No. 11-502

IN THE

Supreme Court of the United States

BLUE MOUNTAIN SCHOOL DISTRICT, ET AL.,

Petitioners,

—v.—

J.S., A MINOR THROUGH HER PARENTS,
TERRY SNYDER AND STEVEN SNYDER, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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INTRODUCTION

Whether *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1963) applies to students' off-campus speech is an important question, but these two cases are ill-suited vehicles to consider that issue. The issue was waived in *Hermitage* while *Blue Mountain* rests on adequate and independent state law grounds. Furthermore, even though the student in *Blue Mountain* argued that a First Amendment standard more stringent than *Tinker* should apply to students' off-campus speech, the *Blue Mountain* majority found it unnecessary to decide that question because the school district could not satisfy even *Tinker*. Petitioners' primary quarrel is over how *Blue Mountain* applied *Tinker*, but how much deference school officials are due under *Tinker* does not implicate the central question petitioners suggest justifies a grant of certiorari: What First Amendment standard should apply to off-campus student speech.

Petitioners also wrongly lump together with *Hermitage* and *Blue Mountain*, which involve student speech criticizing school officials, hypothetical circumstances involving student harassment of peers. *Hermitage* and *Blue Mountain* involve only speech about school officials and thus raise no question related to what petitioners and their amici, National School Boards Association, *et al.*, identify as the most pressing problem, namely, school officials' authority to address off-campus student-on-student harassment, sometimes described as cyberbullying. Consequently, neither *Hermitage* nor *Blue Mountain* is a good vehicle to address what

standard should apply to students' off-campus speech or how to address the problem of cyberbullying.

Finally, contrary to petitioners' assertion, there is no circuit split. Every circuit has applied *Tinker* to off-campus speech (unless the argument was waived, like in *Hermitage*), including the Third Circuit in *Blue Mountain*, and no circuit has extended *Bethel School District v. Fraser,* 478 U.S. 675 (1986), to off-campus speech. Given the number of cases raising these questions that are now percolating in the lower courts and that inevitably will continue to arise, this Court should await a case that actually presents the issue.

COUNTER-STATEMENT OF THE CASE

1. *Blue Mountain School District v. J.S.*

In March, 2007, J.S. and her friend K.L., both eighth-grade students at Blue Mountain Middle School in Pennsylvania, used J.S.'s parents' home computer to create a fake profile parodying Principal McGonigle, which they posted on the social networking website MySpace. App. 1 at 4a. The parody did not identify McGonigle by name, school, or location. *Id.* Rather, it was purported to be a self-portrayal of a middle school principal named "M–Hoe" who was working in Alabama. *Id.* The only thing that associated the profile with McGonigle was his photo, which the girls copied from the Blue Mountain School District website and pasted into the MySpace profile. *Id.*

The information in the profile ranged from nonsense and juvenile humor to profanity and personal attack. *Id.* at 4a-5a. M-Hoe described himself as a bisexual 40-year old man, a Virgo and a

proud parent with a wife and child, whose varied interests included "detention," "spending time with my child," and "hitting on students and their parents." *Id.* at 5a. The profile also included a statement "About Me," in which "M-Hoe" purportedly described himself with unflattering terms ranging from "hairy" and "expressionless" to a "sex addict," and expressed his wish to "pervert the minds of other principal's" and "keep[ ] an eye on you students (who I care for so much)." *Id.* J S. intended the profile to be a joke shared with only her friends. *Id.* at 5a.

For one day, the profile was "public" – meaning it could be found by anyone who knew the URL or who searched for a term it contained – then J.S. made the profile "private," which limited access to the twenty-two students whom she and K.L. ultimately invited to be MySpace "friends" of M-Hoe. *Id.* at 6a. The school's computer filters blocked access to MySpace, so no students accessed the profile in school. *Id.* The profile was never brought to the school until McGonigle learned of it from a student and asked the student to print the profile at home and bring it to him. *Id.*

After McGonigle obtained the profile and learned who had created it, he showed the profile to the Superintendent and the Director of Technology. There is no evidence that either administrator – or anyone else who saw the profile – believed that the profile was anything other than a parody. *Id.* at 5a, 7a. Indeed, although the Superintendent had a duty to report allegations of inappropriate sexual contact or other misconduct by officials in the School District, she did not report McGonigle, or even question him about the statements in the profile, because she immediately dismissed them as false. *Id.* at 23a n.4.

McGonigle called J.S. and her mother to the office and notified them that J.S. was being charged with a "Level Four Infraction" under the school district's Disciplinary Code for making a "false accusation about a staff member of the school" and a "copyright" violation of the computer use policy for using McGonigle's photograph. *Id.* at 7a. Both J.S. and her mother apologized to McGonigle, and J.S. wrote a letter of apology to McGonigle and his wife. *Id.* at 8a. McGonigle next contacted MySpace, provided the URL for the profile and successfully requested its removal. *Id.* The following week McGonigle notified J.S. and her parents that she was suspended from school for ten days, a decision ratified by the school district Superintendent. *Id.* McGonigle also contacted the police to press charges against J.S. but decided not to follow through after the police told him the charges likely would be dropped. *Id.* at 8a-9a.

J.S., through her parents, filed suit against the school district, McGonigle and the Superintendent,[1] alleging First Amendment free-speech and Fourteenth Amendment parental-rights claims. *Id.* at 10a. The district court denied a requested preliminary injunction and ultimately granted the school district's summary judgment motion on all claims. *Id.* at 140a-161a. On the free-speech claim, the court did not rely on *Tinker* to conclude that the school district's actions were justified, specifically acknowledging that "a substantial disruption so as to fall under *Tinker* did not occur." App. 1 at 156a. Instead, the court drew a distinction between the

[1] The parties subsequently stipulated to a dismissal of the individual defendants.

type of political speech at issue in *Tinker*, and type of "vulgar and offensive" speech in *Fraser*, ultimately holding that the school district's punishment was constitutionally permissible because the profile was "vulgar and offensive" under *Fraser*, and J.S.'s off campus conduct had an "effect" at the school. *Id.*

By a 2-1 vote, a panel of the U.S. Court of Appeals for the Third Circuit affirmed the school district's suspension of J.S. on the ground that "challenging [a school official's] fitness to hold his position by means of baseless, lewd, vulgar and offensive language" can be presumed to create a "reasonable possibility" of substantial and material disruption under *Tinker* and can thus be punished by the school, regardless of whether the student speaks on or off campus. *Id.* at 97a, 114a-15a. A vigorous dissent criticized the majority's reasoning and ultimate conclusions, explaining that the majority decision "allows school officials to punish any speech by a student that takes place anywhere, at any time, so long as it is about the school or a school official, is brought to the attention of the school official, and is deemed 'offensive' by the prevailing authority." *Id.* at 138a.

By an 8-6 vote, the Third Circuit sitting *en banc* reversed. *Id.* at 1a-74a. The *en banc* majority declined to decide whether the appropriate standard for assessing school officials' authority to regulate students' off-campus speech was the *Tinker* standard or the First Amendment standards that apply to minors in the community because the school district could not satisfy even *Tinker*'s more relaxed standard. *Id.* at 17a n.3.

The majority initially held that there is "no dispute that J.S.'s speech did not cause a substantial disruption in the school," noting that the school district's counsel had conceded this point at oral argument. *Id.* at 20a. The court, accordingly, framed the issue as whether the school district "was justified in punishing J.S. under *Tinker* because of 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" *Id.* at 21a (citation omitted). On this question, the majority held that "the profile, though indisputably vulgar, was so juvenile and nonsensical that no reasonable person could take its content seriously," and that the only "disruption" attributable to the profile was "a few minutes of talking in class, and some officials [having to] rearrange their schedules" to assist in McGonigle's investigation. *Id.* at 23a, 24a. The majority further distinguished this case from the three appeals court decisions relied upon by the school district, *see Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008); *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007); and *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001), because J.S. never intended for the speech to reach the school and because it was "so outrageous that no one could have taken [the profile] seriously and no one did." *Id.* at 27a. The majority ultimately concluded that the school district could not meet its burden to justify its actions under *Tinker*'s standard because the school district could not "have reasonably forecasted a substantial disruption of or material interference with the school as a result of J.S.'s profile." *Id.* at 28a.

The majority rejected the school district's argument that the school could punish J.S. under the

Fraser standard because *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (citing *Cohen v. California*, 403 U.S. 15 (1971)), foreclosed application of *Fraser* to off-campus speech. *Id.* at 29a-32a.

The majority also held that Pennsylvania statutes "barred the School District from punishing J.S. for her off-campus speech." *Id.* at 24a n.5. Finally, the majority affirmed the district court's rejection of J.S.'s vagueness/overbreadth and parental-rights claims.

Five of the eight judges in the majority issued a concurring opinion stating that they would limit the application of *Tinker* and this Court's other student speech cases to on-campus speech and allow school officials to censor students' off-campus speech only when school officials can justify their conduct under the First Amendment standards that apply to "adult speech uttered in the community." *Id.* at 47.

Six judges dissented. *Id.* at 49a-74a. The dissenters agreed that the majority had applied the *Tinker* standard, *id.* at 49a-50a, and also found that "the facts in the record fail to demonstrate substantial disruption at the School," *id.* at 58a. Yet, the dissenters stated that they would affirm and noted that their principal disagreement was with the majority's "application of [*Tinker*] to the facts of this case" in determining that substantial disruption could not reasonably be forecast on this record. *Id.* at 50a. *See also id.* at 55a, 64a n.4, 65a, 66a n.6.

2. *Hermitage School District v. Layshock*

In December, 2005, Justin Layshock, a seventeen-year-old senior at Hickory High School in Pennsylvania's Hermitage School District, used his grandmother's computer to create a fake, parody profile of his principal, Eric Trosch, and posted it on MySpace. App. 2, 3a. The only school resource Justin arguably used was Trosch's photograph from the school's website, which he copied and pasted onto the profile. *Id.*

The MySpace profile template asked for background information on the subject's likes and dislikes. *Id.* at 3a-4a. Since Trosch is a physically large man, Justin used the theme "big" to answer the questions. *Id.* 4a. "The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other." *Id.* at 79a. For instance, the profile described Trosch as a "big steroid freak," said he smoked a "big blunt" and took "big pills," had skinny-dipped in a "big lake" and had been drunk a "big number of times." *Id.* at 4a. Justin explained that he made the profile to be funny and did not intend to hurt anyone. *Id.* at 5a n.4. He made the profile accessible to "friends" on MySpace. *Id.* at 5a.

Justin's profile was one of four "unflattering" Trosch profiles created by Hickory students, but the other three "contained more vulgar and offensive statements." *Id.* at 80a. Trosch learned of the profiles over the course of several days in December, and identified Justin as one of the posters. *Id.* After Justin and his mother were summoned to Trosch's office, Justin apologized to Trosch, both personally

and later in writing. *Id.* at 7a. The Layshocks disciplined Justin by grounding him. *Id.* at 114a.

After the holiday break, school district officials charged Justin and subsequently found him guilty of several infractions, including "disrespect," "harassment of a school administrator via computer/internet with remarks that have demeaning implications," and "obscene, vulgar and profane language." *Id.* at 8a. They issued Justin a ten-day suspension, placed him in an alternative education program and banned him from extracurricular activities and the graduation ceremony. *Id.* Justin, "who created the least vulgar and offensive profile, and who was the only student to apologize for his behavior, was also the only [one of four] student[s] punished for the MySpace profiles." *Id.* at 9a.

The Layshocks filed suit against the school district and its officials in January, 2006, claiming violations of the First and Fourteenth Amendments. *Id.* at 9a. After the district court denied the Layshocks' TRO motion, the parties resolved the injunctive claims by the school district restoring Justin to his regular classes and reinstating his extracurricular and graduation-ceremony privileges in exchange for plaintiffs dropping their motion for preliminary injunction. *Id.* at 10a.

Following discovery, the district court granted summary judgment for plaintiffs on the First Amendment speech claim, but granted judgment for defendants on all other counts, including a vagueness/overbreadth challenge to the school district's rules and a Fourteenth Amendment substantive due process parents' rights claim. *Id.* at

77a-116a. The court found that the school had "not established a sufficient nexus between Justin's speech and a substantial disruption of the school environment," noting that because "the actual disruption was rather minimal no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action." *Id.* at 99a, 100a. The court, moreover, found that the school district was "unable to connect the alleged disruption to Justin's conduct insofar as there were three other profiles of Trosch that were available on myspace.com during the same time frame," and there was no evidence that the alleged "'buzz' or discussions were caused by Justin's profile as opposed to the reaction of administrators." *Id.* The court also ruled that "Defendants have never attempted to justify their action based on a fear of future disruption." *Id.* at 102a.

The district court also rejected the school district's claim of authority under *Fraser*. *Id.* at 98-99. Although there was some evidence that Justin may have downloaded and showed the profile to others in Spanish class, *id.* at, 80a-81a, 101a, there was no evidence that the school administrators knew that Justin had accessed the profile while in school prior to the disciplinary proceedings and the school punished Justin only for his off-campus conduct, i.e., creating the profile, *id.* at 101a-02a.

A unanimous panel of the U.S. Court of Appeals for the Third Circuit affirmed the district court's First Amendment ruling. *Id.* at 39a-69a. It held that the school district had failed to preserve any argument of disruption under *Tinker*, *id.* at 55a, 60a, 65a, and thus was justifying its punishment of Justin exclusively under *Fraser*, *id.* at 55a-56a. In

the absence of any lewd and vulgar expression by Justin on campus, the panel ruled that it "found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school."

All fourteen judges of the *en banc* court affirmed the district court's grant of summary judgment in Justin's favor. *Id.* at 1a-30a. The *en banc* court did not reach the issue of *Tinker*'s applicability to off-campus speech because, as the panel had noted, the school district had failed to preserve that argument. *Id.* at 18a, 22a, 23a. The *en banc* court also rejected the school district's argument for authority to punish off-campus student expression under *Fraser*, concluding that "the cases relied upon by the school district stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here." *Id.* at 29a. Two judges issued a concurring opinion for the primary purpose of clarifying that neither the unanimous *Hermitage* decision nor the *Blue Mountain* majority opinion "declared that *Tinker* is inapplicable to off-campus speech." *Id.* at 36a.

In other words, neither case decided whether *Tinker* should apply to off-campus student speech.

REASONS TO DENY THE PETITION

I. These Cases Are Not Good Vehicles for Considering Whether *Tinker* Should Apply to Students' Off-Campus Speech

A. The Issue of Whether *Tinker* Applies to Off-Campus Speech is Waived in *Hermitage* and Thus Not Before This Court

Petitioners concede that *Hermitage* does not address the issue of *Tinker*'s applicability to students' off-campus speech. Pet. at 13. The district court ruled that school officials had "not established a sufficient nexus between Justin's speech and a substantial disruption of the school environment," *id.* at 99a, and had "never attempted to justify their action based on a fear of future disruption," *id.* at 102a. Hermitage did not challenge these findings on appeal, either before the panel, *id.* at 55a, 60a, 65a, or before the court *en banc*, *id.* at 18a, 22a, 23a-24a. Indeed, the unanimous *en banc* court held that the school district "does not dispute the district court's finding that its punishment of Justin was not appropriate under *Tinker*; it rests its argument on the Supreme Court's analysis in Fraser." App. 2 at 23a-24a. *See also id.* at 18a, 22a. Consequently, the school district's conceded waiver in *Hermitage* renders this case an inappropriate vehicle for consideration of *Tinker*'s applicability to students' off-campus speech. *See Travelers Cas. & Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 455-56 (2007).

B. *Blue Mountain* Rests on Adequate and Independent State Law Grounds

Although the Third Circuit applied *Tinker* when it decided *Blue Mountain*, it explicitly noted that the school district's punishment of J.S. also was foreclosed by state law. The majority recognized that Pennsylvania law strictly limits school districts' authority over students to "such time as they are under the supervision of the board of school directors and teachers." App. 1 at 24a n.5, citing 24 P.S. § 5-510. *See also* 24 P.S. § 13-1317 (limiting teachers' and other school officials' control over students' conduct and behavior to "the time they are in attendance").

Pennsylvania's intermediate appellate courts have interpreted these two statutes to "prohibit a school district from punishing students for conduct occurring outside of school hours – even if such conduct occurs on school property." App. 1 at 24a n.5 (citing *D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs.*, 868 A.2d 28, 36 (Pa. Commw. Ct. 2004)). *See also Hoke v. Elizabethtown Area Sch. Dist.*, 833 A.2d 304, 310 11 (Pa. Commw. Ct. 2003), *appeal denied*, 847 A.2d 59 (Pa. 2004). Based on this Pennsylvania law, the *en banc* majority correctly concluded that because "[a]ll of the integral events in this case occurred outside the school, during non-school hours . . . [w]e agree with the appellants' argument that 24 P.S. § 5-510 also barred the School District from punishing J.S. for her off-campus speech." App. 1 at 24a n.5.[2]

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[2] *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. Sup. Ct. 2002) ("*Bethlehem*"), a case discussed infra at 20, is not to the

Because of "this Court's policy of avoiding the unnecessary adjudication of federal constitutional questions," *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982), the Third Circuit's alternate holding – based on adequate and independent state grounds – provides ample reason to deny review of the First Amendment question. *See also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

In light of the adequate and independent state law grounds for the *Blue Mountain* decision, petitioners' assertions about the importance of First Amendment issues in *Blue Mountain* provides no reason to grant review in this case. *Blue Mountain* is not the first case involving this off-campus-Internet-speech issue to come before this Court,[3] nor will it be the last. Petitioners concede that these disputes have become "ubiquitous," Pet. at 22, leading to "dozens of cases filed in federal court involving this issue." *Id.* at 24. A case that does not involve a dispositive state-law ground surely will make its way to this Court. Here, however, the Third Circuit's alternative state law holding militates against using

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contrary. That case involved student Internet speech that originated off-campus, but because the student downloaded the website in school and shared it with other students the Court ruled that it was not "purely off-campus speech," *id.* at 865 n.12, and considered "the speech as occurring on-campus," *id.* at 865. Neither 24 P.S. § 5-510 nor § 13-1317 were discussed by the court, and *D.O.F.* and *Hoke* were decided after *Bethlehem*.

[3] *See Wisniewski v. Bd. of Educ. Of the Weedsport Central Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 80 U.S.L.W. 3260 (U.S. Oct 31, 2011) (No. 11 113); *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 573-74 (4th Cir. 2011), *petition for cert. filed*, Oct. 11, 2011, No. 11-461.

Blue Mountain to decide whether *Tinker* applies to students' off-campus speech.

C. First Amendment Issues Arising from the Problem of Student-to-Student Harassment Are Not Implicated in These Cases

Petitioners contend that these cases present an opportunity for this Court to address the pressing legal issues associated with the "disturbing practice of peer harassment, otherwise known as 'cyberbullying.'" Pet. at 22-29. Their amici likewise focus largely on the need for this Court to address school officials' authority to combat student-to-student harassment. *See* Amici Curiae Brief of National School Boards Association, et al., at 10-14, 17-27. *Hermitage* and *Blue Mountain*, however, do *not* involve peer harassment, but rather student criticism of principals.

While determining the First Amendment standard applicable to off-campus expression is a threshold question regardless whether the speech concerns other students or school officials, student-to-student harassment raises a unique set of issues involving a unique body of law that were not considered by the Third Circuit in these cases because it was unnecessary to do so. As petitioners note, "federal laws place an affirmative duty upon school officials to address bullying and harassment." Pet. at 26.[4] But, as this Court has recognized,

[4] Relevant federal statutes include Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq*., which prohibits discrimination on the basis of race, color or national origin; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq*., which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title

whether conduct "rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships.'" *Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (citation omitted).

The Court did not have occasion in *Davis*, or any case since then, to parse the intersection between actionable peer harassment and a student's rights under the First Amendment for in-school conduct, much less the more complex calculus that attends off-campus activity. Because it was unnecessary to grapple with the student harassment issues in either *Hermitage* or *Blue Mountain*, these cases are not a suitable vehicle for resolving the tension between students' First Amendment speech rights and schools' legal obligations to address student bullying, cyber or otherwise.

II. These Cases Do Not Create a Split in the Circuits on the Issue of What First Amendment Standard Applies to Students' Off-Campus Internet Speech

A. The Petition Does Not Identify a Circuit Split on Whether *Tinker* Applies to Students' Off-Campus Speech

The issue petitioners would like this Court to resolve – whether *Tinker* allows school officials to discipline students for off-campus speech that causes material and substantial disruption in the school environment – is not presented in *Hermitage*

II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, *et seq.*, both of which prohibit discrimination on the basis of disability.

because, as discussed above, it was waived. Nor is it presented by *Blue Mountain*.

The majority in *Blue Mountain* assumed, without deciding, that *Tinker* allows school officials to discipline students for off-campus speech if that speech causes material and substantial disruption in the school environment, but held that the district did not reasonably forecast disruption in that case. The court's "failure to decide"[5] whether it would have applied *Tinker* had there been disruption does not create a conflict. Petitioners' contention that a conflict exists would have merit had the concurrence been the majority, but it was not. Pet. at 14-20. The *Blue Mountain* majority applied *Tinker*, the same standard that the Second Circuit applied in *Wisniewski* and *Doninger*,[6] the Fourth Circuit applied in *Kowalski*,[7] the Eighth Circuit applied in *D.J.M. v. Hanibal Public School District,*[8] and the Pennsylvania Supreme Court applied in *Bethlehem*.[9] Contrary to petitioners' assertions, the Seventh and Ninth Circuits have not addressed the issue, Pet. at 16,[10] and as petitioners concede, the Fifth Circuit's

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[5] Petitioners argue that the majority's refusal to pronounce more broadly that *Tinker* should apply to all student-off-campus-speech cases creates a circuit split. Pet. at 17 ("By leaving this crucial question unanswered, the Third Circuit's *en banc* decision conflicts with those other circuits that have resolved it.").

[6] *See Wisniewski*, 494 F.3d at 38-39; *Doninger*, 527 F.3d at 48 .

[7] 652 F.3d at 573-74.

[8] 647 F.3d 754, 761 (8th Cir. 2011).

[9] 807 A.2d at 868.

[10] In *Boucher v. School Bd. of School Dist. of Greenfield*, 134 F.3d 821, 828-29 (7th Cir. 1998), the Court briefly speculated on

holding in *Porter v. Ascension Parish School Board* is "unclear."[11] Accordingly, the only difference between *Blue Mountain* and the Second, Fourth and Eighth Circuit decisions is how the Third Circuit applied *Tinker*. In short, there is no conflict.

Petitioners' alternative "circuit split" argument asserts that the Third Circuit applied *Tinker's* "reasonable forecast" standard more rigorously in *Blue Mountain* than the Second Circuit did in *Wisniewski* and *Doninger*. Pet. at 17-19. But petitioners admit that the majority "recited" the correct standard, *id.* at 31, and only disagree with the outcome. It is true that the Second Circuit presumed that the speech in *Wisniewski* could cause substantial and material disruption while the Third

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whether the school could regulate off campus speech before concluding that "[s]ince the article was in fact distributed on campus, however, we need not reach that issue." *Id.* at 829. In *LaVine v. Blaine School Dist.*, 257 F.3d 981 (9th Cir. 2001), the Ninth Circuit addressed facts in which a student brought a poem to school and showed it to his friends and a teacher. *Id.* at 989. Nothing in the opinion addresses off-campus speech.

[11] *Porter*, 393 F.3d 608 (5th Cir. 2004), did not apply *Tinker*, but as petitioners acknowledge the facts were unusual. Pet at 16 ("[w]hether Porter creates a blanket rule or one tailored to its facts is unclear"). The student in *Porter* drew a picture at home depicting a violent siege of the school, never brought it to school, never intended that it be brought to school, but simply stored it in his closet where by chance his younger brother found it two years after the fact and brought it to school. 393 F.3d at 615. Given these "unique facts," the Fifth Circuit declined to hold that this was in-school speech targeted at the school and therefore subject to *Tinker*. *Id.* and n.22. This would not be considered in-school speech even under the Second Circuit's test because it was not reasonably foreseeable that the drawing would find its way into school. *See Wisniewski*, 494 F.3d at 38-39; *Doninger*, 527 F.3d at 48.

Circuit demanded some evidence to support that forecast in *Blue Mountain*. But contrary to petitioners' argument, which is based on the *Blue Mountain* dissent, *id.* at 19 (quoting from App. 1 at 69a-70a), the Second Circuit did not announce a rule of unquestioning deference to school officials' forecasts – nor even a rule that anything offensive said about a member of the school community is automatically "disruptive." As the *Blue Mountain* majority aptly rejoined, the dissent "overstates" the Second Circuit's holding – both *Wisniewski* and *Doninger* are fact-based decisions – and thus the Second Circuit has not created a presumption that all "off-campus hostile and offensive student internet speech" inevitably leads to material and substantial disruption. App. 1 at 27a n.8. The *Blue Mountain* majority also aptly distinguished the facts in that case from the two Second Circuit cases, noting that they differ "considerably." *Blue Mountain* and the Second Circuit cases resulted in different outcomes on the facts; they did not apply different legal standards.

B. There Is Also No Circuit Split on Application of *Fraser* to Students' Off-Campus Speech

Petitioners also overreach in trying to establish a circuit split on *Fraser's* application to purely off-campus student speech. Pet. at 20-21. In *Morse v. Frederick*, this Court suggested in dicta that *Fraser* does not apply off campus.[12] No appellate court has held that *Fraser* applies to purely off-

[12] 551 U.S. at 404-05 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.") (citing *Cohen v. California*, 403 U.S. 15 (1971)).

campus speech. Although courts have held that speech created off campus but brought into the school could be treated as on-campus speech and thereby subject to *Fraser*, no appellate court has applied *Fraser* to student speech that has never been brought onto campus by the speaker.

Petitioners suggest that the Pennsylvania Supreme Court applied *Fraser* to off-campus speech in *J.S. v. Bethlehem Area School District*, but the Pennsylvania Supreme Court in that case actually considered the speech at issue to be in-school speech because the student had accessed his website on a school computer in a classroom, showed the site to another student, and informed other students at school about the website. 807 A.2d at 865. And even in that case, the court held that it did not need to "definitively decide" whether *Fraser* applies off campus because the school district met its burden under *Tinker*. *Id.* at 867. Likewise, in *Kowalski v. Berkeley County Schools*, the Fourth Circuit speculated whether harassing speech originating off campus but received by the targeted student on campus might fall under *Fraser*, but ultimately did not reach the question because it resolved the dispute under *Tinker*.[13] Such *dicta* does not present a circuit split.

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[13] 652 F.3d at 573-74, *petition for cert. filed*, Oct. 11, 2011, No. 11-461 ("We need not resolve, however, whether this was in school speech and therefore whether *Fraser* could apply because the School District was authorized by *Tinker* to discipline *Kowalski*, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it "interfer[ed] . . . with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone."). *See also* Pet. at 21 (recognizing that *Kowalski* "applied *Tinker*").

Petitioners try to create a split between the Third Circuit and the Pennsylvania Supreme Court's *Bethlehem* decision by claiming that *Hermitage* holds 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." Pet. at 33 (emphasis added). *See also id.* at 20 ("the Third Circuit extended [*Fraser*] to cover speech that makes its way onto campus, as Layshock's speech did. . . ."). The problem with this argument is that it flows from petitioners' mistaken claim, which they repeat several times, that Justin physically brought the profile into school by downloading it on a school computer during a class. *See* Pet. at 11, 20 and 33. Whether Justin actually downloaded the profile while in school is a disputed fact. App. 2 at 80a n.2. What is not disputed is that school officials did not know that Justin downloaded the website in school at the time, id., 6a-7a, 80a-81a, 101a-102a, and that Hermitage officials punished Justin for his off-campus conduct, i.e., for creating the website, not for bringing it into school, *id.* at 28a-29a, 99a, 101a-102a. Accordingly, petitioners' claim that *Hermitage* prohibits punishing students for the off-campus creation of vulgar material that violates *Fraser*, even if the student subsequently brings it onto campus, must be rejected. In sum, these cases do not create a conflict in the circuits on the non-applicability of *Fraser* to students' off-campus speech.

CONCLUSION

For the reasons discussed above, the petition for certiorari should be denied.

Respectfully submitted,

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