UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-4465

JUSTIN LAYSHOCK, a minor by and through his parents,
DONALD LAYSHOCK AND CHERYL LAYSHOCK,
individually and on behalf of their son,
Plaintiff-Appellee/Respondent,

v.

HERMITAGE SCHOOL DISTRICT, KAREN IONTA, District Superintendent, ERIC W. TROSCH, Principal Hickory High School, CHRIS GILL, Co-Principal Hickory High School, all in their official and individual capacities,
Defendants-Appellants/Petitioners.

On Appeal From The Judgment Of The United States District Court
for The Western District of Pennsylvania Dated November 14, 2007
At Civil Action No. 06-00116

APPELLEE'S ANSWER IN RESPONSE TO PETITION FOR REHEARING EN BANC

Kim M. Watterson
Richard T. Ting
William J. Sheridan
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288.3131

Counsel for Appellee/Respondent

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There is no need for this court to rehear en banc the unanimous panel decision, which faithfully applied U.S. Supreme Court and Third Circuit precedent. This case involves a student's off-campus posting on the Internet, from his grandmother's computer, of a fake profile on MySpace.com mocking his high school principal.[1] The panel correctly determined that a school district cannot "punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event."[2] In reaching this decision, the panel applied well-established law showing that a school district's ability to punish lewd, vulgar, or profane speech under *Bethel School District No. 403 v. Fraser*[3] does not extend to speech outside of school.[4]

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1 *Layshock v. Hermitage Sch. Dist.*, No. 07-4465, slip op. at 6-10 (3d Cir. Feb. 4, 2010) (hereafter cited as "Slip Op.").

2 *Id.* at 5.

3 478 U.S. 675 (1986).

4 *See* Slip Op. at 40 n.23 (explaining that *Saxe v. State College Area School District*, 240 F.3d 200, 213 (3d Cir. 2001), clearly interpreted *Fraser* to apply only to in-school speech).

I. The Panel Decision Does Not Implicate Any Questions Of Exceptional Importance

A case involving off-campus speech that "disturb[s] the school environment" may present a question of exceptional importance. But the panel decision implicates no such question, because Appellant/Petitioner Hermitage School District ("the School District") did not challenge the district court's finding that Appellee Justin Layshock's speech did not disrupt the school environment.[5] And the School District, in presenting what it believes is a question of exceptional importance, does not allege that the panel's decision involves the question of whether a school may punish off-campus speech that disturbs the school environment.

Instead, the School District's Petition for Rehearing En Banc presents the question of whether *Fraser* applies "to off-site electronic speech that is aimed at school personnel and accessed on school property by its originator."[6] The U.S.

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[5] Slip Op. at 38; Pet. for Reh'g at 9.

[6] The School District's description of the issue includes the idea that Justin accessed the profile on school property. Pet. for Reh'g at 1. But the panel concluded that the School District punished Justin for his off-campus conduct. Slip. Op. at 46-47; *see also Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 601 (W.D. Pa. 2007) (finding that Justin was punished for off-campus conduct).

Supreme Court's most recent student speech rights case, *Morse v. Frederick*,[7] forecloses application of *Fraser* to out-of-school speech. The *Morse* court noted that *Fraser* drew an explicit distinction between in-school and out-of-school speech, and the Court emphasized the strict limits on a school district's authority to punish a student under *Fraser*'s rationale: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'"[8] The Court recognized that lewd and vulgar speech—which can be proscribed in school—is constitutionally protected outside the school setting.[9] Consequently, the panel's conclusion that the School District had no authority to punish Justin for a "lewd and profane" profile he created at home and distributed to a few friends, but did not distribute in school, simply follows *Morse*.

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7 551 U.S. 393 (2007)

8 551 U.S. at 405 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (citations omitted).

9 *See Cohen v. California*, 403 U.S. 24 (1971); *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

The School District, therefore—not surprisingly—agrees that *Fraser* does not apply to off-campus speech.[10] And the School District presents no precedent from the U.S. Supreme Court or this Court that justifies—or even suggests—creating a special exception to allow *Fraser* to extend to off-campus speech that happens to be on the Internet.

A. Internet Speech Is Entitled To Unqualified First Amendment Protection

The School District suggests that Internet speech is somehow deserving of less First Amendment protection because "[t]he Internet has become a preferred method of communication for many," schools provide "materials and information on-line," and "[i]nformally, for many members of the school community, students, parents, teachers, and school administrators, the Internet, via social network sites and other modes of electronic communication, is the primary method of communicating to and about the school community."[11]

Contrary to the School District's suggestion, the widespread use of the Internet does not diminish constitutional protection for online expression. In

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[10] Pet. for Reh'g at 5 ("[T]he determination of whether speech is political (and *Tinker* is applied) or vulgar and/or lewd (and *Fraser* is applied) is unnecessary until the location of the speech is determined.").

[11] *Id.* at 7.

discussing Internet speech in *Reno v. American Civil Liberties Union*, the Supreme Court explained that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[12] Thus, speech made on the Internet receives *unqualified First Amendment protection.*

In fact, the *Reno* Court took an approach opposite to the one the School District advocates, emphasizing the reach and availability of the Internet as important factors in its decision to strike down federal regulation of Internet speech.[13] The First Amendment does not permit the government to regulate a particular medium of speech solely because that medium is *more effective* than others. And the greater potential for harm that results from the effectiveness of Internet speech likewise cannot justify greater authority to censor.[14] Indeed, courts

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12 521 U.S. 844, 870 (1997).

13 The *Reno* Court recognized that the Internet's "relatively unlimited, low-cost capacity for communication of all kinds" allows any person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870.

14 *Compare Smith v. Doe*, 538 U.S. 84, 99 (2003) (upholding Internet posting of sex-offender-conviction information as non-punitive, despite increased "public shame" and "humiliation" caused by Internet's geographic reach that "is greater than anything which could have been designed in colonial times"), *with* Pet. for Reh'g at 3-4 ("It is undeniable that a student can more easily demean and injure the reputation of a member of the school community with vulgar and lewd language ... by way of the Internet than by any other means, including making pronouncements in a school building....

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turn a wary eye on government regulations that force a speaker to use a less effective medium of expression.[15]

B. The School District Does Not Obtain Authority To Punish Justin's Off-Campus Speech Because It Is "Aimed Specifically At A School District Administrator"

Recognizing that *Fraser* is limited to on-campus speech,[16] the panel correctly determined that off-campus speech does not become "on-campus speech" because it is "aimed at the School District community and the Principal and was accessed on campus by Justin [and] [i]t was reasonably foreseeable that the profile would come to the attention of the School District and the Principal."[17] The panel distinguished the non-binding authority cited by the School District, noting that

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[A] pronouncement made on the Internet can be directed to the entire school community and beyond, with an unlimited lifespan.").

15 *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (residential sign ordinance violated First Amendment with regard to noncommercial speech because it restricted speaker's audience, restricted effectiveness of speech, and relegated speakers to far more expensive means of communication); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (reduced effectiveness of message was important factor in deciding that content-neutral regulation failed to leave open ample alternative avenues for speech); *cf. Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004) (decision to allow less effective message rather than speaker's chosen message can indicate viewpoint discrimination).

16 The panel noted that this Court in *Saxe*, 240 F.3d at 213, correctly interpreted *Fraser* to apply only to in-school speech. Slip Op. at 40 n.23.

17 Slip Op. at 38.

those cases each "involved off campus expressive conduct that resulted in a substantial disruption of the school, and the courts allowed the schools to respond to the substantial disruption that the student's out of school conduct caused."[18]

And it is important to note that the School District did not punish Justin because of his on-campus behavior, but rather for his off-campus conduct of creating the profile.[19] The panel cited the School District's concession that it "was relying on the fact that Justin created the profile."[20] The panel did not question the district court's conclusion that "the actual charges made by the School District were directed only at Justin's off-campus conduct" and that "there [was] no evidence that the school administrators even knew that Justin had accessed the profile while in school prior to the disciplinary proceedings."[21]

The panel decision also is consistent with Supreme Court precedent regarding school speech. The Supreme Court has never held that schools have authority over out-of-school speech because it is "aimed at school personnel,"

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18 *Id.* at 40-41.

19 Slip Op. at 46-47.

20 *Id.* at 47.

21 *Layshock*, 496 F. Supp. 2d at 601.

whatever that may mean.[22] From the Court's first student-speech decision almost forty years ago holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[23] to the Court's 2007 decision reaffirming this core principle,[24] each of the Court's four student-speech cases has focused on school officials' control over *in-school* speech. And in each of these cases, the Supreme Court justified limits on students' in-school speech rights based specifically on the special characteristics of the school environment.[25]

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22 Under the School District's broad conception of speech "aimed at school personnel," a student's letter to the editor of the local newspaper criticizing school officials could be characterized as "aimed at school personnel" and could thus be subject to punishment by the School District.

23 *Tinker*, 393 U.S. at 506, 511.

24 *Morse*, 551 U.S. at 396.

25 In upholding a school's punishment of a student for unfurling a banner advocating drug use during a school-sponsored field trip, the *Morse* Court recognized that "the rights of students must be applied in light of the special characteristics of the school environment." *Id.* at 397 (citations and quotations omitted). In upholding censorship of school-sponsored student newspapers, the Court noted that "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board". *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (emphasis added). In *Fraser*, the Court held that lewd and profane speech "has no place" in a "high school assembly or classroom." 478 U.S. at 686-87. And *Tinker*'s holding that schools can prohibit students from engaging in speech at school if it will cause a material and substantial disruption to the school day recognized school officials' "comprehensive authority ... to prescribe and control conduct *in the schools*." 393 U.S. at 508 (emphasis added).

The Court, however, has never sanctioned any limitation on students' free-speech rights outside of the school environment.

Tinker and its progeny thus reflect a careful balancing of student speech rights and the needs of the "public school setting." Those cases grant school officials the limited authority to punish speech under certain circumstances—even if that speech otherwise would be constitutionally protected—because of the need to "facilitate education and to maintain order" in a school environment.[26] This rationale is not implicated when a student expresses himself in the home—far from the public school setting and during a time when the child is not under school officials' supervision. Nothing in *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* authorizes the expansion of a school district's authority over student speech uttered outside of the schoolhouse gates simply because it is "aimed at school personnel."

Because the panel faithfully applied the precedent of the U.S. Supreme Court and this Court, the panel decision implicates no questions of exceptional importance.

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[26] *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002).

II. Any Conflict With *J.S. v. Blue Mountain School District* Results From The *J.S.* Decision's Conflict With Precedent From The U.S. Supreme Court And This Court

The School District asserts, based on arguments it did not make to the panel, that the unanimous panel decision conflicts with another panel's 2-1 decision in *J.S. v. Blue Mountain School District*,[27] issued the same day.[28] The School District acknowledges that it only presented an argument under *Fraser* to the panel in this case, while the *J.S.* panel applied *Tinker* and declined to address *Fraser*.[29] The School District nonetheless contends that based on issues it "did not specifically argue," the two panel decisions "apparently conflict."[30]

Regardless of what an en banc court might conclude regarding the question in *J.S.* of whether and under what circumstances *Tinker* applies to out-of-school speech, that conclusion would not change the outcome here. The School District cannot create a conflict between two decisions based on issues that one decision did not address. And the School District cannot create a conflict based on its unsupported allegation that the "[d]isruption in this case actually exceeds the

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27 No. 08-4138, slip op. (3d Cir. Feb. 4, 2010).

28 Pet. for Reh'g at 8-10.

29 *Id.* at 8-9.

30 *Id.* at 9-10.

disruption" in *J.S.*,[31] particularly because the School District did not challenge the district court's finding that Justin's off-campus speech did not disrupt the school environment.[32] Moreover, as the panel opinion explains, the School District punished Justin for the creation of the profile, not for any disruption.[33]

The School District's decision not to press the *Tinker* disruption justification on appeal is not surprising, because the district court's finding of no substantial disruption[34] was unequivocal and amply supported by the record.[35] The district court's thorough recitation of the facts noted that (1) a teacher was "unaware of [students'] activity" when Justin and his friends looked at the profile; (2) the co-principal "did not personally witness any disruptive behavior in the school"; (3) "[s]everal teachers made revisions to their lesson plans," but students' "comments did not prevent [a particular teacher] from teaching"; (4) the response by the school's technology administrator "did not otherwise prevent him from being able to complete his tasks"; (5) the school district was unable to determine which of the four extant MySpace.com profiles was at issue; and finally, (6)

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31 *Id.* at 10.

32 Slip Op. at 38.

33 Slip Op. at 46-47.

34 *Layshock*, 496 F. Supp. 2d at 594.

35 *Id.* at 592-93.

"[s]ome of the student discussion related not to the profiles themselves, but to the administration's investigation and punishment of Justin."[36] Viewing all of these facts in the light most favorable to the School District, the district court concluded that the "fully developed summary judgment record ... demonstrates that the disruption of school operations was not substantial."[37]

The district court was willing to "assume arguendo[] that Justin's profile [was] lewd, profane, and sexually inappropriate,"[38] but it still found that "a reasonable jury could not conclude that the 'substantial disruption' standard could be met on this record [because] the actual disruption was rather minimal—no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."[39] In the face of this well-supported finding, the School District did not argue on appeal that Justin's speech created a substantial disruption, and the panel therefore did not address the issue. Consequently, the question in *J.S.* does not apply in this case, *i.e.*, whether the *Tinker* substantial disruption justification can be applied to punish off-campus speech, and if so, what a school district needs to show in order to satisfy the standard.

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36 *Id.*

37 *Id.* at 594.

38 *Id.* at 599.

39 *Id.* at 600.

In sum, the panel decision in this case faithfully applied U.S. Supreme Court precedent and this Court's prior decisions. The School District does not contend otherwise, and only argues that the panel decision somehow conflicts with *J.S.*[40] To the extent any disagreement exists between the two panel decisions, the inconsistency results from a conflict between the *J.S.* decision and prior decisions of the U.S. Supreme Court and this Court. Resolution of that conflict—on the *Tinker* substantial disruption question—would not and could not alter the outcome in this case.

CONCLUSION

Because the panel decision faithfully applied established precedent of the U.S. Supreme Court and this Court, Appellant/Petitioner Hermitage School District's Petition for Rehearing En Banc should be denied.

Respectfully Submitted,

s/ Kim M. Watterson
Kim M. Watterson
Richard T. Ting
William J. Sheridan
REED SMITH LLP
225 Fifth Avenue
Pittsburgh, PA 15222
Phone: (412) 288.3131

Counsel for Appellee/Respondent

Dated: March 19, 2010

[40] Pet. for Reh'g at 8-10.

CERTIFICATE OF SERVICE

Kim M. Watterson, one of the attorneys for Appellee, hereby certifies that:

I caused the foregoing Appellee's Answer in Response to Petition for Rehearing En Banc to be electronically filed this 19th Day of March 2010 via the Court's electronic filing system. The following counsel of record will be electronically served via the Notice of Docket Activity generated by the Court's electronic filing system: Anthony G. Sanchez, Esquire, Andrews & Price; Christina Lane, Esquire, Andrews & Price; Sean A. Fields, Esquire, Pennsylvania School Boards Association; Joanna J. Cline, Esq., Pepper Hamilton; and John W. Whitehead, Esquire, The Rutherford Institute.

s/ Kim M. Watterson
Kim M. Watterson