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

REPLY BRIEF FOR PETITIONERS

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

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

[Additional Counsel Listed On Inside Cover]

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

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

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

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave., N.W., Suite 500
Washington, DC 20037
(202) 639-6500

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Balsbaugh v. *Rowland*,
290 A.2d 85 (Pa. 1972).....4

Bethel School District No. 403 v. *Fraser*,
478 U.S. 675 (1986).....*passim*

City of Mesquite v. *Aladdin's Castle, Inc.*,
455 U.S. 283 (1982).....4

Coleman v. *Thompson*,
501 U.S. 722 (1991).....3, 4

Goss v. *Lopez*,
419 U.S. 565 (1975).....9

Grutter v. *Bollinger*,
539 U.S. 982 (2003).....9

J.S. v. *Bethlehem Area Sch. Dist.*,
807 A.2d 847 (Pa. 2002).....5

Lyng v. *Northwest Indian Cemetery Protective Association*,
485 U.S. 439 (1988).....4, 5

Morse v. *Frederick*,
551 U.S. 393 (2007).....10

New Jersey v. *T.L.O.*,
469 U.S. 325 (1985).....9

Parents Involved in Community Schools v. *Seattle Sch. Dist. No. 1*,
551 U.S. 701 (2007).....9

TABLE OF AUTHORITIES

Page(s)

Tinker v. *Des Moines Independent Community School*,
393 U.S. 503 (1963).....*passim*

Miscellaneous

Pet., *Kowalski* v. *Berkeley County Schools* (No. 11-461) (2011) 3

REPLY BRIEF FOR PETITIONERS

1. Respondents do not dispute that the questions presented here are of fundamental constitutional and practical importance. See, *e.g.*, Br. in Opp. 1. With the advent of the Internet, every school system in the country faces the acute challenge of determining how to respond to online speech directed at teachers, principals, or fellow students. Most school districts have faced this issue in some form already, sometimes with severe consequences for the target of such an attack or the unlucky school administrator who unwittingly runs afoul of the First Amendment when trying to stop it; other districts know it is merely a matter of time before they will have to confront the same issue. See Pet. 22-29.

Respondents do not suggest otherwise, nor do they even seek to defend the decisions below as correct. Yet they nonetheless urge the Court to deny review. Respondents labor mightily to make these cases a bad "vehicle" for addressing the questions presented (they are not, as the decisions below make clear), and to sweep aside the confusion among the lower courts (they are in disarray, as everyone save respondents acknowledges). Br. in Opp. 12-21.

But respondents have no answer to the most crucial question: What are school administrators to do?

Respondents' assurances that conflicting analyses will be dismissed as "*dicta*" (Br. in Opp. 20), or mere "assum[ptions]" (Br. in Opp. 17), and that this "will [not] be the last" piece of litigation involving these issues (Br. in Opp. 14), are cold comfort. School

districts nationwide are all too aware that such incidents are certain to recur. That is why this Court's immediate guidance is so desperately needed. When the 2012 school year opens next fall, teachers and administrators need to know whether the First Amendment requires them to sit on their hands in response to student behavior that, as painful real-world experience demonstrates, can ruin careers, disrupt and undermine the school's learning environment, and, indeed, endanger the very health and well-being of their students.

2. Respondents offer a potpourri of arguments in favor of delaying resolution of the questions presented: They suggest that the question of *Tinker's* applicability to online speech is not before this Court, that the decision in *Blue Mountain* rests on independent and adequate state grounds, and that these cases do not involve student-on-student harassment. Br. in Opp. 12-15. These arguments all lack merit.

a. Respondents' first argument asserts that the applicability of *Tinker* v. *Des Moines Independent Community School*, 393 U.S. 503 (1963), was waived in *Hermitage* and is therefore "not before this Court," at least not in that case. Br. in Opp. 12. This lead point, which is true but irrelevant, misconceives the nature of our petition.

The petition seeks review of two decisions, *Blue Mountain* and *Hermitage*, and it presents two questions. The first involves the applicability of *Tinker* to student internet speech and the second the applicability of *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), to the same type of speech. The *Tinker* question, as respondents

acknowledge, was squarely addressed by the Third Circuit in *Blue Mountain* and is therefore before this Court. The *Fraser* question was addressed in *Hermitage*, so it, too, is before this Court.

The fact that the *Hermitage* court did not *also* address the applicability of *Tinker* is no obstacle whatsoever to this Court reaching the *Tinker* question in its review of *Blue Mountain*. It is therefore no reason to deny this *petition*. To the contrary, it offers another good reason to grant the petition and review both decisions below, as doing so will afford the Court the sure opportunity to address the related *Tinker* and *Fraser* questions in the same opinion, rather than piecemeal in separate cases.[1]

b. Respondents also argue that review is not warranted because *Blue Mountain* rests on "adequate and independent state law grounds" (Br. in Opp. 13), namely the Third Circuit's observation in a footnote that the school district violated a state statute in punishing J.S. Respondents are plainly wrong.

To begin, this doctrine only applies when this Court is reviewing *state* court judgments, not the judgments of lower federal courts. See, *e.g.*, *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991) ("This Court

---

[1] As noted in our petition, this is also a reason to grant review in these cases rather than in *Kowalski*, which only involves the *Tinker* question. See Pet. 34. Even the *Tinker* question might not be squarely before the Court in *Kowalski*, given petitioner's argument in that case that the speech at issue had no connection whatsoever to the school. See Pet., *Kowalski* v. *Berkeley County Schools* (No. 11-461) (2011), at 21-22.

will not review a question of federal law decided by a *state court* if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.") (emphasis added).

Even if the doctrine were in theory applicable to federal court decisions, review would still be appropriate here because the decision in *Blue Mountain* did *not* rest on a state ground that was "adequate to support the judgment," *Coleman*, 501 U.S. at 729. Respondents in *Blue Mountain* seek monetary damages, which are available in this case only for a proven violation of federal constitutional law, not for the alleged state statutory violation. Cf. *Balsbaugh* v. *Rowland*, 290 A.2d 85, 90 (Pa. 1972) (allowing for injunctive relief). Respondents do not suggest to the contrary, and the Third Circuit itself contemplated damages only for respondents' First Amendment claim. See Pet. App. 1 at 24a, 32a. Success on the state claim, therefore, is not adequate to support the judgment below. Put differently, whether respondents succeed on their First Amendment claim *matters* to the outcome of *Blue Mountain*, as is obvious from the sustained attention devoted to that issue by the en banc majority, concurring, and dissenting opinions below.

Neither of the cases cited by respondents—*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982), and *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445 (1988)—is to the contrary. Just the opposite. As explained in *Lyng*, courts should only reach federal constitutional questions when necessary to do so, which requires asking "whether a decision on [the federal] question"

would entitle claimants "to relief beyond which they [are] entitled on their [state] statutory claims." *Id.* at 446. Because the *Blue Mountain* respondents *would* be entitled to relief on their federal claim beyond that which is available for their state claim, it follows that a decision on their federal claim is both necessary and appropriate.

Resolving the First Amendment questions is therefore central to the outcome of *Blue Mountain*, just as it is to the outcome of *Hermitage*, where no state law claim was raised. And beyond the context of these two cases, the importance of resolving these questions cannot be gainsaid, as guidance in this area is critical for every one of the tens of thousands of schools across the country, including those in Pennsylvania.[2]

---

[2] It is worth noting in this regard that the Third Circuit's reading of Pennsylvania law was cursory at best and very likely incorrect. See Pet. App. 1 at 68a-69a (Fisher, J., dissenting). In a single footnote in an otherwise thorough opinion (Pet. App. 1 at 24a, n.5), the Third Circuit cited to one intermediate appellate state court opinion and concluded with scant analysis that the school district lacked authority under state law to discipline J.S.

That offhand conclusion, however, is difficult to reconcile with the Pennsylvania Supreme Court's opinion in *J.S.* v. *Bethlehem Area Sch. Dist.*, 807 A.2d 847, 865 & n. 12 (2002), which held that schools may discipline students for internet speech that originates off campus and is accessed on campus. The court further noted that "we do not rule out a holding that purely off-campus speech may nevertheless be subject to regulation or punishment by a school district if the dictates of *Tinker* are satisfied." *Id.* at 864 n.11. The court gave no

c. Respondents also suggest that review is not appropriate because these cases do not involve the problem of "student-to-student harassment." Br. in Opp. 15. They instead involve student-to-faculty harassment. Respondents do not contend, however, that the First Amendment standard should differ depending on whether students target faculty or other students. To the contrary, they recognize that the First Amendment standard "is a threshold question regardless whether the speech concerns other students or school officials." Br. in Opp. 15. It is therefore difficult to understand respondents' objection, as they cite nothing to suggest that the First Amendment standard governing student speech would or should change depending on whether faculty or other students are targeted.

Nor do respondents deny that the issue of students targeting faculty is independently important. Thus, even if different standards should apply depending on the person targeted by the speech, that is hardly a reason to deny review in these cases. As amici explain, malicious online speech directed at faculty "ruins careers, wastes valuable district resources, and undermines the authority of school administrators charged with student discipline." Amici Curiae Br. of Nat'l Sch. Bds. Assoc., et al., at 13. School administrators therefore need to know how they can respond to this

---

indication whatsoever that state law would prohibit disciplining students for speech that originates off campus. Contrary to respondents' assertion (Br. in Opp. 13-14 n. 2), *Bethlehem* is directly on point and is properly viewed as the authoritative guidance on Pennsylvania law.

kind of speech just as much as they need to know how they can respond to speech targeting students.

3. In the second half of their brief (Br. in Opp. 16-21), after straining to identify vehicle problems, respondents seek to downplay the confusion among the lower courts, which has been documented by courts and commentators alike. See Pet. 24. Respondents argue that courts are not split regarding the related questions of whether and how *Tinker* applies to student speech that originates off campus. They also contend that there is not a genuine conflict over the applicability of *Fraser*. Br. in Opp. 16-21. Neither argument succeeds.

a. As to the conflict over whether *Tinker* applies to online student speech, respondents themselves nicely illustrate the real problem. In a single paragraph, respondents suggest first that there is no conflict because the Third Circuit's "failure to decide" the applicability of *Tinker* does not create a conflict with other courts that have applied *Tinker*. Br. in Opp. 17. Respondents then contend that there is no conflict because "[t]he *Blue Mountain* majority applied *Tinker*," just as other courts have done. Br. in Opp. 17. Readers could be forgiven for asking: Which is it? Does *Tinker* apply or not? More to the point, this is precisely the question that lower courts within the Third Circuit, absent this Court's intervention, will have to grapple with for the foreseeable future.

School administrators will have similar questions, and there are currently no good answers for them. The Third Circuit's entrenched disagreement about whether online student speech can *ever* be punished obviously creates a real risk of liability for school

districts, which will lead most risk-averse school districts to stay their hands rather than act to combat malicious, vulgar, and potentially disruptive student speech that begins online. To do otherwise risks costly and time-consuming litigation, which the decisions below not only condone but positively encourage. Districts that do act run the ultimate risk that a court will read the decisions below as license never to apply *Tinker* and *Fraser* in this context, leaving online student speech immune to regulation by teachers and principals.

In this practical sense, the Third Circuit's failure to resolve whether *Tinker* can ever apply to online student speech is hardly different from an explicit decision *not* to apply *Tinker*. It therefore blinks reality to suggest, as respondents do, that there is no real conflict between the Third Circuit and those courts that have held that *Tinker* definitely applies to online student speech that originates off campus.

b. Respondents further argue, contrary to the dissenting opinion in *Blue Mountain*, that there is not a real conflict between the Second and Third Circuits regarding how *Tinker* should apply to online student speech (assuming for argument's sake that it applies at all, as the Third Circuit did for the purpose of deciding *Blue Mountain*). Br. in Opp. 18-19. Respondents do not dispute petitioner's observation (Pet. 19-20), that the cases below would have come out differently were they decided in the Second Circuit. Respondents also concede that the Second and Third Circuits differ in the degree of deference afforded to the judgment of school officials that speech will be disruptive. Br. in Opp. 18 (acknowledging that the Second Circuit "*presumed* the

speech in *Wisniewski* could cause substantial and material disruption," just as school officials predicted) (emphasis added). Respondents nonetheless suggest that this difference simply means that the Second and Third Circuits reached different results based on different facts, not that they applied different legal standards. Br. in Opp. 19.

The degree of deference afforded school officials, however, is part and parcel of the legal standard governing their actions. This Court recognized as much in *Parents Involved in Community Schools* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), and *Grutter* v. *Bollinger*, 539 U.S. 982 (2003), as one of the key issues that divided the Court in those cases was how much deference should be afforded school and university officials. Similarly, in the context of school discipline, deference to school officials is inextricably linked to the legal standards, and this Court has made plain that courts—contrary to the Third Circuit's approach in these cases—should defer to the professional judgment of school officials when it comes to day-to-day issues of student discipline. See, *e.g.*, *New Jersey* v. *T.L.O.*, 469 U.S. 325, 339-341 (1985); *Goss* v. *Lopez*, 419 U.S. 565, 580-584 (1975). See also *Fraser*, 478 U.S. at 685 ("The First Amendment *does not prevent school officials from determining* that to permit a vulgar and lewd speech * * * would undermine the school's basic educational mission.") (emphasis added). Whether and when to afford school officials deference is thus not a question about "facts," as respondents suggest (Br. in Opp. 19); instead it goes to the very heart of the relationship between federal courts and public schools.

c. Respondents' final argument asserts that there is no conflict regarding the applicability of *Fraser*. Respondents deny a conflict on the ground that statements in opinions by the Pennsylvania Supreme Court and the Fourth Circuit, indicating clearly that *Fraser* can apply to student internet speech that originates off campus, are merely dicta. Br. in Opp. 20-21. However respondents choose to classify those clear statements, there can be little doubt of the legal standard in Pennsylvania and the Fourth Circuit.

Nor can there be any doubt that this standard conflicts with that of the Third Circuit, as the Fourth Circuit itself has recognized. See Pet. 21. The Third Circuit established a bright-line rule, based on a misreading of this Court's opinion in *Morse* v. *Frederick*, 551 U.S. 393 (2007), that *Fraser* simply does not apply to speech that originates off campus, even if that speech makes its way onto campus, as it did in *Hermitage* when the profile was downloaded at school and shown around to students. See Pet. 20-21. Respondents try to avoid the force of the *Hermitage* decision by suggesting that "[w]hether Justin actually downloaded the profile while in school is a disputed fact." Br. in Opp. 21. This suggestion, however, is flatly contradicted by the unanimous opinion of the en banc Third Circuit, which states without equivocation that "Justin used a computer in his Spanish classroom to access his MySpace profile of [Principal] Trosch," and that "[h]e also showed it to other classmates." Pet. App. 2 at 6a. The Third Circuit nonetheless held that *Fraser* cannot apply. That is not what the Pennsylvania Supreme Court or the Fourth Circuit would have concluded.

4. Amici supporting the petition in this case include, among others, the National School Boards Association, the American Association of School Administrators, and the National Associations of Elementary and Secondary School Principals. As they explain, "[s]chool administrators, who must regularly apply this disparate [lower court] precedent to a wide variety of factual situations, are understandably confused. They have no clear, cohesive body of law to guide their regulation of student online speech originating off campus * * * ." Amici Curiae Br. 9-10. These school professionals, who work in school districts all across the country, "implore this Court to rectify this untenable situation by ruling definitively" on the issues presented in these cases. *Id.* at 10. Petitioners join that plea and respectfully request that these cases be granted and set for argument this Term, so that school administrators will not have to wait another school year for guidance.

CONCLUSION

For the foregoing reasons and those stated in the petition and amici brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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

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

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

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

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

JOHN P. ELWOOD
Vinson & Elkins LLP
2200 Pennsylvania Ave., N.W., Suite 500
Washington, DC 20037
(202) 639-6500

DECEMBER 2011