

v.

TERRY SNYDER, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID T. GOLDBERG
Donahue & Goldberg LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 334-8813

JAMES E. RYAN
Counsel of Record
DANIEL R. ORTIZ
UVA Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3572
jryan@virginia.edu

[Additional Counsel Listed On Inside Cover]

JONATHAN P. RIBA
Sweet, Stevens, Katz & Williams LLP
331 E. Butler Avenue
New Britain, PA 18901 (215) 345-9111

MARK T. STANCIL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006
(202) 775-4520

ANTHONY G. SANCHEZ
Andrews & Price LLC
1500 Ardmore Blvd., Suite 506
Pittsburgh, PA 15221
(412) 243-9700

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave., N.W., Suite 500
Washington, DC 20037
(202) 639-6518

QUESTIONS PRESENTED

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969), this Court held that the First Amendment does not disable school authorities from regulating student speech that they have "reason to anticipate * * * would substantially interfere with the work of the school or impinge upon the rights of other students." In *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), this Court further held that school authorities may also regulate "vulgar and lewd speech" by students.

The questions presented are:

1. Whether and how *Tinker* applies to online student speech that originates off campus and targets a member of the school community.

2. Whether and how *Fraser* applies to lewd and vulgar online student speech that originates off campus and targets a member of the school community.

PARTIES TO THE PROCEEDING

Pursuant to this Court's Rule 12.4, petitioners are filing a single petition seeking review of two en banc Third Circuit judgments that involve closely related questions. In *Blue Mountain School District* v. *Snyder*, in addition to the party identified in the caption, respondents include Steven Snyder, individually and on behalf of his daughter, and J.S., a minor, by and through her parents. In *Hermitage School District* v. *Layshock*, petitioners are the Hermitage School District, and Karen Ionta, Eric W. Trosch, and Chris Gill, all in their official and individual capacity. Respondents are Justin Layshock, and Donald Layshock and Cheryl Layshock, individually and on behalf of their son.

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Bd. of Educ. v. *Earls*,
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Bethel Sch. Dist. No. 403 v. *Fraser*,
478 U.S. 675 (1986) .....*passim*

Boucher v. *Sch. Bd. of Sch. Dist. of Greenfield*,
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D.J.M. ex rel. D.M. v. *Hannibal Pub. Sch. Dist. #60*,
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Davis v. *Monroe Cnty. Bd. of Educ.*,
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Doninger v. *Niehoff*,
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Doninger v. *Niehoff*,
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Doninger v. *Niehoff*,
642 F.3d 334 (2d Cir. 2011)..... 15, 32

Goss v. *Lopez*,
419 U.S. 565 (1975) 32

J.S. ex rel. H.S. v. *Bethlehem Area Sch. Dist.*,
807 A.2d 847 (Pa. 2002) .....*passim*

TABLE OF AUTHORITIES–Cont'd

Page(s)

Kowalski v. *Berkeley Cnty. Schs.*,
No. 10-1098, 2011 WL 3132523
(4th Cir. July 27, 2011), pet. for cert. filed
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LaVine v. *Blaine Sch. Dist.*,
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Morse v. *Frederick*,
551 U.S. 393 (2007) .....*passim*

New Jersey v. *T.L.O.*,
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Porter v. *Ascension Parish Sch. Bd.*,
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T.V. v. *Smith-Green Cnty. Sch. Corp.*,
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Thomas v. *Bd. of Educ.*,
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Tinker v. *Des Moines Ind. Cmty. Sch.*,
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Wisniewski v. *Bd. of Educ. of the Weedsport Central Sch. Dist.*,
494 F.3d 34 (2d Cir. 2007)..... 10, 15, 18

TABLE OF AUTHORITIES–Cont'd

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Statutes

20 U.S.C. § 1681(a) 26

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28 U.S.C. § 1331..... 5

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Mass. Gen. Laws Ann. ch. 71, § 37O(b) (West 2011). 27

N.H. Rev. Stat. Ann. 193-F:4 (2011). 27

Other Sources

Dianne L. Hoff & Sidney N. Mitchell, *Cyberbullying: Causes, Effects, and Remedies*, 47 J. of Educ. Admin. 652 (2009). 23

Michelle R. Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, Educ. Wk's Digital Directions 28, Winter 2011, available at

TABLE OF AUTHORITIES–Cont'd

Page(s)

http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html 24, 29

Petition for a Writ of Certiorari, *Doninger* v. *Niehoff*, No. 11-113, 2011 WL 3151990. 34

Petition for a Writ of Certiorari, *Kowalski* v. *Berkeley Cnty. Schs., No. 11-46136*. 34

Sameer Hinduja & Justin W. Patchin, *Offline Consequences of Online Victimization: School Violence and Delinquency*, 6 J. of Sch. Violence 89 (2007) 23

Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies, Cyberbullying Research Center* (Mar. 2011), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf 27

Thomas Wheeler, *Facebook Fatalities, Social Networking, and the First Amendment*, 31 Pace L. Rev. 182 (2011) 23

U.S. Dep't of Educ., Office of Civil Rights, *Dear Colleague Letter: Bullying and Harassment* (Oct. 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/ colleague-201010.pdf..... 26, 28

TABLE OF AUTHORITIES–Cont'd

Page(s)

U.S. Dep't of Educ.,
Educational Technology in U.S. Public Schools: Fall 2008 (2010), available at http://nces.ed.gov/pubs2010/ 2010034.pdf. 22

William G. Buss,
School Newspapers, Public Forum, and the First Amendment, 74 Iowa L. Rev. 505 (1989) 22

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Pursuant to this Court's Rule 12.4, petitioners seek review of two en banc Third Circuit decisions, which present closely related questions and were issued on the same day: *Blue Mountain School District* v. *Snyder* and *Hermitage School District* v. *Layshock*. The en banc opinion of the Third Circuit in *Blue Mountain* is available at 650 F.3d 915; the panel opinion is available at 593 F.3d 286. The district court's memorandum and order granting summary judgment to defendants and denying it to plaintiffs is available at 2008 WL 4279517. The district court's memorandum and order denying plaintiffs' motion for a temporary restraining order and preliminary injunction is available at 2007 WL 954245. All of the above opinions are reproduced in Appendix 1 to this petition.

The en banc opinion of the Third Circuit in *Hermitage* is available at 650 F.3d 205; the panel opinion is available at 593 F.3d 249. The district court's opinion granting summary judgment in part and denying it in part to plaintiffs and to defendants is available at 496 F. Supp. 2d 587. The district court's order entering a final consent judgment, App. 2, *infra*, 70a-71a, is not reported. All of the above opinions and orders are reproduced in Appendix 2 to this petition.

JURISDICTION

Orders granting petitions for rehearing en banc in each case were entered on April 9, 2010. App. 1, *infra*, 170a-171a; App. 2, *infra*, 137a-138a. The judgments of the en banc court of appeals in both cases were entered on June 13, 2011. On August 17, 2011, Justice Alito granted an extension of time to file this petition for a writ of certiorari, to and including October 27, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

These cases present important and urgent First Amendment questions regarding the scope of school officials' authority over student online speech, questions that involve the rights and responsibilities of millions of students and school officials. Lower courts have given conflicting answers to these questions. The legal uncertainty is generating tremendous confusion and wasting resources in thousands of school districts across the country, where these issues arise on nearly a daily basis. At the moment, school officials are stuck between a rock and a hard place: They are responsible for protecting students and teachers from online harassment, but in doing so, they might trigger a lawsuit from a student claiming that his or her First Amendment rights

have been violated. School officials cannot afford to wait any longer for a definitive answer.

These cases offer an ideal opportunity for this Court to clarify the boundaries of school authority over student online speech, which would spare school districts the time and expense they are devoting to puzzling through these questions on an ad hoc basis. The cases also afford the Court the opportunity to correct a dangerous misreading of the Constitution. The students in these cases created profiles on the Internet falsely accusing their principals of, among other things, "fucking in [the principal's] office," "hitting on students and parents," and taking drugs. See App. 1, *infra*, 5a; App. 2, *infra*, 4a-5a. The en banc Third Circuit held that the First Amendment requires that school officials *do nothing* in response. This is wrong. The Constitution does not demand that school officials remain idle in the face of such vulgar and malicious attacks. Petitioners respectfully urge this Court to hear these cases, both to provide desperately needed legal clarity and to make plain that, even in the age of the Internet, the Constitution does not require school officials to "surrender control of the American public school system to public school students." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 686 (1986) (quotation omitted).

1. Blue Mountain School District v. *Snyder*

Facts

On March 18, 2007, J.S. and her friend K.L., both eighth-grade students at Blue Mountain Middle School, used a computer in J.S.'s parents' home to create a profile of their principal, James McGonigle, on the social networking website MySpace. App. 1,

infra, 4a. Roughly a month earlier, J.S. had been disciplined by McGonigle for dress-code violations. *Ibid.*

The profile contained McGonigle's official photograph, which J.S. had copied from the School District's website, as well as crude, "indisputably vulgar," and "shameful personal attacks aimed at [McGonigle] and his family." App. 1, *infra*, 4a-5a, 23a. The profile listed McGonigle's "interests" as "'being a tight ass, * * * fucking in my office, [and] hitting on students and their parents." *Id.* at 5a. It also indicated that "I love children, sex (any kind), * * * being a dick head, and * * * my darling wife who looks like a man (who satisfies my needs)." *Ibid.* The profile nicknamed McGonigle "M-Hoe" and also included "riding the fraintrain" as an interest, a reference to McGonigle's wife, Debra Frain, who worked as a guidance counselor at the Blue Mountain school. *Id.* at 4a-7a.

Initially, the profile could be accessed by anyone who searched the MySpace website or knew the profile's URL address, which ended with the phrase "kidsrockmybed." App. 1, *infra*, 5a-6a; *id.* at 50a (Fisher, J., dissenting). After several students who viewed the profile approached J.S. at school, she made the profile "private," thereby limiting access to roughly twenty students sharing MySpace "friend" status with either J.S. or K.L. *Id.* at 6a. Nonetheless, there were "general rumblings" throughout the school, students talked about the profile in school, and teachers reported disruptions in class. See *id.* at 9a-10a.

Two days after the profile was created, a student informed McGonigle of its existence and later gave

him a printout of it. App. 1, *infra*, 6a. McGonigle ultimately determined that the creation of the profile violated the school's disciplinary code as "a false accusation about a staff member of the school." *Id.* at 7a.

J.S. initially denied her role in creating the profile, but eventually admitted to it. App., *infra*, 7a. McGonigle informed J.S. and her mother, Terry Snyder, that J.S. would receive a ten-day out-of-school suspension. *Id.* at 8a. The District Superintendent, Joyce Romberger, agreed with the punishment and declined Terry Snyder's request to overrule it. *Ibid.*

District Court Proceedings

The Snyders sued the School District, Romberger, and McGonigle. They claimed that the First Amendment prohibited the School District from disciplining J.S. for creating a profile on the Internet suggesting that her middle-school principal enjoyed having sex in his office and sexually propositioning his students and their parents. App. 1, *infra*, 3a, 5a.[1]

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[1] The Snyders also claimed that the School District's policies were unconstitutionally vague and overbroad, that the School District violated the Snyders' substantive due process rights to raise their child, and that the School District violated Pennsylvania law by punishing J.S. for out-of-school speech. App. 1, *infra*, 3a. The Snyders sought damages as well as declaratory and injunctive relief, costs, and attorney's fees. Complaint at 19-21.

The district court exercised jurisdiction over the federal claims pursuant to 28 U.S.C. § 1331 and over the state law claim pursuant to 28 U.S.C. § 1367. App. 1, *infra*, 14a. By stipulation, on January 7, 2008, all claims against Romberger and McGonigle were dismissed and only the School District remained as a defendant. *Id.* at 10a.

The district court granted the School District summary judgment on all claims. App. 1, *infra*, 141a-162a. Regarding the First Amendment claim, the district court held that J.S.'s speech was not protected by *Tinker* v. *Des Moines Ind. Cmty Sch*, 393 U.S. 503 (1969). *Id*. at 149a. It noted that "[t]he type of speech involved in *Tinker* is political speech. In the instant case, the speech is not political; rather it was [a] vulgar and offensive statement ascribed to the school principal." *Id*. at 150a. The district court applied a combination of the standards expressed in *Fraser*, 478 U.S. at 685, and *Morse* v. *Frederick*, 551 U.S. 393 (2007), and held that "as vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's rights in punishing her for it." App. 1, *infra*, 153a.

Court of Appeals Panel Opinion

A panel of the Third Circuit affirmed the district court's order, though on somewhat different grounds. See App. 1, *infra*, 75a-139a. The court of appeals concluded that "the profile at issue, though created off-campus, falls within the realm of student speech subject to regulation under *Tinker*" because of its potential to create substantial and material disruption *Id.* at 93a-96a. The court was "sufficiently persuaded that the profile presented a reasonable possibility of a future disruption," *id.* at 97a, in large part because it "contained undoubtedly offensive, potentially very damaging, and possibly illegal language, including insinuations that strike at the heart of McGonigle's fitness to serve in the capacity of a middle school principal." *Id.* at 102a.

Court of Appeals En Banc Opinion

The court of appeals granted the Snyders' motion for rehearing en banc and ultimately decided in favor of the Snyders on their First Amendment free speech claim.[2] App. 1, *infra*, 1a-74a. In an eight-to-six ruling, the court held that "the School District violated J.S.'s First Amendment free speech rights when it suspended her for creating the profile." *Id.* at 28a.

The court "assume[d], without deciding, that *Tinker* applies to J.S.'s speech in this case." App. 1, *infra*, 17a. The court then concluded that disciplining J.S. was unconstitutional because her web posting did not cause an actual disruption in school and because there were not "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." App. 1, *infra*, 21a (quoting *Tinker*, 393 U.S. at 514). The court rejected the School District's contentions that the profile could cause a disruption because it was accusatory and could "arouse[ ] suspicions among the school community about McGonigle's character because of the profile's references to his engaging in sexual misconduct." *Id.* at 27a. In the court's view, the profile was so outrageous that "no one could have taken it seriously," and therefore, the profile—contrary to the

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[2] The en banc court of appeals, like the panel, unanimously rejected respondents' Fourteenth Amendment substantive due process claim as well as their overbreadth and vagueness claims. See App. 1, *infra*, 33a-40a; *id.* at 107-115a. The court also indicated in a footnote that it "agree[d] with the appellants' arguments that [Pennsylvania statutory law] also barred the School district from punishing J.S. for her off-campus speech." *Id.* at 24a n.5.

views of school officials on the ground—did not have the potential to create a substantial disruption. *Ibid.* In addition, the court reasoned that if "Tinker's armbands" could not have justified a forecast of potential disruption, neither could the web posting here, "despite the unfortunate humiliation it caused for McGonigle," *id.* at 25a, and despite the fact that, as the court recognized, speech like that in this case "could damage the careers of teachers and administrators." *Id.* at 25a n.7. The court further suggested that Principal McGonigle, rather than preventing or containing disruption by acting quickly to sanction J.S., had actually "*exacerbated*" the disruption by disciplining her. *Id.* at 28a.

The court also rejected the School District's argument that J.S. could be disciplined under *Fraser* for her lewd and vulgar web post. The Third Circuit ruled categorically that "*Fraser* does not apply to off-campus speech." App. 1, *infra*, 30a. *Fraser* can thus never be summoned, the court explained, to "justify a school's punishment * * * for use of profane language outside the school, during non-school hours." *Id.* at 30a. The court of appeals remanded the case to the district court "to determine appropriate relief on" the First Amendment claim. *Id.* at 33a.

In an opinion for five of the eight judges in the majority, Judge Smith "address[ed] a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place." App. 1, *infra*, 40a (Smith, J., concurring). Noting that "[l]ower courts * * * are divided on whether *Tinker's* substantial-disruption test governs students' off-campus expression," *id.* at 41-42a, the concurring judges stated that they would join those courts that have held that *Tinker* does not apply to

off-campus speech. *Id.* at 42a. In their view, *Tinker* has a "narrow reach," *id.* at 42a, and extending it would lead to "ominous" results. *Id.* at 45a. Applying *Tinker* to a case like this one, the concurring judges argued, would allow schools to "regulate students' expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes substantial disruption at school," *id.* at 46a, and it might even allow school officials to regulate "*adult* speech uttered in the community" that causes disruption at school. *Id.* at 47a.

Judge Fisher, joined by five colleagues, filed a dissent, observing that the decision "causes a split with the Second Circuit," and, more importantly, "leaves schools defenseless to protect teachers and school officials" from "malicious and unfounded accusations about their character in vulgar, obscene, and personal language." App. 1, *infra*, 49a-50a (Fisher, J., dissenting). The dissenting judges explicitly endorsed the application of *Tinker* to off-campus speech, *id.* at 54a, and they disagreed with the majority's assertion that this Court's precedents "compel the conclusion that the School District violated J.S.'s First Amendment free speech rights." *Id.* at 51a (quoting *id.* at 16a). The dissent noted that "the Supreme Court has never addressed whether students have the right to make off-campus speech that targets school officials with malicious, obscene, and vulgar accusations." *Ibid.*

The dissent also emphasized that school officials could reasonably forecast potential disruption. App. 1, *infra*, 57a-70a. The dissent reasoned that the web post accusing Principal McGonigle of sexual misconduct with children, if not addressed, would disrupt classroom activities and undermine

McGonigle's authority and ability to do his job. *Ibid.* The dissent also rejected the majority's suggestion that the potential for disruption in this case was less than that in *Tinker*, observing that *Tinker* involved "peaceful and nonintrusive political speech," *id.* at 55a, whereas the speech in this case "targeted [the] principal and [his] family" and was "lewd, vulgar, and offensive." *Id.* at 56a.

The dissent further explained, App. 1, *infra*, 70a-71a, that the decision created a conflict with the Second Circuit's decision in *Wisniewski* v. *Board of Education of the Weedsport Central School District*, 494 F.3d 34 (2007). The *Wisniewski* court held that a school could punish a student's hostile online speech about his teacher, created away from school property, because it posed a reasonably foreseeable risk that it would come to the attention of school authorities and substantially and materially disrupt the work and discipline of the school. 494 F.3d at 38-39.

The dissent concluded by noting that, given the ubiquitous use of the Internet and social networking media among students, the "line between 'on-campus' and 'off-campus' is not as clear as it once was" and that the "majority's approach does not offer a promising way forward." App. 1, *infra*, 72a-73a. The dissent observed that "with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment." *Id.* at 73a.

2. Hermitage School District v. *Layshock*

Facts

Between December 10 and December 14, 2005, Justin Layshock, then a seventeen-year-old senior at Hickory High School, used his grandmother's home computer to create a MySpace profile of his principal, Eric Trosch. App. 2, *infra*, 3a. The profile contained a photograph of Trosch that Layshock had copied from the School District's website, as well as answers to MySpace survey questions. *Ibid.* The answers were attributed to Trosch and contained fictitious "admissions" of illegal drug use, excessive alcohol consumption, and lewd and criminal behavior. *Id.* at 3a-5a. In particular, the posting indicated that Trosch smoked marijuana, took a "big" number of drugs, was a "big steroid freak," a "big fag," and a "big whore." *Id.* at 4a.

The profile was accessible to all those students whom Layshock listed as "friends" on MySpace, and on December 15, Layshock used a computer during class to access the profile and show it to his classmates. App. 2, *infra*, 5a-6a. "[M]ost, if not all, of Hickory High's student body" eventually learned of the profile, and in mid-December 2005, three other students also posted "vulgar" and "offensive" profiles of Trosch on MySpace. *Id.* at 5a.

Trosch first learned of one of the profiles through his daughter, an eleventh-grade student at Hickory High School, and Trosch showed the profile to School District officials on December 12, 2005. App. 2, *infra*, 5a. For the next ten days, school officials attempted to restrict students' on-campus access to the profiles by disabling the school's connection to MySpace, limiting students' use of computers to areas where

Internet use could be supervised, and cancelling computer programming classes. *Id*. at 6a.

School District officials investigating the profiles eventually learned of Layshock's potential involvement, and, when confronted, Layshock admitted creating a profile. App. 2, *infra*, 7a. After an informal hearing, the School District found that Layshock's conduct violated several provisions of the Hermitage School District Discipline Code, including "[d]isruption of the normal school process; [d]isrespect; [and] [h]arassment of a school administrator via computer/internet." *Id*. at 7a-8a. The District imposed a ten-day out-of-school suspension. *Id*. at 8a.[3]

District Court Proceedings

The Layshocks filed suit under 42 U.S.C. § 1983 against the School District and several of its officials, claiming that the punishment imposed by the School District violated Justin's First Amendment right to freedom of speech. They sought compensatory damages, declaratory relief, and attorney's fees. App. 2, *infra*, 85a-86a, 102a.

The district court granted the Layshocks' summary judgment motion on the First Amendment claim.[4] App. 2, *infra*, 102a-103a. It held that there

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[3] Initially, the District also placed Layshock in the high school's alternative education program and banned his participation in extracurricular activities and the graduation ceremony, but the District removed these sanctions in exchange for the Layshocks' agreement to withdraw their request for a temporary injunction. App. 2, *infra*, 8a-10a, 10a n.9.

[4] The court held only the District liable on the First Amendment claim, App. 2, *infra*, 103a; it granted summary judgment to all the District *officials* on this claim. *Id*. at 102a-103a. The district court ruled for all defendants on the Layshocks' additional claims

was not "a sufficient nexus between Justin's speech and a substantial disruption of the school environment" to justify the punishment under *Tinker*, *id.* at 99a, and that "because *Fraser* involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech." *Ibid.*

Court of Appeals Panel Opinion

After the parties cross-appealed, a panel of the Third Circuit affirmed the district court's decisions on all claims. App. 2, *infra*, 65a-69a. It noted that the "School District does not dispute the district court's finding that its punishment of Justin was not appropriate under *Tinker*." *Id.* at 60a. It also rejected the District's argument that *Fraser* permitted discipline in this case, concluding that speech originating off campus can be punished only if "it results in foreseeable and substantial disruption of school." *Id.* at 65a.

Court of Appeals En Banc Opinion

The en banc court, in a unanimous opinion issued the same day as *Blue Mountain*, affirmed the district court's decision on the First Amendment issue.[5] App. 2, *infra*, 29a-30a. The court began by declining to apply *Tinker*, observing that the "School District is not arguing that it could properly punish Justin under the *Tinker* exception." *Id.* at 18a. The court

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that defendants violated their substantive due process rights and that the District's disciplinary policies were unconstitutionally vague and overbroad. *Id.* at 112a-114a.

[5] The Layshocks did not seek rehearing en banc on their other claims, and the en banc court reinstated the panel opinion's affirmance of summary judgment to the defendants on those claims. App. 2, *infra*, 11a n.11.

then declared that a *Fraser*-based argument must fail because "*Fraser* does not allow the School District to punish Justin for expressive conduct which occurred outside of the school context." *Id.* at 28a-29a.

Judge Jordan, joined by Judge Vanaskie, filed a concurring opinion to address "an issue of high importance on which we are evidently not agreed and which [has not] been resolved by either [*Blue Mountain*] or our decision here. The issue is whether [*Tinker*] can be applicable to off-campus speech. I believe it can, and no ruling coming out today is contrary." App. 2, *infra*, 30a-31a (Jordan, J., concurring). Judge Jordan agreed that *Tinker* did not control the *Layshock* case but emphasized that it ought to be "viewed as providing the governing rule of law in [*Blue Mountain*]." *Id.* at 32a. Whether *Tinker* can ever apply to speech that originates off campus, however, has been "thrown into question by the competing opinions that have emerged in en banc review." *Ibid.* The concurrence concluded by voicing the "worry that the combination of our decisions today in this case and in [*Blue Mountain*] may send an 'anything goes' signal to students, faculties, and administrators of public schools." *Id.* at 35a.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decisions Deepen A Split Over Whether And How The *Tinker* And *Fraser* Standards Apply To Online Student Speech

This Court has frequently recognized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and that the rights of

students must be applied in light of the special characteristics of the school environment." *Morse* v. *Frederick*, 551 U.S. 393, 396-397 (2007) (citation omitted). The First Amendment does not prohibit school administrators from restricting speech that "reasonably" leads them "to forecast substantial disruption of or material interference with school activities." *Tinker* 393 U.S. at 514 (1969). Furthermore, school authorities may discipline students for "offensively lewd and indecent speech." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986). Lower courts have split, however, on whether and how these principles apply to speech that originates off campus.

A. Lower Courts Are Split On Whether The *Tinker* Standard Applies To Speech Originating Off Campus

The "[l]ower courts * * * are divided over whether *Tinker*'s substantial-disruption test governs students' off-campus expression." App. 1, *infra*, at 41a-42a (Smith, J., concurring). The Second, Fourth, Seventh, Eighth, and Ninth Circuits, as well as the Supreme Court of Pennsylvania, apply the *Tinker* standard to student speech originating off campus. In *Doninger* v. *Niehoff*, for example, the Second Circuit applied *Tinker* to a student who created a derogatory blog about school authorities on her home computer. 527 F.3d 41, 48-50 (2008) (*Doninger I*); see also *Doninger* v. *Niehoff*, 642 F.3d 334, 347 (2d Cir. 2011) (*Doninger II*); *Wisniewski* v. *Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007) ("We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school.") (citation omitted).

Similarly, in a case where a student created from her home computer a webpage defaming a fellow student, the Fourth Circuit applied *Tinker*. *Kowalski* v. *Berkeley Cnty. Schs.*, No. 10-1098, 2011 WL 3132523, at *7 (July 27, 2011) ("[T]he School District was authorized by *Tinker* to discipline [the student], regardless of where her speech originated, because the speech was materially and substantially disruptive."), pet. for cert. filed October 11, 2011, No. 11-461. The Eighth Circuit has also applied the *Tinker* standard to speech originating outside of school. *D.J.M. ex rel. D.M.* v. *Hannibal Pub. Sch. Dist. #60*, 647 F.3d 754, 761 (2011) (holding that *Tinker* governs "conduct outside of school or a school sanctioned event"). Moreover, the Supreme Court of Pennsylvania applied *Tinker* to Internet speech originating from a student's home computer. *J.S. ex rel. H.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 868 (2002); see also *LaVine* v. *Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *Boucher* v. *Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 828-829 (7th Cir. 1998).

The Fifth Circuit, by contrast, has declined to apply *Tinker* to speech originating off campus. *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 620 (2004). Whether *Porter* creates a blanket rule or one tailored to its facts is unclear. Compare *Porter*, 393 F.3d at 615 n.22 (suggesting that *Porter* "is not in conflict" with cases applying *Tinker* to off-campus speech), with App. 1, *infra*, 42a (Smith, J., concurring) (citing *Porter* as evidence of a circuit split over the applicability of *Tinker*).

The en banc Third Circuit, on the other hand, has explicitly declined to decide whether *Tinker* ever applies to speech originating off campus. The *Blue*

Mountain court "assume[d], without deciding, that *Tinker* applie[d]" to the student's Internet speech. App. 1, *infra*, 17a. By leaving this crucial question unanswered, the Third Circuit's en banc decision conflicts with those other circuits that have resolved the issue. It also creates the possibility that whether *Tinker* will govern a case originating in Pennsylvania will depend on whether the case is filed in federal court, where a district court remains free to not apply *Tinker*, or in state court, where *Tinker* clearly governs by virtue of the Supreme Court of Pennsylvania's decision in *Bethlehem*, 807 A.2d at 868-869.

B. Lower Courts Are Also Split On How *Tinker* Applies In This Context

Courts are also divided on the amount of deference that should be afforded to school administrators who forecast potential disruption from online speech. In *Tinker*, this Court held that, in order to regulate a student's speech, school authorities need only be able to "reasonably * * * forecast substantial disruption." *Tinker*, 393 U.S. at 514. Most circuits closely follow *Tinker*'s lead and require only a reasonable forecast of disruption, not actual disruption. See, *e.g.*, *Nuxoll* v. *Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008) ("It is enough for the school to present facts which might reasonably lead school officials to forecast substantial disruption.") (citation omitted).

For example, the Second Circuit in both *Wisniewski* and *Doninger I* affirmed the schools' disciplinary decisions despite the absence of any evidence of actual disruption. *Wisniewski*, 494 F.3d at 39-40; *Doninger I*, 527 F.3d at 50. The court

instead required only that the online speech "foreseeably create a risk of substantial disruption within the school environment." *Doninger I*, 527 F.3d at 50 (quoting *Wisniewski*, 494 F.3d at 40). The Second Circuit's inquiry is directed at the potential effects of the speech, not the actual effects, and that commonsense inquiry considers the nature of the speech itself—whether, for example, it is directed at school officials and contains vulgar language. See *Doninger I*, 527 F.3d at 50-51.

Other courts have made it equally clear that schools are not obliged to sit on their hands while potentially harmful conduct germinates. The Eighth Circuit, in dealing with a student's potentially threatening instant messages, held that "[t]he First Amendment did not require the District to wait and see whether [a student's] talk about taking a gun to school and shooting certain students would be carried out." *D.J.M.*, 647 F.3d at 764. The Supreme Court of Pennsylvania has expressed the principle more generally: "[W]hile there must be more than some mild distraction or curiosity created by the speech, complete chaos is not required for a school district to punish student speech." *Bethlehem*, 807 A.2d at 868 (citation omitted). By requiring only that school officials point to evidence supporting the reasonableness of their forecast of disruption, these courts necessarily defer to the judgment of school officials on the issue of school discipline.

The Third Circuit, by contrast, affords school officials almost no deference. Instead, the Third Circuit essentially requires strong proof of actual disruption, not simply evidence indicating a potential for disruption. See App. 1, *infra*, 57a-70a (Fisher, J., dissenting). The majority in *Blue Mountain*, for

example, failed to defer to the judgment of school officials that accusations of sexual misconduct by a middle-school principal could easily cause disruption and therefore warrant a quick response. *Id.* at 59a-61a (Fisher, J., dissenting). The majority blithely asserted that "no one could have taken [the profile] seriously." *Id.* at 27a. But as the dissenting opinion observed, courts are hardly in a good position "to determine how schools should treat accusations of sexual misconduct and personal attacks on school officials." *Id.* at 66a (Fisher, J., dissenting). See also *Morse*, 551 U.S. at 427 (Breyer, J., concurring in part and dissenting in part) (warning against the dangers of interfering "with reasonable school efforts to maintain discipline").

As the judges dissenting in *Blue Mountain* noted, moreover, the Third Circuit's narrow standard "causes a split with the Second Circuit" regarding whether "off-campus hostile and offensive student internet speech that is directed at school officials" satisfies *Tinker*. App. 1, *infra*, 70a (Fisher, J., dissenting). Although the majority attempted to brush aside this conflict, see *id.* at 27a n.8, the plain fact is that *Blue Mountain* and other cases like it would come out differently were they litigated in the Second Circuit rather than the Third. The Second Circuit effectively presumes that that "off-campus hostile and offensive student internet speech that is directed at school officials" has the potential to cause substantial disruption. *Id.* at 70a (Fisher, J., dissenting). Conversely, the Third Circuit effectively presumes that unless and until serious disruption from such speech actually occurs, there is no reasonable basis for forecasting disruption. *Id.* at 23a-28a. Indeed, the split is even wider, as cases like

Blue Mountain would also come out differently in the Seventh and Eighth Circuits, as well as in the Supreme Court of Pennsylvania, which do not require "complete chaos," *Bethlehem*, 807 A.2d at 868 (citation omitted), before school officials are permitted to regulate student speech.

C. Lower Courts Are Divided Over Whether And How *Fraser* Applies To Speech Originating Off Campus

The Third Circuit has also split from other courts on the question of whether *Fraser*, which permits regulation of "offensively lewd and indecent speech," 478 U.S. at 685, applies to speech originating off campus. In *Blue Mountain*, the Third Circuit established a bright-line rule against the application of *Fraser* to speech originating off campus. App. 1, *infra*, 30a ("*Fraser*'s 'lewdness' standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours."). In *Hermitage*, the Third Circuit extended this bright-line rule to cover speech that makes its way onto campus, as Layshock's speech did when he shared with classmates his web post that called his principal a "big whore" and "big fag." App. 2, *infra*, 6a.

The Fourth Circuit and Supreme Court of Pennsylvania, by contrast, both have indicated that *Fraser* can apply to speech originating off campus, *Kowalski*, 2011 WL 3132523, at *7; *Bethlehem,* 807 A.2d at 867-868, whereas the Second Circuit has expressly left the question open. *Doninger I*, 527 F.3d at 49-50. In *Kowalski*, a student created a vulgar MySpace page from her home computer and invited classmates to view it. *Kowalski*, 2011 WL

3132523, at *1-2. Although it applied *Tinker*, the Fourth Circuit thought it obvious that *Fraser* could also apply to speech that originates off campus. *Id.* at *7 ("To be sure, a court could determine that speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them was in fact in-school speech. In that case * * * its regulation would be permissible * * * under *Fraser*."). The *Kowalski* court also acknowledged that the Fourth and Third Circuits disagree regarding the applicability of *Fraser* to speech originating off campus. *Ibid.*

Similarly, in *Bethlehem*, a student created a website on his home computer that "contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal." 807 A.2d at 850-852. Although the Supreme Court of Pennsylvania applied *Tinker*, it too indicated that *Fraser* could be applied to speech originating off campus. *Id.* at 867-868.

Courts of appeals and a state supreme court are therefore divided over whether and how *Tinker* applies to online speech, and they are also divided over whether and how *Fraser* applies to online speech. These conflicts are especially acute in Pennsylvania, the largest state in the Third Circuit, where the outcome of a student speech dispute could very well depend on whether suit is filed in federal or state court.

II. These Cases Present Important And Pressing Issues Regarding The Rights And Responsibilities Of Millions Of Students And School Officials

Despite this Court's periodic guidance, questions regarding the First Amendment's limitations on the disciplinary power of school officials have lingered. Especially vexing have been questions involving speech that originates off campus. Compare, *e.g.*, *Boucher* v. *Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 828-829 (7th Cir. 1998) (upholding school's punishment of a student for creating an underground newspaper), with *Thomas* v. *Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979) (striking down a school's punishment of students who created an underground newspaper). In the "underground" newspaper cases of the past half century, school districts and courts repeatedly struggled to find the right balance between students' First Amendment rights and the authority of school administrators to maintain order. See William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 Iowa L. Rev. 505, 520-524 (1989).

With the advent of the Internet, the clash between student rights and school authority has become ubiquitous and acute, for the simple reason that the Internet has become omnipresent. In fact, nearly all American teenagers use the Internet, App. 1, *infra*, 72a (Fisher, J., dissenting) (citing a study showing that 93 percent of teenagers use the Internet), and every public school has Internet access. U.S. Dep't of Educ., *Educational Technology in U.S. Public Schools: Fall 2008*, at 2 (2010), available at http://nces.ed.gov/pubs2010/ 2010034.pdf.

Despite the benefits of modern communication tools, the new technology "can [also] be a potent tool for distraction and fomenting disruption" in schools. App. 2, *infra*, 36a (Jordan, J., concurring). Students have used the Internet not only to belittle or humiliate school administrators, as was the case here. They have also used it in the equally if not more disturbing practice of peer harassment, otherwise known as "cyberbullying." See Dianne L. Hoff & Sidney N. Mitchell, *Cyberbullying: Causes, Effects, and Remedies*, 47 J. of Educ. Admin. 652, 652-653 (2009).

As the dissenting opinion in *Blue Mountain* observed, "these forms of online personal attacks by students occur with some degree of frequency." App. 1, *infra*, 61a n.3 (citing studies indicating that as many as one in five students have been the targets of cyberbullying). Cyberbullying can have devastating effects on students, including academic problems, Sameer Hinduja & Justin W. Patchin, *Offline Consequences of Online Victimization: School Violence and Delinquency*, 6 J. of Sch. Violence 89, 89, 95 (2007); truancy, *id.* at 92–93; feelings of depression, *id.* at 93; the potential for violent responses, *ibid.*; and increased chances of suicide, Thomas Wheeler, *Facebook Fatalities, Social Networking, and the First Amendment*, 31 Pace L. Rev. 182, 182-184 & 183 n.8 (2011) (describing reported incidents where students committed suicide after being relentlessly bullied online by their peers). See also *Kowalski*, 2011 WL 3132523, at *6 (describing scope and severe consequences of cyberbullying and the duty of schools to protect students).

Despite the prevalence of student online speech and disputes concerning it, the legal standards governing such speech remain clouded by uncertainty and confusion. As one court noted, "[W]hen it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles." *Doninger* v. *Niehoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009), aff'd in part, rev'd in part, 642 F.3d 334 (2d Cir. 2011) (citation omitted). Across the nation, school administrators face these issues "daily and often feel they have little legal advice or precedent to guide them in their decision making." Michelle R. Davis, *Schools Tackle Legal Twists and Turns of Cyberbullying*, Educ. Wk's Digital Directions, Winter 2011, at 28, 29, available at http://www.edweek.org/dd/articles/2011/02/09/02cyberbullying.h04.html.

The ubiquity of these disputes is also evident from the dozens of cases filed in federal court involving this issue, which represent only the tip of the iceberg. See, *e.g.*, *Kowalski*, 2011 WL 3132523, at *8 (collecting and discussing relevant federal cases). In fact, within just two months of the Third Circuit's decisions below, three other courts issued opinions on this issue. Compare *D.J.M.*, 647 F.3d at 766 (holding that the school did not violate the student's free speech rights), and *Kowalski*, 2011 WL 3132523 at *8-9 (rejecting the Third Circuit's approach and upholding a school's punishment of a student who created a website off campus that was aimed at an on-campus audience), with *T.V.* v. *Smith-Green Cnty. Sch. Corp.*, No. 109-CV-290-PPS, 2011 WL 3501698, at *11, *14 (N.D. Ind. Aug. 10, 2011) (citing the Third

Circuit's opinions and finding that the school violated the student's First Amendment right by punishing off-campus speech). As these most recent cases illustrate, this issue is not going to disappear, nor is it one where consensus will emerge without this Court's intervention.

In addition to increasing the volume of off-campus speech cases, the Internet has also increased their complexity. Because the Internet makes off-campus speech accessible on campus, "[t]he line between 'on-campus' and 'off-campus' speech is not as clear as it once was." App. 1, *infra*, 73a (Fisher, J., dissenting). Indeed, "*Tinker's* simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by * * * complex multi-media web site[s], accessible to fellow students, teachers, and the world." *Bethlehem*, 807 A.2d at 864.

The nature of the Internet makes it unrealistic to rely solely on the geographic origins of speech in order to determine the appropriate boundaries of school discipline. As the Fourth Circuit noted in a case where a student made a lewd website about a fellow student, the student may have "pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment." *Kowalski*, 2011 WL 3132523, at *7. Courts can thus no longer "sidestep the central tension between good order and expressive rights by leaning on property lines." App. 2, *infra*, at 34a (Jordan, J., concurring). Because modern technology has given students the opportunity to "engineer egregiously disruptive events" from off campus, *id.*, school administrators need guidance regarding the

circumstances under which they may appropriately discipline students for speech that originates online.

School administrators, moreover, need that guidance sooner rather than later. They currently face an untenable dilemma. On the one hand, they might incur legal liability under state and federal laws if they fail to prevent online bullying or harassment based on sex, race, ethnicity, or disability. On the other hand, if they take such action, they face potential legal liability (not to mention protracted and expensive litigation) if they are ultimately deemed to have transgressed the now murky line that marks out protected student speech.

As for the first horn of this dilemma, several federal laws place an affirmative duty upon school officials to address bullying and harassment. See 20 U.S.C. § 1681(a); 42 U.S.C. § 2000d *et seq.*; 29 U.S.C. § 794. Nothing in these laws or their implementing regulations indicates that school administrators are immune from liability if harassment or bullying occurs, with their knowledge, online. To the contrary, the Department of Education has instructed school districts that they could be held liable under Title IX for failing to discipline students who "create e-mails or Web sites of a sexual nature." U.S. Dep't of Educ., Office of Civil Rights, *Dear Colleague Letter: Bullying and Harassment* 6 (Oct. 26, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (*Dear Colleague*); see also *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 646-647 (1999) (holding that school boards may be liable under Title IX when "deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority").

Many states have also passed laws to respond to the increase in online harassment. Sameer Hinduja & Justin W. Patchin, Cyberbullying Research Center, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies,* 1 (2011), available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (noting that 46 states have anti-bullying laws, 34 of which include electronic harassment). Some of these laws explicitly require schools to respond to online harassment. For example, Massachusetts's anti-harassment law mandates that schools address bullying, regardless of whether such bullying is on school property "or through the use of technology or an electronic device that is not owned, leased, or used by the school district." Mass. Gen. Laws Ann. ch. 71, § 37O(b) (West 2011). Similarly, New Hampshire requires schools to discipline students who engage in "cyberbullying" behavior if it "occurs on, or is delivered to, school property" or if it "occurs off of school property" and "interferes with a pupil's educational opportunities." N.H. Rev. Stat. Ann. 193-F:4 (2011).

More generally, as this Court has recognized repeatedly, school officials have a duty to ensure a safe and orderly environment that is conducive to learning. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 339-340 (1985); see also *id.* at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves."); *Morse*, 551 U.S. at 408 (recognizing a school's strong interest in "working to

protect those entrusted to their care from the dangers of drug abuse"). In order to protect students and preserve an atmosphere conducive to learning, school officials must have at least some authority to respond to threats, harassment, or intimidation that begins online, as it would deny reality to conclude that online threats, bullying, or harassment do not have an impact on the school environment.

The difficulty is that, given the current legal uncertainty, school administrators cannot possibly know how far their authority extends when it comes to online speech. Even the most basic questions remain unanswered. Can school officials ever discipline students for speech that originates off campus? If they can, under what circumstances? Does the Constitution grant students blanket immunity for online speech that is not disruptive but is nonetheless lewd, vulgar, and directed at other students, teachers, or principals?

Without answers to these fundamental questions, school administrators face a minefield of legal responsibility and the prospect of lengthy and costly litigation. Indeed, this dilemma is illustrated perfectly by two conflicting directives from the U.S. Department of Education, one of which instructs schools to respond quickly to harassment and bullying and the other of which warns schools—without any more guidance—not to violate the First Amendment when doing so. Compare *Dear Colleague* 2 (detailing potential liability schools face for not responding to bullying), with *Dear Colleague* 2 n.8 ("Some conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.").

This legal uncertainty generates a tremendous amount of distraction, inefficiency, and anxiety, consuming school resources at a time when already limited school budgets are shrinking. Time, resources, and attention are diverted on a daily basis from the business of educating students to puzzling about the legal limits of school disciplinary authority. See Davis, Educ. Wk's Digital Directions, at 30-32. Even more harmful, however, is the paralysis that legal uncertainty can induce and the resulting threat to safety that arises when school officials fail to act for fear of lawsuits.

III. The Decisions Below Are Wrong

The Third Circuit's decisions should not be permitted to stand. Four errors stand out.

1. The court's first and most basic misstep was its failure to decide that *Tinker* governs online speech that has the potential to disrupt the work or discipline of the school. As explained above, see pp. 22-29, *supra*, guidance on this issue is crucial, and the Third Circuit's failure to decide the basic question of *Tinker*'s applicability leaves school administrators and lower courts to guess about the legal standard.

Nothing in this Court's precedents, moreover, indicates that the First Amendment renders school officials powerless to address vulgar and malicious speech that targets members of the school community and has an impact on campus. The Third Circuit was wrong to suggest the contrary by refusing to decide whether *Tinker* could ever apply to such speech. The situation is even worse in Pennsylvania because, while federal courts may or may not apply *Tinker* to online speech, state courts have been clearly instructed to do so. See pp. 17, 21, *supra*.

2. The Third Circuit also placed far too much weight on the physical origins of the speech. In *Blue Mountain*, the majority promptly noted that J.S. and K.L. created the page mocking McGonigle on a computer in J.S.'s parents' home. App. 1, *infra*, 4a. The issue is even more central to the *Hermitage* opinion. The court repeatedly made reference to Layschock's composition of the profile from his grandmother's home, suggesting that disciplining him for speech that made its way onto campus would stretch state authority "into Justin's grandmother's home and reach[ ] Justin while he is sitting at her computer." App. 2, *infra*, 2a-3a, 22a.

This approach fails to recognize that the "line between 'on-campus' and 'off-campus' speech is not as clear as it once was." App. 1, *infra*, 73a (Fisher, J., dissenting). The fact that Layshock pressed buttons on a keyboard while at his grandmother's home cannot be, as the Third Circuit's opinion suggests, the end of the inquiry, just as the fact that students might ingest drugs off campus does not mean that schools are powerless to respond when the school environment is threatened. See, *e.g.*, *Bd. of Educ.* v. *Earls*, 536 U.S. 822 (2002). Indeed, it is worth noting that the Third Circuit seems to take an asymmetric approach to physical space. While the *Hermitage* opinion is replete with anxiety concerning the potential intrusion of school authority into the home, the court seemed uninterested in the fact that the speech came onto campus when Layshock accessed the profile on a school computer and showed it to his classmates. See App. 2, *infra*, 6a.

3. The Third Circuit also failed to afford school officials the sort of deference that this Court, on numerous occasions, has indicated is necessary in the

context of school discipline. In *Tinker* itself, this Court emphasized that while schools strive to inculcate the public virtues requisite for democracy, including free expression, they must do so while maintaining control over the educational environment. See *Tinker*, 393 U.S. at 507. Because of this need to balance speech rights and the discipline of the school, the Court did not require officials to wait until a substantial disruption occurred before taking corrective action. Rather, they need only show "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities." *Id.* at 514. The Third Circuit itself recites this standard, adding that the School District need not show an absolute certainty of substantial disruption. App. 1, *infra*, 21a.

Despite this recitation, the Third Circuit empties the words of meaningful content by failing to give any deference to the judgment of school officials. See pp. 18-20, *supra*. In *Blue Mountain*, for example, Principal McGonigle responded quickly to contain the potential disruption from J.S.'s malicious web post falsely accusing him of sexual misconduct. Instead of praising him, however, the Third Circuit accused McGonigle of *causing* disruption by disciplining J.S., App. 1, *infra*, 27a, implicitly suggesting that when students falsely accuse their principal of grossly improper, lascivious misconduct, the proper response is to *do nothing*.

To second-guess and hamstring school officials like this vitiates the recognition by this Court, from *Tinker* forward, that school officials must retain sufficient authority to keep order, and that courts should respect the reasonable educational judgments of school officials. See, *e.g.*, *T.L.O.*, 469 U.S. at 339

("Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.") (quoting *Goss* v. *Lopez*, 419 U.S. 565, 580 (1975)).

The Third Circuit also took an exceedingly narrow view of what counts towards creating a substantial disruption. In both cases below, the court basically began and ended its analysis by considering whether students disrupted in-class activity by viewing or discussing the profiles. App. 1, *infra*, 9a-10a, 23a-28a; App. 2, *infra*, 6a, 23a, 28a-29a. Disruption can also occur, however, if teachers or principals are unable to perform their jobs because their authority or, indeed, integrity has been undermined.

In *Blue Mountain*, for example, the student's web post accused the principal of "fucking in [his] office" and "hitting on students and their parents," App. 1, *infra*, 5a, and the web page itself hinted at pedophilia in the URL address: "kidsrockmybed." *Id.* at 50a, 59a (Fisher, J., dissenting). Such scandalous accusations have the potential to disrupt classroom activities, for sure. They also have the potential to undermine the principal's ability to do his job by raising questions among students and parents alike about the principal's character. See *id*. at 51a, 58a-61a, 71a-72a (Fisher, J., dissenting). At the very least, such character attacks divert school resources towards resolving and clarifying such controversies. See, *e.g.*, *Doninger II*, 642 F.3d at 341. If left unchecked, they "can have a snowballing effect, in some cases resulting in 'copycat' efforts by other students." *Kowalski*, 2011 WL 3132523, at *8. Indeed, copycats occurred in the *Hermitage* case. See App. 2, *infra*, 5a. The attacks can also take a substantial personal toll on the school officials

themselves, making it less likely that they will be able to provide quality instruction to students. App. 1, *infra*, 61a-64a (Fisher, J., dissenting).

4. Finally, the Third Circuit was wrong to declare that *Fraser* can never apply to speech that originates outside of the school or school-sponsored events, even if such speech makes its way onto campus. See App. 1, *infra*, 29a-32a; App. 2, *infra*, 23a-30a. The Third Circuit relied on a statement in *Morse*, in which the Court indicated that had Fraser given his speech outside of the "school context," it would have been protected. App. 1, *infra*, 30a n.12 (quoting *Morse*, 551 U.S. at 405). However, neither in *Morse* nor in any other case has this Court had occasion to define the outer boundaries of the "school context." The Third Circuit erred by simply assuming that any and all speech that originates off campus is outside of the "school context" for purposes of *Fraser*—even when such speech, like Layshock's, makes its way onto campus. It is especially odd that the Third Circuit would rely upon *Morse* to support its categorical rule that *Fraser* can never apply to speech that originates off campus. *Morse*, after all, makes clear that the "school context" is not confined to the physical boundaries of the school yard, and the Court also endorsed the school's interest in preventing drug abuse regardless of where it might occur. See *Morse*, 551 U.S. at 407-408.

The Third Circuit's repeated reliance on the geographical origins of speech is too facile. Under the Third Circuit's approach, it is entirely permissible for a student to attack school administrators with lewd, vulgar, and malicious emails so long as they originate a foot outside the school property line and other students do not become aware of the exchange and

cause a substantial disruption. This Court's precedents neither command nor condone such an intolerable result.

IV. These Cases Present An Ideal Vehicle to Resolve Both Questions Presented

The decisions below offer an ideal opportunity for this Court to resolve important and pressing issues regarding student online speech. The cases squarely present two questions: whether and how *Tinker* applies to online speech, and whether and how *Fraser* applies to online speech. Taking the two cases together offers the Court the full opportunity to address both questions and the opportunity to consider those questions in two different but complementary factual contexts. In *Blue Mountain*, for example, J.S.'s web posting did not come "on campus" until the principal requested a printout, while in *Hermitage*, Layshock accessed the offending profile while in class.

These issues are ripe for review. There are no procedural, jurisdictional, or other obstacles to this Court's resolution of the First Amendment issues. Unlike the *Doninger II* case, moreover, there are no questions of qualified immunity that might complicate the Court's reaching the underlying merits of the constitutional questions. See Petition for Writ of Certiorari at 1, 10, *Doninger* v. *Niehoff*, No. 11-113, 2011 WL 3151990. And unlike *Kowalski*, these cases squarely present both the *Tinker* and *Fraser* questions. See Petition for a Writ of Certiorari at *i*, 12-13, *Kowalski v. Berkeley Cnty. Schs.*, No. 11-461.

The various opinions of the en banc Third Circuit fully explore the questions of *Tinker*'s and *Fraser*'s

applicability to online speech. Moreover, as the fractured opinion in *Blue Mountain* indicates, and the decisions from other courts confirm, resolution of these pressing questions requires this Court's intervention. There is no need to allow this issue to percolate further, and, as described, there are great costs to allowing the current legal uncertainty in the Third Circuit and elsewhere to continue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID T. GOLDBERG
Donahue & Goldberg LLP
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

JAMES E. RYAN
Counsel of Record
DANIEL R. ORTIZ
University of Virginia
School of Law Supreme
Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924–3572
jryan@virginia.edu

JONATHAN P. RIBA
Sweet, Stevens, Katz &
Williams LLP
331 E. Butler Avenue
New Britain, PA 18901
(215) 345-9111

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave.,
N.W., Suite 500
Washington, DC 20004
(202) 639–6518

ANTHONY G. SANCHEZ
Andrews & Price LLC
1500 Ardmore Blvd.,
Suite 506
Pittsburgh, PA 15221
(412) 243-9700

MARK T. STANCIL
Robbins, Russell,
Englert, Untereiner &
Sauber LLP
1801 K Street, N.W.,
Suite 411
Washington, DC 20006
(202) 775–4520

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