United States Court of Appeals

for the

Third Circuit

Case No. 19-1842

B.L., a minor, by and through her parents
LAWRENCE LEVY and BETTY LOU LEVY,

Appellee,

– v. –

MAHANOY AREA SCHOOL DISTRICT,

Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA IN CASE NO. 3-17-CV-01734
HONORABLE A. RICHARD CAPUTO, U.S. DISTRICT JUDGE

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus curiae* Foundation for Individual Rights in Education certifies that *amicus* does not have any parent corporations, and no publicly held companies hold 10% or more of its stock or other ownership interest.

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INTEREST OF AMICUS CURIAE

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student First Amendment rights at campuses nationwide. FIRE believes that to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free speech rights on campus.

FIRE coordinates and engages in targeted litigation and regularly files briefs as *amicus curiae* to ensure that student First Amendment rights are vindicated when violated at public education institutions. Because courts often mistakenly apply high school First Amendment rulings to college cases, and because today's high school students are tomorrow's college students, faculty, and administrators, FIRE has a strong interest in ensuring robust First Amendment protections for student speech in the K-12 context.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), FIRE files this *amicus curiae* brief with the consent of all parties. Pursuant to Federal Rule of Appellate Procedure 29(a)(4), counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus curiae or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

Appellee B.L., while a sophomore in high school, vented her frustration over not making the varsity cheerleading squad by posting a "Snap" to her private Snapchat account that depicted her in street clothes on a weekend, displaying "the finger," and using a profanity in reference to the team. *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429, 433 (M.D. Pa. 2019). In a time of ubiquitous social media use, B.L.'s post is unremarkable, especially for a frustrated teenager. Yet Appellant Mahanoy Area School District ("the District") suspended B.L. from the cheerleading squad after her coaches learned of her post. *Id.*

B.L. brought a First Amendment challenge to her suspension and the district court granted summary judgment in her favor. Applying this Court's binding precedent in *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (*en banc*), and *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (*en banc*), the district court correctly rejected the District's argument that it could force B.L. to waive her First Amendment rights in exchange for participation on the team, and that it could thereby extend its regulatory authority off-campus far beyond any point this Court or the Supreme Court have previously permitted.

The District now brings these same arguments before this Court. Contrary to the District's assertions, however, the Supreme Court has long made clear that an institution cannot condition the receipt of a public benefit on the surrender of a

constitutional right. B.L. is entitled to a public education in Pennsylvania, and both the state and the federal government recognize extracurricular programs as integral to public education. Thus, the District's attempt to restrict B.L.'s speech rights as a precondition to participating on the team should be rejected by this Court under the unconstitutional conditions doctrine.

The District further argues that sanctions related to extracurricular activities receive lesser First Amendment protection than disciplinary sanctions. Conflating due process standards with a First Amendment analysis, the District asserts that extracurriculars are a privilege, not a right, that may be permissibly taken away where a disciplinary sanction would otherwise violate a student's free speech rights. Such authority is necessary, according to the District, to further its "educational mission of instructing students to follow rules and be good citizens." Br. for Appellant 8. But neither the Supreme Court nor this Court have ever permitted a school's regulation of student speech to stretch so far.

As the district court observed, the District's focus on the extracurricular nature of its sanction "puts the constitutional cart before the horse." *B.L.*, 376 F. Supp. 3d at 438. Under a correctly-framed First Amendment analysis, the relevant question is whether B.L.'s speech was protected—and the clear answer under the undisputed facts is that it was.

This Court has left undecided the question of whether a student's off-campus speech is fully protected by the First Amendment or instead may be restricted under the Supreme Court's K–12 school speech jurisprudence. However, it has made clear that "[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school. . . . An opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion." *J.S.*, 650 F.3d at 933. As the district court found, such authority is precisely what the District seeks to exercise here. Under any applicable First Amendment framework, the District punished B.L. for clearly protected speech in violation of her constitutional rights.

The Court's refusal to grant schools the "overbroad censorship discretion" that the District exercised here is necessary to protect student speech and autonomy, particularly online. As social media has become the new public square, FIRE's experience fighting the censorship of online student speech in the college setting evidences a pressing need for clear judicial boundaries around a school's authority to police student social media. FIRE's archives are replete with examples of the increased monitoring of social media by colleges and pervasive administrative censorship and punishment of disfavored online speech. Because

high school speech jurisprudence is often misapplied to higher education, it is important that this Court continue to clearly demarcate the limits of administrative control over speech for all students at public institutions.

Consequently, this Court should affirm summary judgment in B.L.'s favor.

ARGUMENT

I. The district court correctly ruled that the school district could not condition extracurricular participation on B.L.'s purported agreement to forgo her constitutional rights.

A. The unconstitutional conditions doctrine prohibits conditioning the receipt of a public benefit on an individual's willingness to surrender a constitutional right.

As this court has long recognized, a public entity cannot demand the surrender of a constitutional right as a condition of receiving a public benefit. *See, e.g.*, *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 112 (3d Cir. 1987) ("[W]e reject the suggestion that the government can condition its selection of new employees on the applicants' waiver of their constitutional rights."). The Supreme Court explained the necessity of the doctrine in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)):

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the

> government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

The benefits of the public education system, like any other public benefit, cannot be conditioned on a willingness to surrender a constitutional right. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (employment); *Healy v. James*, 408 U.S. 169, 187 (1972) (student group funding); *cf. Seamons v. Snow*, 84 F.3d 1226, 1236–39 (10th Cir. 1996) (district court erred in granting qualified immunity to school district that dismissed student from football team for reporting hazing) (citing *Perry*, 408 U.S. at 597).

B. Public education is a benefit offered by the Commonwealth of Pennsylvania.

Until the age of 21, a resident of Pennsylvania "is entitled to attend the public schools of the child's district of residence." 22 Pa. Code §§ 11.12 (school age); 11.11(a)(1) (entitlement to attend). From ages 8 to 17, that attendance is compulsory until the student graduates from high school. *Id.* at § 11.13. In 1835, Pennsylvania House of Representatives member Thaddeus Stevens explained that the purpose of the 1834 Act creating a statewide school system was so

> that the blessing of education shall be conferred on every son of Pennsylvania—shall be carried home to the poorest child of the poorest inhabitant of the meanest hut of your mountains, so that even he may be prepared to act well his part in this land of freemen[.][2]

[2] REGISTER OF PENNSYLVANIA, Vol. XV p.287 (Samuel Hazard ed., 1835).

In the 2017–2018 school year, approximately 87.5% of students attending K-12 schools in Pennsylvania were in the public system.[3]

C. Extracurricular activities, including athletic activities like cheerleading, are part of the educational programs they support.

As the U.S. Department of Education Office for Civil Rights has observed, "Extracurricular athletics—which include club, intramural, or interscholastic (e.g. freshman, junior varsity, varsity) athletics at all education levels—are an important part of an overall education program."[4] Title IX of the Education Amendments of 1972, which prohibits sex discrimination in "any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a), encompasses extracurricular activities; its Senate sponsor, Sen. Birch Bayh, explained its purpose was to ensure that "*educational opportunity* should not be based on sex[.]" 117 Cong. Rec. 30,406 (Aug. 6, 1971) (statement of Sen. Bayh) (emphasis added).

Courts interpreting Pennsylvania law have similarly recognized the value of extracurricular participation. *Davis v. Cent. Dauphin Sch. Dist. Sch. Bd.*, 466 F. Supp. 1259, 1263–64 (M.D. Pa. 1979) (finding under Pennsylvania law that a

[3] *See generally* Enrollment Reports and Projections, PENN. DEP'T. OF EDUC. (2019); *cf.* "Public School Enrollments 2017-2018" (Excel doc.) (total 1,719,336) *with* "Enrollments Private Nonpublic 2017-2018" (Excel doc.) (total 245,498).
[4] Seth M. Galanter, Acting Asst. Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, 1 (Jan. 5, 2013), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf.

student who "had a reasonable expectation under the athletic policies that he would be permitted to participate" arguably has "a property interest in participating[.]"); *accord Clouse v. East Stroudsburg Area Sch. Dist.*, 47 Pa. D. & C.3d 27, 31–32 (Monroe Co., Sept. 30, 1987) (granting preliminary injunction restoring player to football team where expectation to participate was reasonable).

Such recognition reflects the wide adoption and success of extracurricular activities as part of an education. A recent nationwide survey found that 82% of middle and high school-age children participate in some extracurricular activity, with 52% participating in at least one sport.[5] In 2018, the U.S. Census Bureau released a report finding that students engaged in extracurricular activities were more likely to be highly engaged in school.[6]

Accordingly, courts have generally viewed extracurricular programs as integral school activities and have analyzed speech restrictions imposed on

[5] C.S. Mott Children's Hospital, Univ. of Mich., NATIONAL POLL ON CHILDREN'S HEALTH: PAY-TO-PARTICIPATE: IMPACT ON SCHOOL ACTIVITIES 1 (Vol. 33 Issue 5, March 18, 2019), https://mottpoll.org/sites/default/files/documents/031819_PayToParticipate.pdf.

[6] Brian Knop and Julie Siebens, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, A CHILD'S DAY: PARENTAL INTERACTION, SCHOOL ENGAGEMENT, AND EXTRACURRICULAR ACTIVITIES: 2014, 8 (P70-159, Nov. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P70-159.pdf; *see also* U.S. Census Bureau Newsroom, *School Engagement Higher for Children Involved in Extracurricular Activities*, November 6, 2018, https://www.census.gov/newsroom/press-releases/2018/childs-day.html.

participating students, at least while engaged in the activity, under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See, e.g.*, *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. App'x 852, 855 (5th Cir. 2010) (finding a cheerleader's refusal to cheer would "substantially interfere with the work of the school"); *Pinard v. Clatskanie Sch. Dist.*, 446 F.3d 964, 967 (9th Cir. 2006) (finding basketball players' refusal to board a bus in protest "substantially disrupted" the operation of the program).

D. The District demanded the surrender of a constitutional right as a precondition to the receipt of the benefit of a public education program, in violation of the unconstitutional conditions doctrine.

The District argued before the district court that B.L. waived her First Amendment rights as a precondition of participating in cheerleading. *B.L.*, 376 F. Supp. 3d at 437. As the district court correctly held, the facts at issue cannot be reconciled with the requirements of a valid wavier, which permits, in some circumstances, the government to demand the surrender of a right as a precondition to receiving a benefit *to which the individual is not otherwise entitled*, such as a settlement. *See, e.g.*, *Overbey v. Mayor of Balt.*, No. 17-2444, 2019 U.S. App. LEXIS 20598 at *11 (4th Cir. July 11, 2019) (finding non-disparagement clause in police misconduct settlement unenforceable as the interest in enforcing the waiver was outweighed by public policy concerns). The facts at hand cannot be squared with the unconstitutional conditions doctrine, which prohibits a government agent

from demanding the surrender of rights as a condition of receiving a benefit *to which the individual is already entitled*. *See, e.g.*, *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 789 F.2d 1348, 1350–51 (9th Cir. 1986) (finding a state participant in a federal scheme to reimburse family planning services could not prohibit reimbursements to groups that offer counseling for abortion procedures), *aff'd*, 479 U.S. 925 (1986). The validity of a waiver is measured against public policy concerns, while an unconstitutional condition is always unconstitutional. *Compare Lefkowitz v. Turley*, 415 U.S. 70, 80 (1973) (finding waiver of independent contractor's Fifth Amendment right coerced and thus invalid when loss of future employment threatened) *with O'Hare Truck Services v. City of Northlake*, 418 U.S. 712, 720 (1996) (finding removal of independent contractor from approved list for refusal to contribute to re-election campaign an unconstitutional condition).

B.L. is entitled to a public education in Pennsylvania. Extracurricular programs are recognized by both the state of Pennsylvania and the federal government as integral parts of that education. Because B.L. met all requirements necessary to participate in cheerleading, the District's attempt to deprive B.L. of

her First Amendment rights as a precondition to the enjoyment of that benefit must be rejected by this Court as an unconstitutional condition.[7]

II. The district court correctly rejected the District's argument that extracurricular participation is a privilege, not a right, as irrelevant to its First Amendment analysis and found that B.L.'s speech was protected.

Although extracurricular participation is indisputably part of an educational benefit to which B.L. is entitled under state law, the District justifies B.L.'s punishment by relying heavily on the proposition she has no *constitutional* right to participate in extracurricular activities. Br. for Appellant 14–20. As the district court observed, this argument is irrelevant to the First Amendment analysis, which asks whether the District unconstitutionally sanctioned B.L. for protected speech, not whether she had a constitutionally-protected interest in participation. *B.L.*, 376 F. Supp. 3d at 440–41. Under the correct First Amendment framework, the District plainly violated B.L.'s constitutional rights.

The District cites a number of cases addressing Fourteenth Amendment claims for deprivations of due process in arguing that because there is no constitutionally protected property right to participate in extracurricular activities, it could therefore impose conditions on such participation. Br. for Appellant 17–20. None of these cases, however, stand for the proposition that B.L.'s online, off-

[7] Though such a rule would also constitute an invalid waiver against public policy, this Court need not reach that issue.

campus speech should receive lesser First Amendment protection by virtue of her voluntary participation in a sport.[8] As the district court reasoned, the District's argument conflates a Fourteenth Amendment due process analysis with a First Amendment analysis in an attempt to avoid the relevant inquiry: The question is not whether B.L. has a constitutional right to be on the team, but whether the District could permissibly punish her online speech about the team. *B.L.*, 376 F. Supp. 3d at 438 ("What the District's argument does is put the constitutional cart before the horse.").

[8] The District cites only one case applying a First Amendment analysis to a student free speech claim and affording lesser protection to extracurricular participation. Br. for Appellant 17–18 (citing *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 213–14 (D. Conn. 2007)). There, the *Doninger* district court rejected a student's First Amendment challenge to her school's refusal to let her run for student government as punishment for an online blog post. Drawing on due process principles, the court found that schools have greater discretion in punishing speech where the penalty is exclusion from an extracurricular activity. *Id*. at 213. On appeal, however, the Second Circuit declined to adopt this reasoning; it instead applied the *Tinker* standard and found that the student's "posting 'foreseeably create[d] a risk of substantial disruption within the school environment.'" *Doninger v. Niehoff*, 527 F.3d 41, 50 (2d Cir. 2008) (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)). Noting that the district court based its decision in part on the proposition that extracurricular activities are a "privilege" that can be revoked when students "fail to comply with the obligations inherent in the activities themselves," the Second Circuit instead considered this factor within the *Tinker* framework, finding that the student's speech risked disrupting the operation of student government, the relevant extracurricular activity. *Id*. at 52.

A Fourteenth Amendment due process analysis considers whether a plaintiff has a constitutionally-significant liberty or property interest guarding against a government deprivation, and, if so, balances the government's actions against the importance of the constitutional interest. *Id.* at 439; *see also DeLaTorre v. Minn. State High Sch. League*, 202 F. Supp. 3d 1046, 1055, 1059 (D. Minn. 2016) (noting that federal constitutional law determines whether an interest rises to the level of an entitlement protected by the Due Process Clause and finding that even if plaintiff was deprived of a protected interest in participating in varsity sports, "he received sufficient process given the nature of the interest at issue").

Unlike the due process context, B.L. was not required to have a protected interest in extracurricular activity participation in order to be free from sanction for her speech.[9] *B.L.*, 376 F. Supp. 3d at 439 ("The right a public school infringes by punishing a student for protected speech is not the right to education or to play a sport, it is the right to freedom of speech."). As the district court correctly framed the First Amendment analysis, the threshold inquiry is whether B.L.'s speech was

[9] Whether the District's punishment of B.L. was harsh enough or significant enough may be relevant if this Court interprets B.L.'s claim as one for First Amendment retaliation, as the district court did. *B.L.*, 376 F. Supp. 3d at 436. Having established that her speech was protected, B.L. must also demonstrate "a retaliatory action sufficient to deter a person of ordinary firmness from exercising [her] constitutional rights" to succeed on a retaliation claim. *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). The District concedes that B.L.'s treatment satisfies this element of a retaliation claim and contests only whether her speech was protected. Br. for Appellant 24 n. 2.

protected "considering the speech at issue and the context in which it was uttered." *Id.* at 438. "And the Third Circuit has made the applicable standard clear: a public school's 'punishment' for a student's protected expression opens the courthouse doors." *Id.* at 440 (citing *Walker-Serrano v. Leonard*, 325 F.3d 412, 419 (3d Cir. 2003)). In the context of B.L.'s off-campus social media post, the district court correctly concluded that her speech was protected under the precedents of the Supreme Court and this Court.

A. The District argues that it may exercise regulatory authority in a manner firmly rejected by the Supreme Court and this Court.

The District argues that "schools must be permitted to enforce socially acceptable behavior" and posits that "enforcing team rules assists schools in their educational mission of instructing students to follow rules and be good citizens." Br. for Appellant 7, 8. It further argues for the existence of a previously unrecognized exception to *Tinker* allowing it to categorically restrict speech (on and off campus) relating to "student deportment," as opposed to political speech. *Id*. at 32, 34. The Supreme Court and this Court have rejected precisely these type of attempts to extend a school's authority beyond the reach of *Tinker* and its progeny.

In the controlling case of *J.S. v. Blue Mountain School District*, this Court rejected a school's arguments in favor of punishing vulgar and profane off-campus online student speech: "Neither the Supreme Court nor this Court has ever allowed

schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school. . . . An opposite holding would significantly broaden school districts' authority over student speech and would vest school officials with dangerously overbroad censorship discretion." 650 F.3d 915, 933 (3d Cir. 2011) (*en banc*). As Judge Smith noted in his concurrence, "[T]he lack of political content is irrelevant for First Amendment purposes. There is no First Amendment exception for offensive speech or for speech that lacks a certain quantum of social value." *Id.* at 939 (Smith, J., concurring); *see also Pinard*, 467 F.3d at 766 ("In striking the balance between the First Amendment rights of students and preservation of the educational process, . . . neither *Tinker* nor its progeny limited students' rights solely to the exercise of political speech or speech that touches on a matter of public concern.") (internal quotation and citation omitted).

This refusal to extend school authority far beyond existing precedent is also found in Justice Alito's controlling concurrence in *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring). *See also B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 310–13 (3d Cir. 2013) (holding that the rationale of Alito's concurrence is binding and narrows the majority opinion). There, Justice Alito concurred in the judgment that speech reasonably viewed as advocating illegal drug use at a school-sponsored event could be categorically prohibited, and agreed

with the majority that *Tinker* "does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id*. at 422. However, he wrote separately to underscore that he "[did] not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court." *Id*. Indeed, Justice Alito regarded the regulation of the *in-school* speech at issue "as standing at the far reaches of what the First Amendment permits." *Id*. at 425.

Moreover, Justice Alito expressly rejected "the broad argument" that a school may restrict student speech that interferes with its "educational mission":

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups. . . . The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

Id. at 423.

This Court, following *Morse*, has similarly rejected the argument that "schools may define their 'basic educational mission' and prohibit student speech

that is inconsistent with that mission." *B.H.*, 725 F.3d at 316. "[S]uch an approach would swallow the other student-speech cases, including *Tinker*, effectively eliminating judicial review of student-speech restrictions." *Id.*

B. The District's actions are unconstitutional under any applicable First Amendment framework.

This Court has not yet decided whether off-campus student speech is governed by *Tinker* and its progeny, or if it is instead regulated by general First Amendment jurisprudence. That question was specifically left unanswered in this Court's decisions in *J.S.*, 650 F.3d at 926, and *Layshock v. Hermitage School District*, 650 F.3d 205, 219 (3d Cir. 2011) (*en banc*). As B.L.'s speech is constitutionally protected whether or not *Tinker* is applied, *Tinker*'s application to off-campus speech is not squarely before this Court, and the Court should decline to resolve that question in dicta.

The district court correctly found that the undisputed facts do not permit B.L.'s punishment under *Tinker* and its progeny in these circumstances. *B.L.*, 376 F. Supp. 3d at 438. Even if, under *Tinker*, a school may punish off-campus speech that "materially and substantially disrupt[s] the work and discipline of the school," or creates a reasonable forecast of such disruption, the district court found that the District failed to produce evidence of any substantial disruption or likelihood thereof. *B.L.*, 376 F. Supp. 3d at 443–44.

The precedents following *Tinker* are equally inapplicable. First, this Court, consistent with the Supreme Court, has held that a school may not punish off-campus speech solely on the basis that it is lewd or profane, as it may on-campus speech under *Bethel School District v. Fraser*, 478 U.S. 675 (1986). *See J.S.*, 650 F.3d at 932; *see also Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had [the student] delivered the same [lewd] speech in a public forum outside the school context, it would have been protected.") (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)). Next, although a school may restrict school-sponsored speech in furtherance of "legitimate pedagogical concerns," neither this Court nor the Supreme Court have extended that authority to circumstances, such as these, in which no reasonable observer would attribute the student's speech to the school. *See B.L.*, 376 F. Supp. 3d at 435 ("It appears that of the Court's student speech precedents, only [*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)] holds a court can balance a student's speech against 'legitimate pedagogical concerns;' however, this balancing is limited to situations in which a reasonable observer would conclude the speech is essentially that of the school itself."); *id*. at 443 ("A passing reference to cheerleading on B.L.'s private social media account does not equate to an imprimatur.")

Of course, assuming *Tinker* and its progeny do not apply leads to the same conclusion: B.L.'s speech is fully protected. *See Cohen*, 403 U.S. at 26 (upholding

First Amendment right to wear jacket bearing the words "Fuck the Draft" in a courthouse hallway); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Thus, contrary to the District's assertions, there is no basis under any appropriately-framed First Amendment analysis to conclude that B.L.'s speech was unprotected. Accordingly, this Court should, as it did in *J.S.* and *Layshock*, decline to decide on *Tinker*'s applicability to off-campus speech and uphold the district court's decision.

III. To protect student First Amendment rights online, this Court must reject the District's attempted overreach.

In an attempt to avoid the district court's application of established student speech jurisprudence, the District spends much of its brief arguing to extend its regulatory authority in unprecedented ways that would enable it to censor any disfavored student speech in exchange for the ability to participate in extracurricular activities. *See, e.g.*, Br. for Appellant 36–42. The danger inherent in the District's paternalistic approach is particularly acute with regard to online student speech. FIRE's experience fighting censorship of online student speech in the higher education setting evidences the need for clear judicial boundaries around a school's authority to police student social media.

A. Ever-increasing threats to online student speech demonstrate the consequences of unchecked abuse of school authority.

For more than a decade, FIRE has warned that the unprecedented visibility of online student speech renders it an inviting target for censorship.[10] This censorship has occurred and bears out Justice Alito's concerns over the exercise of administrative discretion voiced in his *Morse* concurrence. Because the conversations once held in dorm rooms have moved to online arenas, students now find their everyday speech subjected to a pervasive form of administrative scrutiny. At colleges across the country, the student jokes, debates, criticisms, and frustrations that establish the daily rhythm of campus life are increasingly cited as grounds for investigation and discipline, despite being fully protected by the First Amendment or institutional promises of free expression.

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[10] *See, e.g.*, Will Creeley & Greg Lukianoff, *Facing Off Over Facebook*, PHOENIX, Mar. 2, 2007, http://thephoenix.com/boston/news/34242-facing-off-over-facebook, *archived at* http://perma.cc/MT58-NPUU (FIRE attorneys observing that "America's institutions of higher education are increasingly monitoring students' activity online and scrutinizing profiles, not only for illegal behavior, but also for what they deem to be inappropriate speech."); Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 CHARLESTON L. REV. 333, 336, 348 (2011) (observing that "the widespread adoption and integration of e-mail and social media into students' lives has resulted in a growing number of cases of students being punished for engaging in protected speech online" and arguing that in "monitoring student expression on blogs and social media sites, college administrators are spurred by a recognition that online expression may offend, embarrass, or insult in newly visible ways.").

FIRE's case archives are replete with examples of the pervasiveness of the threat to online student speech. Students have been suspended for emails that offended coaches[11] and expelled for social media posts that embarrassed university leadership.[12] They have been prevented from participating in graduation ceremonies for criticizing the administrative response to a natural disaster on Facebook,[13] investigated for both satirical[14] and political[15] Instagram posts, and

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[11] Will Creeley, *Journalism Student Suspended for Offending Hockey Coaches*, HUFFINGTON POST (Nov. 14, 2012), https://www.huffpost.com/entry/suny-oswego-journalism-alex-myer_b_2121906 (detailing suspension of State University of New York College at Oswego student for "disruptive behavior" following email to hockey coach for journalism class assignment).

[12] Allie Grasgreen, *President Personally Liable for Student's Expulsion, Jury Says*, INSIDE HIGHER ED (Feb. 5, 2013), https://www.insidehighered.com/quicktakes/2013/02/05/president-personally-liable-students-expulsion-jury-says ("The jury found that Ronald M. Zaccari violated the student's due process rights and must cover the $50,000 due to Hayden Barnes, who was expelled after Zaccari claimed he had been indirectly threatened by a collage Barnes posted on Facebook to protest the construction of two parking garages."); *see also Barnes v. Zaccari*, 592 Fed. App'x 859 (11th Cir. 2015).

[13] Marc Parry, *'Negative' Facebook Post Gets Student Barred From Commencement*, CHRON. OF HIGHER EDUC. (June 1, 2011), https://www.chronicle.com/blogs/wiredcampus/negative-facebook-post-gets-student-barred-from-commencement/31563 ("The apparent offending comment—a 'negative social-media exchange,' as the college put it—concerned Saint Augustine's handling of recovery from tornado damage.").

[14] Jenny Drabble, *Instagram post sparks outrage; Wake Forest investigating source of post*, WINSTON-SALEM J. (Mar. 23, 2019), https://www.journalnow.com/news/local/instagram-post-sparks-outrage-wake-forest-investigating-source-of-post/article_99482d36-0932-541c-a932-b59dc98b3499.html.

[15] Sarah McLaughlin, *Cooper Medical School of Rowan University revises social media policy after letter from FIRE*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.

suspended for copy-editing an ex-girlfriend's apology letter on Twitter.[16] More examples abound. These rights violations are depressingly common, but should be unsurprising; colleges and universities now routinely monitor student social media.[17]

Subjecting student speech to this suffocating oversight teaches our future leaders the wrong lesson about the essential value of freedom of expression and pluralistic tolerance in our liberal democracy. This Court has previously noted that the "concept of the 'schoolhouse gate,' and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse." *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 247 (3d Cir. 2010) (internal citation omitted).

The Court made this observation in differentiating between speech regulations at public high schools and public universities, but its core point holds true in either context with regard to online student speech: Constant monitoring of

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(Oct. 6, 2017), https://www.thefire.org/cooper-medical-school-of-rowan-university-revises-social-media-policy-after-letter-from-fire/.

[16] Cora Lewis, *The Suspension Of A College Student For A Viral Tweet Has Been Lifted*, BUZZFEED NEWS (July 19, 2017), https://www.buzzfeednews.com/article/coralewis/college-student-suspeneded-viral-tweet#.tjyzZD2z.

[17] *See, e.g.*, Amy Rock, *Social Media Monitoring: Beneficial or Big Brother?*, CAMPUS SAFETY (Mar. 12, 2018), https://www.campussafetymagazine.com/university/social-media-monitoring.

protected student expression, such that a student never effectively exits the schoolhouse gates, is misguided and impermissible. Moreover, because restrictions on high school speech may migrate to the university context,[18] compounding their harm, this Court should again make clear that administrators may not police protected student expression, whether online or off.

CONCLUSION

As our daily dialogue moves to social media, schools' efforts and ability to monitor student speech has likewise grown. The District argues that it may wrest control over a student's online conversations—and in doing so gain veto power over speech its dislikes—in exchange for the right to participate in extracurricular activities. The Supreme Court and this Court have rejected the notion that a school's regulatory power may reach so far, because to hold otherwise would "would vest school officials with dangerously overbroad censorship discretion." *J.S.*, 650 F.3d at 933. This Court should maintain the boundaries it has already laid around a school's off-campus reach and hold that the undisputed facts evidence a clear violation of B.L.'s First Amendment rights.

[18] *See, e.g., Ward v. Polite*, 667 F.3d 727, 733–34 (6th Cir. 2012) (applying standard announced by Supreme Court for high school speech restrictions in *Kuhlmeier*, 484 U.S. 260, to graduate student and arguing that "[n]othing in *Hazelwood* suggests a stop-go distinction between student speech at the high school and university levels, and we decline to create one.").

Accordingly, *amicus curiae* FIRE urges this Court to protect students' free speech rights by affirming the district court's grant of summary judgment in B.L.'s favor.

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Respectfully Submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1. At least one of the attorneys whose names appear on the foregoing brief, including the undersigned, is a member of the bar of this Court, as required by Local Rule 28.3(d).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,566, excluding the parts exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point, Times New Roman typeface for both body text and footnotes.

4. The text of the electronic version of this Brief filed on ECF is identical to the text of the paper copies filed with the Court.

5. The electronic versions of this Brief filed on ECF were virus checked using Vipre Virus Protection, version 3.1 and no virus was detected.

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CERTIFICATE OF SERVICE

I, Marieke Tuthill Beck-Coon, certify that I caused the foregoing brief to be served on all counsel of record via the Court's electronic case filing system, where the brief is available for viewing and downloading.

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