IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOCKET NOS. 07-4465 AND 07-4555

JUSTIN LAYSHOCK, a minor, by and through his parents, **DONALD LAYSHOCK** and **CHERYL LAYSHOCK,**

Appellees/Cross-Appellants,

v.

HERMITAGE SCHOOL DISTRICT; KAREN IONTA, Superintendent; **ERIC W. TROSCH,** Principal, Hickory High School; **CHRIS GILL,** Co-Principal, Hickory High School, in their official and individual capacities,

Appellants/Cross-Appellees.

On Appeal from the judgment and the Order of the United States District Court for the Western District of Pennsylvania dated July 10, 2007 at Docket No. 2:06-cv-00116

BRIEF FOR *AMICI CURIAE*

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The Pennsylvania Center for the First Amendment
Filed in Support of Appellees/Cross-Appellants, Seeking Affirmance

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IDENTITY OF THE AMICI CURIAE, STATEMENT OF INTEREST, AND SOURCE OF AUTHORITY TO FILE

This Amicus Curiae Brief is respectfully submitted by the Student Press Law Center and the Pennsylvania Center for the First Amendment (collectively, "Amici").

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal advice and information, as well as low-cost educational materials for student journalists on a variety of legal topics.

Because the SPLC's work focuses in part on issues relating to the First Amendment rights and responsibilities of high school and university students, their parents, and the authority and constitutional limits imposed on school district and government officials, the SPLC has a special interest in the potential consequences of the decision of the United States District Court in this matter, which substantially implicate issues of censorship of off-campus speech in public high schools and universities.

The Pennsylvania Center for the First Amendment (the "PCFA")was established by the Pennsylvania State University in 1992 to promote awareness and understanding of the principles of free expression to the scholarly community and the general public. The PCFA's goals support the University's outreach mission of providing the Commonwealth and the nation with education, research and service. Faculty members involved in the PCFA have published books and articles on First Amendment topics. The PCFA regularly tracks issues related to student expression, and the research generated from those projects is presented annually at national education law conferences. Additionally, the PCFA provides expert testimony to courts and legislative bodies grappling with First Amendment issues.

Pursuant to F.R.A.P. 29(a), this Brief is being filed without a motion seeking leave of Court, because the Appellants and the Appellees have consented to its filing.

SUMMARY OF ARGUMENT

The right of free expression is the life-blood of a free society. To safeguard it, the First Amendment provides that the power of the government shall intrude upon the expression of citizens in only the rarest circumstances; absent such circumstances, the agents of the state may not touch the speaker or the speech, no matter how disfavored. An individual's status as a high school student does not destroy these basic rights. Students "are 'persons' under our Constitution," entitled to "fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

To be sure, courts interpreting the First Amendment have held that the constitutional rights of public school students in the school environment are not co-extensive with those of adults in other settings. But even the well intentioned goal of maintaining a school environment conducive to learning does not give school administrators an unlimited license to reach beyond the schoolhouse gate to punish students for speech made away from school grounds and outside the context of the school environment.

The administrators of the Hermitage School District—Appellants here—did exactly that. They punished Justin Layshock for speech, in the form of a posting to a non-school website, that took place after school hours, on his

grandmother's personal computer, using a private (*i.e.*, not school-owned) Internet service provider. The District Court ruled as a matter of fact that such speech was off-campus, and Appellants do not make any viable challenge that conclusion.[1]

Rather, Appellants and Amicus Pennsylvania School Boards Association ("PSBA") seek to expand their ability to regulate off-campus student speech "in situations wherein a student utilizes the instantaneous and global reach of the Internet to direct 'speech' to a school district community." Appellants' Brief at 18. In support of their quest for expanded power, Appellants and the PSBA invoke a litany of student free speech Supreme Court decisions that actually undermine their position. Appellants and the PSBA rely on *Tinker* and its progeny, but those cases address the extent of students' rights *inside* the schoolhouse gate (or conversely, they address the bounds of a school district's ability to punish *on-campus* speech).

In fact, to the extent the *Tinker* line of cases address off-campus speech at all, they make clear that outside the schoolhouse gate, a student's First Amendment rights are subject only to the reasonable time, place, and manner

[1] By contrast, in *Morse v. Frederick*, 127 S. Ct. 2618 (2007) – on which the Appellants rely – "every other authority to address the question" in that case (namely, the U.S. District Court for the District of Alaska and the Ninth Circuit Court of Appeals) concluded that it was, factually, "a school speech case" involving on-campus speech. *Morse*, 127 S. Ct. at 2624.

restrictions applicable to speech by any American. Thus, in punishing Layshock for his off-campus speech, Appellants violated his First Amendment rights.

ARGUMENT

I. SUPREME COURT PRECEDENT PROHIBITS SCHOOL OFFICIALS FROM PUNISHING OFF-CAMPUS STUDENT SPEECH

The *Tinker* Court held that, within the "schoolhouse gate," school officials can restrict student speech only if such speech "materially and substantially disrupts the work and discipline of the school." *Id*. at 513. The Court emphasized that in analyzing students' First Amendment rights, the government's enhanced disciplinary powers at school were to be considered in "light of the special characteristics of the school environment." *Id*. at 506. Nowhere did the Court suggest that such powers extended beyond the "schoolhouse gate," nor has the Court made any such suggestion in the 39 years since *Tinker* was decided. In fact, the Court has been consistently careful to limit intrusions on students' rights to conduct taking place on school property, at school functions, or while engaged in school-sponsored or school-sanctioned activity.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), the first student speech case after *Tinker*, the Court upheld the punishment of a student who gave an "offensively lewd and indecent speech" at a school function. *Id*. at 685. This punishment was not prohibited by the First Amendment because the speech in question was given at a school event. As Justice Brennan's concurrence

made clear, however, if the student "had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate[.]" *Id*. at 688 (Brennan, J., concurring).

This principle was reinforced in the Court's next two student speech cases. In *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1988), the Supreme Court held that a principal could censor the publication of stories in a school-sponsored student newspaper when the censorship was "reasonably related to legitimate pedagogical concerns." *Id.* at 273. Nevertheless, in Justice White's majority opinion, the Court recognized that, although the school could censor certain speech, "[it] could not censor similar speech outside the school." *Id.* at 266.

In *Morse v. Frederick*, decided in 2007, the Supreme Court held that a school could punish a student who, at a school-sanctioned event during school hours, stood directly across from the school grounds and displayed an offensive banner promoting drug use. *Morse,* 127 S. Ct. at 2625. Writing for the majority, Chief Justice Roberts expressly rejected the argument that it "[wa]s not a school speech case," noting—unlike here – that the events "occurred during normal school hours" and at a school-sanctioned activity; the Chief Justice also noted that the lower courts thought it was "a school speech case" as well. *Id*. at 2624. Even in *Morse*, the Court emphasized the importance of the fact that the speech was

made at a school-sponsored activity and made the same point Brennan made in *Fraser*: while "Fraser's First Amendment rights were circumscribed [at school,]" had he "delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 2626-27.

In sum, no Supreme Court case addressing student speech has held that a school may punish students for speech away from school – indeed, every Supreme Court case addressing student speech has taken pains to emphasize that, were the speech in question to occur away from school, it would be protected.

In their attempts to contort *Tinker* and its progeny in support of their position, Appellants assert that the rise of the Internet has blurred the distinction between on-campus and off-campus speech. They argue that the on-campus standards in those cases should now carry over to all manner of student speech, wherever made, simply because that speech winds its way on a circuitous route through the ether and arrives on the doorstep of the school community. Such extreme overreaching simply is not consistent with the First Amendment (nor is it justified by any legitimate educational goals).

In 2008, a school cannot punish a student for off-campus Internet speech any more than the Bethel School District could have punished Matthew Fraser in 1983 for making a lewd speech "outside the school environment," or the Hazelwood School District could have punished the student journalists in 1983 for

publishing articles on pregnancy and divorce "outside the school," or the principal of Juneau-Douglas High could have punished Joseph Frederick in 2002 had he made his speech "in a public forum outside the school context." In all three post-*Tinker* cases, the aftermath of the speech at issue was likely to have some disruptive impact on the school community even if made off-campus; indeed, in *Fraser* and *Kuhlmeier*, the subject matter of the speech that would have been protected off-campus concerned the school itself. Presumably, this fact was not lost upon Justices Brennan and White when remarking upon the students' unfettered rights to give such speeches outside of school.

The Supreme Court's jurisprudence is clear, and technological innovation does not render it null. If the publication of a student's speech does not take place on school grounds, at a school function, or by means of school resources, a school cannot punish the student without violating his First Amendment rights.[2]

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[2] In a further strained attempt to transform Layshock's speech into on-campus speech, the Appellants attempt to create a "nexus" by the purported misappropriation of a photograph of Principal Trosch from a school website for use in Layshock's MySpace profile. Leaving aside the substantial question of whether Layshock's use of the photograph was legally wrongful at all, since parody is a well-recognized exception to copyright protection of an image, electronically copying and pasting a school photo into a personal website does not somehow transform the personal website into on-campus speech. To the extent that the school believed that a misappropriation occurred, ample legal recourse exists without punishing speech; but it has never been the school's position that

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II. THIS COURT SHOULD FOLLOW OTHER FEDERAL COURTS THAT HAVE DECLINED TO ASSESS OFF-CAMPUS STUDENT SPEECH UNDER THE STANDARDS DEVELOPED FOR ON-CAMPUS STUDENT SPEECH

Consistent with the *Tinker* line of cases, lower courts have protected off-campus student speech from school censorship. In so doing, these courts recognize that students enjoy their full free speech rights as citizens when they speak in the general community. Amici the SPLC and the PCFA respectfully urge this Court to do the same.

A. Other Appellate Courts Have Recognized The Supreme Court's Distinction Between On-Campus And Off-Campus Speech.

The Second Circuit recognized this essential First Amendment principle in *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043 (2d Cir. 1979), which is cited by the lower court here. In *Thomas*, four high school students were suspended for the off-campus distribution of a satirical humor newspaper, *Hard Times*, which contained lewd and prurient articles and drawings. *Id.* at 1045-46. Although distributed off-campus, preparation for publication took place in a classroom after school hours and some of the articles

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Layshock would have incurred the same punishment had he "stolen" Principal Trosch's photo to make a MySpace page honoring Trosch as "Educator of the Year." To the contrary, it is clear that Layshock's negative viewpoint of Trosch was the motivating factor for the discipline, and it is beyond dispute that the state may not single out disfavored viewpoints for differential treatment.

were written or typed at school. Further, the copies to be distributed were stored in a closet at the school. *Id.* After an unknown student brought a copy of *Hard Times* on campus, a school administrator became aware of the publication and its offensive content and as a result punished the student publishers. *Id.* at 1045-46.

In finding that the student's First Amendment rights were violated, the *Thomas* Court insisted on a strict and clear delineation of the boundary beyond which the punitive reach of school administrators may not extend. Mindful of the deference owed to administrators charged with maintaining order and discipline within the school, the Court nevertheless observed that this deference had its limits: "our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself." *Id.* at 1052.

Beyond those "metes and bounds" lies the wider society, where First Amendment strictures apply with full vigor. Because the administrators at Granville High had "ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith," the *Thomas* Court held that "their actions must be evaluated by the principles that bind government officials in the public arena." *Id*. at 1050. In keeping with this logic, the Court declined to apply *Tinker*'s substantial disruption test. The Court noted

that, because the case before it involved off-campus speech, it arose "in a factual context distinct from that envisioned in *Tinker* and its progeny." *Id.*

Importantly, the *Thomas* Court did not regard the few connections that did exist between school property and the newspaper to be sufficient to transform *Hard Times* into on-campus speech. Rather, it recognized that these "insignificant" contacts did not change the fundamental fact that the newspaper "was conceived, executed, and distributed outside the school." Because of this, the Court considered the contacts with campus to be "*de minimis*" and accordingly concluded that the expression was not governed by *Tinker*'s "substantial disruption" test. By ruling that school authorities can go no farther than the "metes and bounds" of the school itself, the *Thomas* Court upheld the stark line that protects student speech and prevents the government from reaching beyond the "schoolhouse gate."[3]

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[3] Appellants err in relying on *Wisniewski v. Board of Education*, 494 F.3d 34 (2d Cir. 2007), in support of their contention that the District's punishment of Justin Layshock was justified because it was reasonably foreseeable that the profile would come to the attention of school officials. Amici respectfully suggest that the approach in *Wisniewski* is flatly contrary to the clear import of the Supreme Court cases governing student speech, as described above. Appellees' brief explains the inconsistency between that case and the Supreme Court precedents. See Appellees' Br. at 45-46.

Likewise, the recently issued ruling in *Doninger v. Niehoff*, No. 07-3885 (2d Cir. May 29, 2008), inasmuch as it follows *Wisniewski*, is wrongly decided and should not be followed by this Court. In that case, which involved a school's

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The Fifth Circuit also recognized this bright line in *Porter v. Ascension Parish School Board*, 393 F.3d 608 (5th Cir. 2004). In *Porter*, a drawing that was made at home and that depicted the school in an offensive manner was inadvertently brought to campus by the plaintiff's younger brother. *Id.* at 611. Nevertheless, school officials punished the plaintiff. *Id.* at 612.

In declining to apply *Tinker*, the Fifth Circuit recognized that the government had no authority to punish the student because his speech – though clearly related to the campus – was nevertheless off-campus expression. *Id.* at 615. Quoting *Thomas* and other cases, the *Porter* Court concluded that, since the

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decision to remove a student from a class officer position and bar her from seeking future offices in retaliation for comments on a blog attempting to prompt public complaints to the superintendent's office, the court narrowly limited its ruling to the specific facts at hand. In the *Doninger* Court's view, the consequence imposed by the School District was minimal and was justified by a concern for undermining the integrity of the student government: "[W]e have no occasion to decide whether a different, more serious consequence than disqualification from student office would raise constitutional concerns." *Id.* at p. 19.

In any event, in *Doninger*, the Court declined to adopt the argument made by the School District that, under *Wisniewski*, it had a free hand to punish off-campus speech that, were it to occur on-campus, would be punishable under *Fraser*. *Id.* at p. 13. Rather, the Court only permitted the punishment of off-campus speech when warranted under the *Tinker* standard. As noted, the District Court here found that, even under *Tinker*, no punishment was justified for Justin Layshock's off-campus speech. Thus, even under *Wisniewski*, the Appellants' argument that a school district can punish off-campus speech for merely being offensive or vulgar has no support.

drawing "was composed off-campus and remained off-campus … until it was unintentionally taken to school," *Tinker* did not apply. *Id.* at 615. Instead, the First Amendment applied with full force, barring the school from punishing the plaintiff. *Id.* at 617-18.

Taken together, and echoing the clear holding of *Tinker* that students are "'persons' under our Constitution," *Tinker*, 393 U.S. at 511, *Thomas* and *Porter* show that, beyond the strictly defined limits of the school environment, students enjoy full First Amendment protection and are not relegated to full-time, second-class citizen status.

B. District Courts Likewise Have Declined To Extend School Authority Beyond The School Context.

Several federal district courts have limited school official authority in the same manner as the Supreme Court, the *Thomas* Court, and the *Porter* Court. In *Klein v. Smith*, for instance, a high school student "extended the middle finger of one hand" towards a teacher when they saw each other in restaurant parking lot. 635 F. Supp. 1440, 1440-41 (D. Me. 1986). Noting that this vulgar gesture was made in a place "far removed from any school premises or facilities at a time when [the teacher] was not associated in any way with his duties as a teacher," the District Court concluded that any connection between the gesture and the school was "far too attenuated to support discipline[.]" *Id.* at 1441.

Even in the Internet Age, this on-campus/off-campus distinction has been protected in district court. In *Emmett v. Kent School District No. 415*, high school administrators suspended a student who had created a website with "mock obituaries" of his classmates. 92 F. Supp. 2d 1088, 1089 (W.D. Wash. 2000). The District Court granted the plaintiff's motion for a preliminary injunction, finding that the speech in question had no connection to any "class or school project" or was in any way "school-sponsored"; indeed, while "the intended audience was undoubtedly connected to" the high school, "the speech was entirely outside of the school's supervision or control." *Id.* at 1090.

III. *J.S. V. BETHLEHEM AREA SCHOOL DISTRICT* CONFLICTS WITH APPLICABLE FEDERAL PRECEDENT AND SHOULD NOT BE ADOPTED

In contending that off-campus Internet use directed toward the school community can be punished by school officials, Appellants rely upon a case decided by the Pennsylvania Supreme Court, *J.S. v. Bethlehem Area School District*, 569 Pa. 638, 807 A.2d 847 (2002). In *J.S.*, the Court attempted to reshape the analysis for school speech cases by reclassifying off-campus expression as on-campus expression using a "sufficient nexus" test. Pursuant to this test, "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id.* at 668.

The *J.S.* approach stands in stark contrast to the fundamental idea, forged in the jurisprudence of the Supreme Court and confirmed in the federal cases cited above, that there is a distinction between speech that occurs on-campus and speech that occurs off-campus.[4] Adoption of the *J.S.* test by a federal court would mean that speech on any topic, brought on campus (in any medium) by any person (including school officials), could be considered on-campus speech and could run the risk of being punishable under *Tinker*, *Fraser*, or *Kuhlmeier*. This broad, unlimited test, which would be implemented at the government's discretion, amounts to a standardless counting of the connections between the speech and the school community, and provides no means to assess the relative significance of those connections.[5] Its ambiguity alone makes the extent of protection unclear and, thus, has the potential to chill off-campus expression unjustifiably.

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[4] Here, the District Court recognized this fact, prudently finding that *J.S.* incorrectly balanced student expression and school authority. 496 F. Supp. 2d at 602.

[5] The *J.S.* Court found that a "sufficient nexus" existed for several reasons: first, because the student accessed the website on campus, showed it to another student, and told other students about it; second, because administrators and faculty accessed the site at school; third, because the audience was not "random" but was a "specific audience of students and others connected with this particular School District"; and finally, because school officials "were the subjects of the site." *J.S.*, 569 Pa. at 668. Each of these connections is patently inadequate to sustain the conclusion that the expression was on-campus. Whether speech is on-campus or off-campus is, as the *J.S.* Court itself put it, a "threshold consideration of ***location***." *Id.* at 666. (Emphasis added.) The identity of the intended audience

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This Court should not disregard the distinction between on-campus and off-campus speech established in First Amendment jurisprudence. Adoption of *J.S.* would permit school administrators to determine that off-campus student speech could be subject to punishment because it concerned the school, was addressed to members of the school community, was received by members of the community, or any other such combination of links. These types of contacts bring to mind the types considered "de minimis" by other Courts of Appeal. To hold otherwise would dismantle the First Amendment protection to students outside the schoolhouse gates by allowing the school district itself to determine that a sufficient nexus exists. The United States Supreme Court has never granted such broad powers to school officials. Any adoption of the *J.S.* test would thus be inconsistent with federal First Amendment jurisprudence.[6]

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and the subjects of the expression of course have nothing to do with location (indeed, inasmuch as the subject matter of the expression concerned the school, consideration of this factor would chill off-campus student expression about their school lives). Furthermore, as the *Porter* Court acknowledged, to the extent that expression reached the campus through the actions of others (in *J.S.*, school administrators and faculty), the expression should not be treated as on-campus. Finally, as the *Thomas* Court noted, some connections are simply too *de minimis* to warrant application of *Tinker*; in *J.S.*, the facts that the student accessed the site on campus, showed it to a friend, and told people about it are as tenuous as the connections in *Thomas* and *Porter*.

[6] The common denominator in the "online speech" cases on which the District and PSBA rely, the *J.S.* case and *Wisniewski* is that the speech in those

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IV. GRANTING SCHOOL OFFICIALS THE POWER TO PUNISH OFF-CAMPUS SPEECH WILL INEVITABLY CHILL LEGITIMATE STUDENT EXPRESSION

The Appellants wish to use the "sufficient nexus" test of *J.S.* as a door through which they can export the standards of *Tinker*, *Fraser* and *Kuhlmeier* to off-campus speech generally. That door should be kept closed.

The standard urged by the Appellants and by the PSBA would enable school authorities to suppress even core First Amendment speech addressing matters of great public concern. Everything the Appellants and PSBA say about Layshock's speech – that its subject matter concerned the school, that it was directed to reach a school audience, that it was reasonably anticipated to be discussed at school – would apply equally to the high school student who writes a truthful letter-to-the-editor of her city's local newspaper that exposes harassment of or discrimination against students by faculty at her school. The First Amendment cannot countenance a standard under which the state may prevent a student from talking, truthfully, about her school when she is away from school.

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instances was interpreted as threatening violence against particular teachers. Though it is debatable whether a reasonable person would have viewed the speech in *J.S.* and *Wisniewski* as serious threats rather than distasteful humor, it is unsurprising that courts are less willing to second-guess disciplinary decisions where school officials are responding to what they say were credible and particularized threats of bodily harm. There is no such allegation in this case.

The Appellants and PSBA place heavy reliance on the vulgarity of Layshock's speech, but a standard enabling the state to block or punish speech because of vulgar content would encompass core First Amendment speech as well. Further, the Supreme Court has made clear that students can engage in vulgar speech off-campus. In making the point that Fraser's lewd and indecent speech would be protected if expressed off-campus, the Supreme Court in *Morse* cited to *Cohen v. California*, 403 U.S. 15 (1971) as support. In *Cohen*, the Court held that the government could not punish the wearing of a "fuck the draft" jacket in a public building. By relying upon *Cohen*, the *Morse* Court extends to students the right to engage in similarly vulgar speech. Had Layshock's website said, "Fuck the principal's busing policy," it undoubtedly would have been protected, notwithstanding its vulgarity. Such a website, however, as "school related" speech, would flunk the First Amendment test urged by Appellants here.

Accepting the position urged by the Appellants and PSBA would render students second-class citizens under the guise of the First Amendment simply because they are enrolled as students. For example, under the Appellants' and PSBA's rationale, the state (through the school) can punish Justin Layshock even though he engaged in speech off-campus, though the state clearly cannot punish a high school dropout for engaging in the same speech. Not only is there no support for this differential treatment in the law, the Supreme Court has expressly

stated otherwise by making clear that students are considered "persons" under the First Amendment. *Tinker*, 393 U.S. at 511. To the extent a school has authority to punish speech, such power is rooted in "light of the special characteristics of the school environment," not the mere fact a person is a student. *Id*. at 506. Accordingly, speech expressed on-campus, in a school-sponsored medium, or during a school-sanctioned event that violates the precepts of *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* can be sanctioned. The school's powers, however, do not reach beyond this scope.

Moreover, because off-campus speech can arrive on-campus in a wide variety of ways, students who wish to avoid punishment for their off-campus speech may find it difficult to keep their expression from those who might bring it with them to campus. This realization may dissuade students from engaging in speech over the Internet, since they would thereby be unable to control whether it could be accessed by school administrators. Indeed, in declining to apply *Tinker*, the *Thomas* Court acknowledged this very problem:

> It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of *National Lampoon*, the inspiration for *Hard Times*, at a neighborhood newsstand and lends it to a school friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television…. [S]chool officials,

> in such instances, are not empowered to assume the character of *Parens patriae*.

Thomas, 607 F.2d at 1051. After all, if school administrators are empowered to punish off-campus expression, then the burden will be on the speaker to prevent the administrators from learning of it. Placing such a burden on students' free speech rights will inevitably make students more reluctant to exercise those rights.

The chilling effect of Appellants' position is exacerbated by the fact that it imposes no firm limits on school officials' ability to find a "sufficient nexus" and, accordingly, impose punishment on off-campus speech. (This concerned the *Thomas* Court as well, as the above-quoted excerpt makes clear.) The Appellants provide no guidance whatsoever on how to determine which contacts create a "sufficient nexus" and which do not. They provide no guidance because, of course, they cannot; the test they urge is potentially boundless in its application.[7]

If courts were to adopt the vague, impressionistic standard urged by Appellants and the PSBA, the punitive power of the school could be brought to bear on speech regardless of its subject, time, location, audience, or means of

[7] Indeed, as noted above, not even the *J.S.* Court explained what can constitute a "nexus" and what would make it "sufficient" to warrant application of *Tinker*.

communication.[8] The "sufficient nexus" test could warrant punishment of a student for speech that is critical of administrators – even if it takes place entirely off school grounds and outside school hours, to an audience with no connection to the school.

Imagine, for instance, if a student criticized his school's harassment policy, which does not cover sexual orientation, at a gay pride event. Or imagine if a student criticized his school's harassment policy, which does cover sexual orientation, at a religious event. Would a "sufficient nexus" exist in either case? If the speech in either case also happened to be vulgar, would *Fraser* apply, such that the school would not even have to show the risk of a substantial disruption?

That these questions have no clear answer under the non-standard "standard" that the School District urges is reason enough to reject the District's position. Justice Brennan said it best 45 years ago: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). There is nothing narrow or specific about the open-ended discretion that the School District seeks here.

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[8] A school could even make the circular argument that a reasonably foreseeable risk of "substantial disruption" is *itself* a "sufficient nexus" justifying punishment – even if the speech had no other "nexus" at all with the school, aside from the fact that the speaker is a student.

To be clear, Appellants' purpose and intent is to prevent disfavored speech – speech critical of school officials that might be read at school and might, if read, provoke discussion – from ever coming into being. The result will necessarily be that substantial amounts of speech that would not be read during school (and that, even if read, would not prompt disruption) will never be uttered. If forced to live under Appellants' standard, reasonable students will needlessly censor themselves, recognizing that they are at the mercy of (a) whether audience members choose to bring their writings onto campus and (b) whether the writings will be discussed in a manner that school officials deem disruptive. Unless school administrators are required to respect the "breathing space" that Justice Brennan saw was so vital – unless they are required to work within a narrow and specific set of parameters governing their power to punish student speech – then valid, protected, non-disruptive speech will surely suffocate.

What is most striking about the Appellants' position is how unnecessary it is. Their argument suggests that, if this Court were to prohibit punishment of off-campus speech, students could, with impunity, hurl as much invective as they like at school administrators. Amicus PSBA goes so far as to invoke some truly horrific behavior by students as somehow justifying punishment

of those students by school administrators.[9] These arguments ignore two very important considerations: first, civil and criminal remedies are generally available, fully adequate, and preferable; second, the use of public power in lieu of those remedies is an abuse of that power. Thus, for instance, while the Appellants contend that Layshock's speech was defamatory and was the result of misappropriation of school property, they ignore that the appropriate means of vetting such claims is through a civil lawsuit. Indeed, Principal Trosch has a pending defamation suit against Layshock in which his concerns about any reputational damage inflicted by the MySpace page can be fully redressed. Principal Trosch should be left to pursue his private legal remedy; this Court should not legitimize the use of public power to settle private scores.[10]

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[9] PSBA *Amicus* Brief at 23. Tellingly, the PSBA never mentions any disruptions at school stemming from the events it describes. Moreover, it fails utterly to explain why civil or criminal remedies are not available or are insufficient to redress the wrongs it describes. Indeed, in at least one case cited by the PSBA, criminal proceedings have been filed against a mother responsible for a MySpace hoax that led a teenage student to commit suicide. *Indictment in Internet Suicide*, The Washington Post, May 16, 2008 at D02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/05/15/AR2008051503918.html. Such serious matters are best left to the proper authorities – not school officials.

[10] Similarly, schools have ample disciplinary tools at their disposal to discipline those actually responsible for the disruption, if they claim that students are acting disruptively by viewing non-school-related websites on school time. If students are using class time to talk about unrelated matters or to view personal websites, and if such behavior is disruptive of teaching, then schools can discipline

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V. EVEN IF *TINKER* WERE TO APPLY TO LAYSHOCK'S SPEECH, APPELLANTS STILL VIOLATED THE FIRST AMENDMENT

The district court correctly found that, even if it were proper to apply an on-campus speech analysis to Layshock's Web site, the First Amendment would preclude punishment. The district court's analysis and the Layshocks' brief thoroughly address why, if using the on-campus speech framework, *Tinker* would provide the applicable legal standard,[11] and why nothing that Justin Layshock did in this case even comes close to the "substantial disruption" of school operations that would legitimize censorship under *Tinker*. Amici the SPLC and the PCFA adopt these rationales, and wish merely to reinforce and amplify several points.

(continued...)

those students without running afoul of the First Amendment. Indeed, Principal Trosch testified that the school has a "technology meeting" at the beginning of the school year in which students are instructed to refrain from accessing unauthorized websites, and that, following the events at issue here, the school blocked access to Myspace.com pages on school computers (Trosch Dep. at 102, 114). The School thus would have had ample justification to punish those who might have – but, in fact, did not – create a disruption in response to Layshock's off-campus speech.

[11] In a particularly tortured line of argument, PSBA attempts (PSBA Brf. at 19) to argue for application of the *Morse v. Frederick* standard, on the grounds that Layshock's profile "promotes illegal drug use and alcohol abuse[.]" The Court should decline PSBA's invitation to strain the limited holding of *Morse* beyond recognition. The profile obviously was meant to ridicule its subject as a person with *undesirable* qualities, including a proclivity to use alcohol and drugs. To the extent that the profile can be read to carry any message at all, which is a stretch, the profile does the opposite of glorifying alcohol or drug use. It would be radical and dangerous to hold that student speech *mentioning* alcohol or drugs equates to *promoting* alcohol or drugs.

The district court correctly made the factual finding that the MySpace profile caused minimal, if any, disruption. Principal Trosch acknowledged (Trosch Dep. at 105) that his first-hand knowledge about any disruptive impact of the profile was limited to one teacher's comment that "the teacher overheard a student talking about knowing about the My-Space (sic) profiles." Whatever "substantial disruption" means, it cannot mean such a mild and harmless occurrence.[12]

Amici's principal concern is not for speakers like Justin Layshock, but for those engaging in more profound journalistic commentary that would be swept

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[12] Indeed, attempting to quash off-campus student speech that is offensive or vulgar will not eliminate the impulses that drive students to engage in that speech and will ultimately do more harm than good. As one commentator observed,

> [g]iven the pervasiveness of the Internet and World Wide Web, the problems encountered by administrators [concerning off-campus student speech] are not likely to disappear anytime soon. Indeed, it seems very likely that more students will turn to the Web to express their feelings. Dealing with these sites through suspensions and expulsions ultimately accomplishes very little. The better solution is counter speech and a healthy recognition on the part of educators that sophomoric humor and verbal attacks on teachers will not be eliminated through suspensions and expulsions. The third arm of justice – the school's own internal discipline system – must be reined in before First Amendment rights are needlessly sacrificed.

Clay Calvert, "Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground," 7 Boston Univ. J. of Sci. & Tech. L. 243, 286-87 (2001).

up in the net of censorship. Journalism, when practiced at its best, is meant to be provocative; that is, to cause people to talk. If anecdotal evidence that students talked during school hours about something they had read equated to "substantial disruption" – the standard that the School District would have this Court adopt – then even the best journalism (in fact, especially the best journalism) would be subject to disciplinary action under *Tinker*.

Finally, having failed to adduce legitimate legal arguments justifying the school's overreaching, Amicus the PSBA attempts to fall back on generalized policy rationales about the need for inculcating responsibility and discipline. In the first place, this argument is uniquely ill-suited to the facts of Justin Layshock's case. Before the school could impose sanctions, Layshock had already attempted voluntarily to pull down the offending profile, apologized sincerely to his principal, and incurred the punitive wrath of his parents, who grounded him and took away his computer privileges. It is simply untrue that Layshock needed to be kicked out of school and consigned to "alternative" classes for delinquents in order to learn his lesson.

More to the point, everything that the PSBA says about the necessity for teaching responsibility could apply equally to speech having no connection whatsoever to school. Indeed, the very examples on which the PSBA relies – including the tragic Missouri case in which a parent impersonating a teenage boy

in online chats was blamed for driving a teen girl to suicide – are cases in which the speech was purely personal and not at all school-related. The PSBA's vision of the public schools as general civility police has no principled stopping point, and it offends basic principles of parental autonomy.

Court after court has correctly refused to allow school administrators to usurp parental control over the discipline of children for functions outside of and unsupervised by the school. *See, e.g., Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972) ("It should have come as a shock to the parents of five high school seniors ... that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights expressing their thoughts. We trust that it will come as no shock to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment."); *Thomas*, 607 F.2d at 1051 (concluding that after-school activities are "the proper subjects of parental discipline" and that school officials are not empowered to assume the role of surrogate parent).

The PSBA has the "civics lesson" of this case wrong, and the district court got the lesson right. Young people do not learn civic responsibility by being told to sit down, shut up, and not make waves. Young people must have the leeway to participate in the dialogue of their community (a dialogue that increasingly is taking place online) without fear that a step over the line will bring

expulsion and the stigma of being classified a "problem kid." School administrators must be counted on to keep a cool head and show some maturity – and with a powerful government official like a school principal, that includes the maturity to accept even sometimes-unfair criticism as part of the job. If the district court is overturned, the civics lesson will be that government officials can abuse their power to suppress any speech, taking place anywhere, that provokes so much as a conversation in the schoolyard.

CONCLUSION

For all the reasons set forth above, Amici the Student Press Law Center and the Pennsylvania Center for the First Amendment respectfully request that the District Court's judgment be affirmed.

Respectfully submitted,

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June 3, 2008

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on this 3rd day of June, 2008 an original and ten copies of the foregoing Brief for *Amici Curiae* The Student Press Law Center and the Pennsylvania Center for the First Amendment were filed with the Clerk's Office of the United States Court of Appeals for the Third Circuit, by hand delivery. An electronic copy was also sent to electronic_briefs@ca3.uscourts.gov. I further certify that on this 3rd day of June, 2008 two true and correct copies of the foregoing Brief for *Amici Curiae* The Student Press Law Center and the Pennsylvania Center for the First Amendment were served by overnight mail and an electronic copy was served by electronic mail on each of the following:

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Bar Membership: Pursuant to L.A.R. 28.3(d), I hereby certify that Joanna J. Cline, attorney for *Amicus Curiae* the Student Press Law Center, is a member of the bar of the United States Court of Appeals for the Third Circuit.

Identical Briefs: Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic and hard copy versions of this brief are identical.

Virus Check: Pursuant to L.A.R. 31.1(c), I hereby certify that a virus check was performed on the electronic version of this brief using Symantac Anti-Virus, version 10.1.1.5 and no viruses were found.

Word Count: Pursuant to F.R.A.P. 32(a)(7)(C), I hereby certify that the foregoing brief was produced in Microsoft Word using a 14-point Times New Roman proportionally spaced font. I further certify that this brief contains 5,242 words, excluding sections exempted under F.R.A.P. 32 (a)(7)(B)(iii). Accordingly, this brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B).

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