No. 11-461

In The Supreme Court of the United States

KARA KOWALSKI,

Petitioner,

v.

BERKELEY COUNTY SCHOOLS, ET AL.,

Respondents.

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

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER

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MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.2(b), for leave to file an *amicus curiae* brief in support of the Petitioner in the above-styled case presently before this Court on a Petition for Writ of Certiorari.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of the parties to this case, but consent was withheld by the Respondents. The Rutherford Institute also avers that it provided counsel of record to the parties with notice of the intent to file an *amicus curiae* brief

more than 10 days prior to the due date of this brief pursuant to Sup. Ct. R. 37.2(a).

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute believes that out-of-school speech of students should be beyond the reach of school authorities. Allowing schools to impose a standard of good manners and appropriate behavior on off-campus speech will impose an intolerable limitation upon the First Amendment rights of minors. Except in the case of criminal conduct by a minor, the right and duty to correct and discipline students for inappropriate behavior outside of school lies with parents. The decision below makes an unwarranted extension of this Court's school speech jurisprudence and the Institute asks that it be heard on the reasons why the Court should grant the petition and delineate the limits on public school authority over student speech.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the First Amendment permits a public school to discipline a student for speech that occurs off-campus and not at a school-related event, and that is not directed at the school.

2. Whether off-campus student speech not directed at the school satisfies *Tinker*'s "material and substantial disruption" test merely because a single student missed one day of school and because school officials speculated that the off-campus speech might lead to "copycat" behavior on school grounds.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have argued cases and filed *amicus curiae* briefs in the Federal Courts of Appeal and U.S. Supreme Court in numerous cases involving student rights in the public education setting, including *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) and *Morse v. Frederick*, 127 S. Ct. 2618 (2007). Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

The Rutherford Institute works to preserve the maximum freedom for citizens to express opinions without fear of repression or discrimination and to enhance respect and protection for free speech rights guaranteed by the First Amendment. The Institute diligently promotes a society where the free marketplace of ideas can predominate. Furthermore, The Rutherford Institute is dedicated

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[1] No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

to assuring that all citizens, including students, teachers and school administrators, appreciate the delicate balance between the First Amendment's protection of free expression and the need for students to be well-educated, productive citizens of our republic with a healthy respect for, and tolerance of, differing opinions and viewpoints and an understanding of the rights granted under the Bill of Rights.

SUMMARY OF THE ARGUMENT

This case will have a critical impact on the First Amendment rights of student-citizens expressing their views off school property. Student speech occurring away from school property should not be made subject to rote application of school rules that are appropriate to speech occurring in school. Rather, unless the student is formally representing the school or is present at a school-sponsored event, restrictions on off-campus student speech should be determined according to the reasonable and principled standards that apply to the forum where the speech occurs.

Just as students do not forfeit their First Amendment rights upon entering the schoolhouse gate, so, too, schools should not be able to censor student speech uttered off-campus based on rules that otherwise might be proper within the school. In other words, unless students are physically on school property, formally representing the school system or at a school-related event, student speech outside the schoolhouse gates should not be restricted any more

than the legitimate restriction of utterances by adult members of the community in the same forum. Likewise, punishment for off-campus expression of a viewpoint that conflicts with the school system's preferred message constitutes unlawful viewpoint discrimination.

Finally, Respondents' misguided attempt to obtain control over off-campus speech, if sustained, will greatly undermine First Amendment values and send the wrong message to young citizens and their parents. Student speech has often prompted, and even produced, broad cultural and political change. If administrators are accorded the power to censor and punish students for off-campus speech or protest, the nation and its political dialogue will suffer indescribable loss. Additionally, it will send a message to parents, who are primarily responsible for the custody and control of their children, that the state intends to usurp that authority and become the primary disciplinarian of children who attend public schools. This Court should reject this constitutional double standard that would destroy the public school system's credibility among America's youth and encourages parents to abdicate their duty and prerogative to direct the upbringing of their children.

ARGUMENT

IF THE SCHOOL'S DISCIPLINARY ACTION IS SUSTAINED, IT WOULD SET THE PRECEDENT FOR AN OMNIPRESENT SCHOOL AUTHORITY OVER OFF-CAMPUS SPEECH AND IMPOSE A CHILLING EFFECT ON STUDENT SPEECH

In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969) *("Tinker")*, the United States Supreme Court declared the vital importance of student speech and the protection it deserves, even on school campuses:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 1.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—the kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-09. While school officials have some latitude in regulating the speech of students occurring within the context of the educational environment, *Tinker* also made clear at the same

time that "state-operated schools may not be enclaves of totalitarianism." *Id.* at 511.

The place and geography where speech occurs is a critical factor in determining the level of protection afforded under the First Amendment. *Frisby v. Schultz*, 487 U.S. 474 (1998); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985). *Tinker* and its progeny dealt with student speech that either occurred within the metes and bounds of the school, at school assemblies or in school curricula. *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (lewd and profane speech "has no place" in a "high school assembly or classroom"); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (school districts may regulate "school-sponsored" events). Most recently, *Morse v. Frederick*, 551 U.S. 393 (2007) upheld the right of school officials to engage in viewpoint discrimination against speech that can reasonably be regarded as advocating illegal drug use at a school-supervised event.

Kara Kowalski's speech, however, is beyond the scope of *Tinker* and its progeny. The MySpace (www.myspace.com) page that Kara posted was created on a computer at her home and in her own free time. As such, neither *Fraser, Kuhlmeier* nor *Morse* is controlling and cannot be used to justify the punishment the school imposed on Kara. Although the Court of Appeals recognized that the speech at issue here occurred outside of school and that the school's authority to impose punishment because of it was not "clear cut," *Kowalski v. Berkeley County Schools*, 652 F.3d 565, 573 (4th Cir. 2011), it held

that *Tinker* did authorize the discipline because it "'interfer[ed] . . . with the schools' work [and] collided with the rights of other students to be secure and to be let alone.'" *Id.* at 573-74 (quoting Tinker, 393 U.S. at 508, 513).

But nothing in *Tinker* or its progeny authorizes schools to punish speech occurring off-campus because it causes a "material and substantial disruption" within the school.[2] In articulating the test for school regulation of speech, *Tinker* recognized the "authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct *in the schools*." *Tinker*, 393 U.S. at 507 (emphasis added). The opinion's discussion of the authority of schools over student speech refers to speech "in class, in the lunchroom, or on campus," *id.* at 508, and gives no indication that the authority extends to speech occurring outside of the school context. Indeed, the decision emphasized that "[s]chool officials do not possess absolute authority over their students. Students in school as well as out

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[2] As pointed out in the Petition for Certiorari, the Fourth Circuit's reliance on potential harms as the basis for the finding that material and substantial disruption resulted from Kara's internet posting is plainly inconsistent with *Tinker*. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. Even if *Tinker* is applicable to Kara's off-campus speech, absent specific and articulable facts supporting a forecast of substantial disruption, the school's mere supposition that such disruption would occur is not sufficient to justify punishing Kara's speech.

of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Id.* at 511.

More recently, this Court rejected attempts to further limit the First Amendment rights of minors by striking down a law restricting access to video games deemed violent. In refusing to extend the authority of the state to create a new category of expression that is unprotected in the context of children, this Court wrote:

> That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. Jacksonville,* 422 U.S. 205, 212–213. No doubt a State possesses legitimate power to protect children from harm, . . ., but that does not include a free-floating power to restrict the ideas to which children may be exposed.

Brown v. Entertainment Merchants Ass'n., 131 S.Ct. 2729, 2735 -2736 (2011). By the same token, there is no precedent of this Court allowing a school to act as a roaming censor with the ability to police student speech regardless of where it occurs.

While the growth of modern communication technology has made speech by all persons, including students, more accessible, easily transmitted and pervasive, this does not provide a legal justification for allowing schools to punish off-campus speech. If the reasoning of the Fourth Circuit in this case is allowed to stand, the concept of private student speech will be seriously endangered. Anything posted by public school students on the internet that is even vaguely related to the school environment, teachers, students, etc., would be considered speech subject to review, regulation, censorship or punishment by school administrators. Considering this potential for abuse and overreaching by even well-meaning school administrators, it is imperative that there remain an area where students are subject to First Amendment protections. Students must not be subject to the chilling effect of the fear of reprisals for engaging in private speech whenever the speech could be deemed to affect, however slightly, the activities or persons connected with a school.

Courts are typically reluctant, for obvious reasons, to interfere with the administration of school discipline. The traditional "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Thomas v. Board of Education, Granville Central School District*, 607 F. 2d 1043, 1044-45 (2nd Cir. 1979). When it is suggested, however, that school disciplinary authority should reach beyond the schoolhouse gates, traditional judicial deference

is no longer appropriate. Barring extraordinary circumstances, ordinary constitutional principles apply just the same as they do to all citizens.

In *Thomas*, 607 F.2d at 1045, the Second Circuit declared that "[w]hen an educator seeks to extend his dominion beyond [the schoolhouse gate]...he must answer to the same constitutional commands that bind all other institutions of government." In striking down discipline imposed on students for the content of a newspaper they published, the court distinguished *Tinker* based on the off-campus location of the speech, noting that "[w]hile prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." *Id* at 1050. The court held that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id*.

Even if the development of the internet and social networking websites makes student speech accessible in schools, the constitutionally-principled response is not to simply deem any speech that concerns the school to fall under the umbrella of on-campus speech. Granting public school officials, who exercise the authority of the state, virtually unlimited censorship authority, as advanced here by the lower courts, would not only result in a grossly overbroad restriction on First Amendment rights, but would also disserve students and the body public

by imposing a chill upon student expression. If school administrators are granted authority to punish speech occurring off school grounds, the effects are potentially dire. As Judge Kaufman warned in *Thomas*:

> 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 . . . at a neighborhood newsstand and lends it to a student 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. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Parens patriae*.
>
> The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression.

> In addition to their vested interest and susceptibility to community pressure, they are generally unversed in difficult constitutional concepts such as libel and obscenity. Since superintendents and principals may act "arbitrarily, erratically, or unfairly," the chill on expression is greatly exacerbated.

Id. at 1051.

Moreover, similar juvenile and mean-spirited words must be uttered numerous times by students across the country every day, both inside and outside of school. Even where the courts have upheld disciplinary action for cruel statements and caricatures, there is a need for something considerably more than hurt feelings. *See J.S. v. Bethlehem School District*, 569 Pa. 638 (Pa. 2002) (holding that a student's threats, statements and caricatures of a teacher, created in private, which led to the teacher being forced to take over 20 days of medical leave and necessitating the use of three substitute teachers, adversely impacted the education environment).

If the Court sustains the school's disciplinary action, it would give school administrators *carte blanche* authority to punish students' private speech whenever it related to the school, teachers, students, etc., simply because they disagree with it—even innocent jokes could be targeted. School officials would be free to act in an arbitrary and capricious manner, with unrestricted freedom to engage in viewpoint discrimination. It is not difficult to envision "positive" comments being allowed by school

officials, but "negative" comments resulting in disciplinary action against the students who made them. The potential for abuse and inconsistent application amounting to viewpoint discrimination by school administrators represents a very serious First Amendment concern.

Furthermore, rejection of schools' authority to punish off-campus speech would not leave the community at the mercy of student speech that is offensive and hurtful. The legal system has substantial recourse for school officials who are defamed or subject to "true" threats. The appropriate relief in such cases should not be through an overreaching of the arm of the school (and corresponding weakening of students' First Amendment rights), but rather through appropriate remedies in tort and criminal law.

Even more appropriately, instead of invoking the heavy hand of state retribution to remedy the kind of mean-spirited speech at issue here, school officials should enlist the aid and assistance of parents in enforcing standards of good conduct and civility by children. As this Court has eloquently stated before, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

That the prerogative to control and punish this speech lies with parents is supported by the recent decision in *Brown*, where, responding to a claim that minors have no First Amendment rights and that laws restricting the access of minors to constitutionally-protected materials are constitutionally valid, the Court wrote as follows:

> Such laws do not enforce *parental* authority over children's speech and religion; they impose *governmental* authority, subject only to a parental veto. In the absence of any precedent for state control, uninvited by the parents, over a child's speech and religion . . ., and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional. . . . It is the absence of any historical warrant or compelling justification for such restrictions, not our *ipse dixit,* that renders them invalid.

Brown, 131 S.Ct. at 2736, n. 3 (emphasis in original).

While there is certainly a societal interest in curtailing bullying and harassment of students, this interest in itself does not justify a school's invocation of the power of the state to punish off-campus speech. This Court has repeatedly recognized the bedrock principle that government may not punish speech because it finds that speech offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "Indeed, 'the point of all speech protection . . . is to shield just those choices of content that in

someone's eyes are misguided, or even hurtful.'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)). School officials are not powerless in this regard as they are free to alert parents of students who engage in hurtful or harassing speech of their children's offensive speech and urge the parent to take appropriate steps to discipline and control the child. *Amicus* asks the Court to reaffirm the responsibility and authority of parents—not the state—to discipline and control their children by granting the petition in this case.

CONCLUSION

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). The decision below and others which authorize public schools to punish students for off-campus speech deemed offensive by school officials constitute an unprecedented and unwarranted extension of state power. Schools should be engaging parents and guardians in a joint effort to promote civil behavior, not reaching the heavy hand of government sanction beyond the schoolhouse gate. The Court should grant the petition in order to establish limits on the power of schools to punish and chill speech.

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