UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 07-4465 & 07-4555

JUSTIN LAYSHOCK, a minor by and through his parents,
DONALD LAYSHOCK AND CHERYL LAYSHOCK,
individually and on behalf of their son,
Plaintiffs-Appellee/Cross-Appellants,

v.

HERMITAGE SCHOOL DISTRICT, KAREN IONTA, District Superintendent,
ERIC W. TROSCH, Principal Hickory High School, CHRIS GILL, Co-Principal
Hickory High School, all in their official and individual capacities,
Defendants-Appellants/Cross-Appellees.

On Appeal From The Judgment Of The United States District Court
for The Western District of Pennsylvania Dated November 14, 2007
At Civil Action No. 06-00116

SECOND-STEP BRIEF OF APPELLEE AND CROSS-APPELLANTS

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COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW ON APPEAL AND STATEMENT OF ISSUE PRESENTED FOR REVIEW ON CROSS-APPEAL

Whether the district court correctly concluded that the School District violated student Justin Layshock's First Amendment free-speech rights when it punished him for a parody profile of his principal that he created and posted on the Internet while at his grandmother's house during non-school hours?

Whether the district court committed legal error in concluding that the School District's punishment of student Justin Layshock for a parody profile that he created in the family's home did not violate his parents' fundamental right to direct the upbringing of their children?

SCOPE AND STANDARD OF REVIEW

In cases involving First Amendment challenges to government action, the burden of proof and persuasion rests on the government to demonstrate the constitutionality of its action.[1] This burden allocation applies with equal force to challenges to regulation of student expression in the school context.[2] This appeal involves the district court's summary judgment rulings — and the issues raised are legal ones. This Court's review of a district court's legal conclusion is plenary.[3]

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1 *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816-17 (2000); *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir.), *cert. denied*, 522 U.S. 932 (1997).

2 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

3 *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996). When reviewing a district court's conclusion that no First Amendment violation had occurred, the appellate court must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (citations and internal quotations omitted). This Court has never squarely addressed whether *Bose* applies to the factual findings on a summary judgment decision that favors a First Amendment claimant. Other circuits are split on this issue. *See United States v. Friday*, ___ F.3d ___, No. 06-8093, 2008 WL 1971504, at *8 (10th Cir. May 8, 2008) ("*Bose* opinion does not make clear whether its more searching review — whose purpose was to avoid a forbidden intrusion on First Amendment rights — applies symmetrically to district court findings that favor as well as disfavor the First Amendment claimant" and "circuits have long been split on this issue") (citing *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (White, J.) (noting split and dissenting from denial of certiorari)). This Court, however, need not resolve the matter here, as the principal issues on this appeal are legal ones and the district court's fact findings survive review under either standard.

COUNTERSTATEMENT OF THE CASE

A. JUSTIN LAYSHOCK CREATES A PARODY PROFILE OF PRINCIPAL TROSCH ON MYSPACE USING A COMPUTER AT HIS GRANDMOTHER'S HOME

In December 2005, Plaintiff Justin Layshock was a seventeen-year-old senior at Hickory High School in the Hermitage School District. He lived with his mother and father, Plaintiffs Donald and Cheryl Layshock ("Layshock parents"), and three younger siblings. A. 408-09 (TRO Tr.); A. 460 (Cheryl Layshock ("CL") Dep.).[4] Justin had attended the District's schools since Kindergarten. A. 409 (TRO Tr.). He was classified as a "gifted student," was enrolled in advanced-placement classes, won awards for the school at interscholastic-academic competitions, and was considered by his teachers to be particularly gifted in foreign languages. A. 391-92, 405, 408-14, 430 (TRO Tr.); A. 753 (Leeds Dep.).

Sometime between December 12 and 14, 2005,[5] while Justin was at his grandmother's house during non-school hours, he used her computer to post on the Internet a parody profile of his Hickory High School principal, Eric Trosch. A. 416 (TRO Tr.); *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp.2d 587, 591 (W.D. Pa. 2007); A. 897-900 (Justin's profile). Justin did not use school computers or class time to create the profile. *See id.*; A. 451-52 (JL Dep.).

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4 Justin graduated in 2006 and is attending St. John's University in New York City. A. 440 (Justin Layshock ("JL") Dep.).

5 The evidence about precisely when Justin created the profile is inconsistent, but as the district court noted, the discrepancy is immaterial. 496 F. Supp.2d at 591 n.1.

Justin posted the profile on an Internet website known as MySpace (http://myspace.com), which is a popular social-networking website. *See* http://en.wikipedia.org/wiki/MySpace. The website

> allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests. Once a member has created a profile, she can extend "friend invitations" to other members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.

Doe v. MySpace, Inc., 474 F. Supp.2d 843, 845-46 (W.D. Tex. 2007). As of 2007, MySpace was "the most visited web site in the United States." *Id.* at 845. The website is especially popular among young people, including Hermitage students. A. 415, 428-29 (TRO Tr.).[6] Anyone with access to the Internet can load information onto Myspace or view the site, though the system allows profile creators to restrict access to pre-identified "friends." For instance, a student could post or view information about school officials on the Internet from any computer at a coffee shop, library, business, or home located in Honolulu, Helsinki, or Hiroshima. Justin happened to use a home computer in Hermitage, Pennsylvania, to post the Trosch profile.

The creation of the profile was straightforward. Justin first used a MySpace template, which includes background information such as age and place

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[6] A 2005 report noted that 87% of teenagers aged 12-17 accessed and used the Internet, a number that has likely increased. *See* Amanda Lenhart & Mary Madden, *Teen Content Creators and Consumers*, Washington: D.C: Pew Internet and American Life Project (2005) (*available at* http://www.pewinternet.org/pdfs/PIP_Teens_Content_Creation.pdf).

of birth. A. 416-17 (TRO Tr.); A. 441-46 (JL Dep.). He then imported another website's template for a survey, which included questions about favorite shoes, weaknesses, fears, perfect pizza, bedtime, etc. A. 447-48 (JL Dep.); A. 897-900 (Justin's Profile). Since Trosch is a large man (physique, not girth), Justin used the theme "big" to answer the questions. A. 897-900 (Justin's Profile); A. 422 (TRO Tr.). "The answers ranged from nonsensical answers to silly questions on the one hand, to crude juvenile language on the other." *Layshock*, 496 F. Supp.2d at 591. Answers to the survey questions included phrases such as "big hard ass," "big faggot," "big dick," or just "big." For the question, "what did you do on your last birthday," the profile said, "too drunk to remember." A. 897-900. Justin also copied Trosch's picture from the school's website "by performing a simple 'copy and paste' operation with his mouse." 496 F. Supp.2d at 591.[7] Justin did not post Trosch's actual email address on the profile, but rather "made one up." A. 418-19 (TRO Tr.). Justin explained that he made the profile to be funny, and did not intend to hurt anybody. A. 415-16, 419-20 (TRO Tr.).

B. PRINCIPAL TROSCH DISCOVERS SEVERAL PARODY PROFILES AND TAKES STEPS TO BLOCK STUDENTS FROM VIEWING THEM AND TO IDENTIFY THE AUTHORS

The School District did not learn of Justin's profile because of anything that had happened in school. Instead, over the course of one week in December 2005, Principal Trosch discovered four parody profiles of himself on MySpace (the second of which was Justin's) while at his home. A. 468-70, 492-97, 502, 922 (Trosch Dep.). He discovered the first profile on Sunday, December

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[7] Although images on websites can be posted to prevent viewers from copying them, the School District apparently did not employ such precautions; nor did it display any warning to indicate that content should not be copied. *See* A. 417 (TRO Tr.)

11, A. 468-70; A. 894-95 (Profile 1); Justin's profile and a third one on Thursday evening, December 15, A. 492-97, A. 902-06 (Profile 3); and a fourth one on Sunday, December 18, A. 502, 522, A. 908-14 (Profile 4).

In the School District's view, the three other profiles, *i.e.,* the ones *not* created by Justin, "contained more vulgar and offensive statements." 496 F. Supp.2d at 591; *compare* A. 897-900 (Justin's profile) *with* A. 894-95 (Profile 1), A. 902-06 (Profile 3), and A. 908915 (Profile 4). Trosch did not think Justin's profile was physically threatening. A. 498, 501 (Trosch Dep.). He viewed them all to be "degrading," "demeaning," "demoralizing," and "shocking." A. 471, 476, 498, 501.

The School District's response to the profiles was never focused on quelling disruption — there was none. Rather, Trosch's aversion to the profiles drove the School District's actions — and its response to the profiles was geared towards preventing students from seeing them, and later towards uncovering the authors' identities. The School District's technology coordinator, Frank Gingras, worked with MySpace staff and an outside computer consultant to disable and remove all four profiles from the Internet within hours of their discovery. *See* A. 258-59, 607-12, 618-24, 636 (Gingras Dep.); A. 477-78, 499-501 (Trosch Dep.). At Trosch's request, Gingras successfully installed a firewall, which since December 19 has effectively blocked access to any MySpace page from school computers. A. 621-24 (Gingras Dep.).

Trosch's overriding concern about his reputation also was reflected in his complaints to the police. He contacted the police, not to complain about his safety or disruption at school, but rather to press charges about what he characterized as a "forged" profile and to discuss whether the first profile (not Justin's) might constitute harassment, defamation, or slander. A. 479-82, 489,

503-05 (Trosch Dep.). The police never brought charges against Justin or the other students later identified as the profile authors.

The School District's other actions likewise reflected a concern over minimizing students' knowledge about the profiles and identifying their authors — not a concern about any disturbance. Before classes began on Friday morning, December 16, Trosch and Co-Principal Chris Gill convened a meeting of the high school teachers to discuss the MySpace profiles. A. 407 (Trosch Dep.). Before that meeting, teachers had not been aware of the Trosch profiles — and no teacher had complained about the profiles or any disruption caused by them.[8] After telling the teachers about the profiles, Gill "asked [them] not to discuss it with students during class," 496 F. Supp.2d at 592, because they "did not want to draw more attention to it." A. 653-54 (Ionta Dep.); *see also* A. 569 (Gill Dep.); A. 517-521 (Trosch Dep.). Consequently, Hickory High School students were never expressly told that they could not access *MySpace* generally, or the Trosch profiles specifically. A. 517-21 (Trosch Dep.); A. 653-54 (Ionta Dep.); *see also* A. 567-68 (Gill Dep.).

School District officials also focused their efforts on identifying the profile authors. At the Friday morning meeting, "teachers were directed to send all students who might have information about the profiles to the office." 496 F. Supp.2d at 592. Gill subsequently talked to several teachers, and students referred by them, "in an effort to find out who had created the profiles…." *Id.*; *see also*

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[8] Gill testified that teachers had complained, but he was unable to identify them or recall specifics. A. 549-52 (Gill Dep.). Moreover, none of the fourteen teachers identified by the School District as trial witnesses testified to even being aware of the profiles before the December 16 meeting. *See* A. 661, 674, 692-93, 704, 719; 731, 737, 745-46, 755, 767,774-75, 786, 795, 810, 821.

A. 554-55 (Gill Dep.). These students were sent to Gill not for disciplinary reasons, but to help investigate who created the Trosch profiles. 496 F. Supp.2d at 592; A. 554-55 (Gill Dep.). Though Gill claimed that these students "disrupted" class by asking "off topic" questions, he admitted that they did nothing "improper" or that would warrant disciplinary action. A. 556-58.

Trosch and Gill decided to restrict all students' access to school computers even though they had not received any complaints from teachers related to the profiles, A. 510 (Trosch Dep.); had no information that students had accessed the Trosch profiles from school computers, A. 535 (Trosch Dep.), A. 560-61 (Gill Dep.); had not punished any students for viewing the profiles, A. 561-62 (Gill Dep.); had not witnessed students disrupting class during the week, A652-54 (Ionta Dep.), A. 570-73 (Gill Dep.);[9] and were aware that all of the Trosch profiles had been disabled and rendered inaccessible. At about 1:30 p.m. on Friday, December 16, Trosch and Gill sent an e-mail message, A. 917, to all teachers instructing them not to let students use computers unless supervised. 496 F. Supp.2d at 592; A. 512-15 (Trosch Dep.). Student access to computers in Hickory High School was restricted for approximately three school days from mid-day Friday, December 16, to Wednesday, December 21 (only a half-day of school), in order to investigate who was accessing the profiles from school computers. A. 431 (TRO Tr.). During this time, students were permitted to use computers for regularly scheduled classes in the computer lab, A. 726-27 (Dye Dep.), and

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[9] During discovery, one teacher testified that he had seen students looking at a MySpace Trosch profile in his computer lab, but did not report it to the administration because he quickly stopped the students' activity and "it wasn't anything that [he] felt was serious." A. 674-81.

teachers were permitted to let students use in-class computers so long as they were supervised. A. 515-16 (Trosch Dep.).[10]

In sum, from December 11, when Trosch discovered the first profile, until the holiday vacation began on December 21, in a school of 803 students,[11] not a single student was disciplined for disrupting the school. A. 538-44 (Trosch Dep.). No teacher experienced any disruption in the classroom that they felt needed to be reported to the administration. *See* A. 720, 723-25, 811-1, 661-64, 675-78, 684-87, 694, 705-07, 731-32, 738-40, 746-48, 753-57,768-69, 776-77, 787-90, 798-800 (teachers' depositions). Computers did not crash or run slowly. *See* A. 607-09, 611-14, 621-23, 634-35 (Gingras Dep.); A. 834-43 (Plaintiffs' Expert Dep.); A. 851-75 (Plaintiffs' Expert Report). And no classes were cancelled. *See* A. 512, 526-27, 535 (Trosch Dep.). In the district court's words, "The actual disruption was rather minimal …." 496 F. Supp.2d at 600.[12]

Meanwhile, school officials continued to hunt for the profiles' authors. At Trosch's directive, Gingras investigated and found that there were about nineteen searches for or "attempts to find" a Trosch profile during the

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10 *See* 496 F. Supp.2d at 592-93 for discussion of computer use during these days.

11 *Enrollment Projections, Hermitage Sch. Dist.* (Sept. 2005) (*available at* http://www.pde.state.pa.us/k12statistics/lib/k12statistics/HermitageSD09_05.pdf.).

12 We have not included much evidence from the record showing that Justin's profile caused no disruption because the School District has all but abandoned its primary argument in the district court, namely that Justin's speech caused a material and substantial disruption to the school day. On appeal, the School District's central argument is that schools have the authority to punish students for off-campus speech, regardless of any disruption.

preceding week, and two of those involved teachers. A. 637-45 (Gingras Dep.). Gingras remembered only five students actually accessing a profile. One of the students who accessed a profile was Justin. A. 642-45 (Gingras Dep).

Justin did not dispute attempting to access his profile on December 16; he did so in order to delete it. A. 421-22 (TRO Tr.); A. 449-50 (JL Dep.). But he never actually accessed the profile because Gingras had already deleted it, and only undecipherable fragments remained. *Id.* There is conflicting testimony about whether Justin accessed his profile at school on December 15. *See* 496 F. Supp.2d at 591 n.2. Justin denies doing so. A. 213-15 (JL Dep.). The district court deemed the discrepancy "not material," since there is no evidence that Justin engaged in any lewd or profane speech while in school, 496 F. Supp.2d at 599-600, and because "there is no evidence that school administrators even knew that Justin had accessed the profile" when they decided to punish him. *Id.* at 592, 601.

C. JUSTIN ADMITS TO CREATING ONE PROFILE, APOLOGIZES, AND IS PUNISHED

School District officials first learned on December 21 that Justin might have authored one of the Trosch profiles posted on MySpace. A. 575-76 (Gill Dep.). Superintendant Karen Ionta and Gill summoned Justin and his mother to a meeting, at which time Justin admitted creating one of the profiles. A. 393-96, 423 (TRO Tr.). After the meeting, without prompting from anyone, Justin went to Trosch's office and apologized for creating the profile. A. 424-25 (TRO Tr.). Trosch found Justin's apology respectful and sincere. A. 525 (Trosch Dep.). Justin followed up with a letter of apology on January 4, 2006. A. 426-27 (TRO Tr.).

Justin's parents were upset over his behavior. A. 396 (TRO Tr.). They discussed the matter with him, expressed their extreme disappointment,

grounded him, and banned him from using the computer. A. 396 (TRO Tr.). Justin was contrite. *See* A. 424-27 (TRO Tr.).

On January 3, 2006, Gill called Mrs. Layshock to tell her that Justin was suspended and should not return to school on January 4, the first day of classes following the winter break. A. 398 (TRO Tr.). At a January 6 informal hearing, the Layshocks were given, for the first time, a letter dated January 3, 2006, which purported to serve as written notice of the hearing and listed Justin's alleged violations of the District's discipline code. A. 919 (letter); A. 398 (TRO Tr.). The offenses charged were:

> Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/Internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violation (use of school pictures without authorization).

A. 919. The suspension notice found Justin guilty of all charges based on the fact that he "admitted prior to the informal hearing that he *created* a profile about Mr. Trosch," not based on anything he did in school. A. 921 (emphasis added).

The School District issued Justin a ten-day, out-of-school suspension, which lasted from January 4 through 18. *Id.*; A. 399 (TRO Tr.). The District's punishment of Justin also included (a) placing him in the alternative education program ("the ACE Program") at the high school for the remainder of the 2005-2006 school year;[13] (b) banning his attendance or participation in any extra-curricular activities, including Academic Games and foreign-language tutoring;

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[13] ACE, which is Hickory High School's alternative education program, includes only three, as compared to the usual seven, instructional hours per school day. A. 400 (TRO Tr.). Students are given assignments from their regular teachers, but may not attend class. *Id.*

and (c) forbidding his attendance at the June 2 graduation ceremony. A. 399-403 (TRO Tr.); A. 921. Ionta also advised the Layshocks that the District was considering expelling Justin for the profile. A. 401-02 (TRO Tr.).

After all was said and done, Justin, who created the least "vulgar and offensive profile," 496 F. Supp.2d at 591, and who was the only student to apologize for his behavior, was the only student punished for the MySpace controversy.

D. THE LAWSUIT

On January 27, 2006, the Layshocks filed this action, asserting claims for violations of Justin's First Amendment free-speech rights and his parents' due process rights. A. 57-75 (Verified Complaint). The Layshocks also filed a Motion for Temporary Restraining Order and/or Preliminary Injunction. A. 45 (Docket). On January 30, the district court held a hearing on the Layshocks' TRO request. By Order dated January 31, 2006, the court denied the motion. *Layshock v. Hermitage Sch. Dist.*, 412 F. Supp.2d 502, 508 (W.D. Pa. 2006).

On February 8, the court mediated a resolution of the Layshocks' outstanding preliminary injunction motion. In exchange for the School District's agreement to remove Justin from the ACE program and reinstate him to his regular classes and allow him to participate in Academic Games and attend his anticipated graduation, the Layshocks agreed to withdraw their preliminary injunction motion. 496 F. Supp.2d at 594.

On March 31, 2006, the district court denied the School District's motion to dismiss the Layshock parents' claims, recognizing that parents may assert a claim on their *own* behalf for a violation of their due process right to "raise, nurture, discipline and educate their children" based on a school district's

punishment of their child for speech the child uttered in the family home. *See* A. 84-99 (March 31, 2006 Order).

After discovery, both parties moved for summary judgment. A. 100-102 (Layshocks' Motion); A. 145-147 (School District's Motion). The district court entered summary judgment in favor of Justin on his First Amendment claim and in favor of the School District on the Layshock parents' due process claim. By way of background, in three earlier cases involving out-of-school student speech, the United States District Court for the Western District of Pennsylvania had not reached the threshold question of whether a school district has authority to punish or regulate off-campus speech because the school districts could not even meet their burden under *Tinker*.[14] The district court here followed suit in part. Although it framed the issue as "whether the school administration was authorized to punish Justin for creating the profile," 496 F. Supp.2d at 597, and found that the School District violated Justin's First Amendment rights by exceeding school authority to punish Justin for off-campus speech, *id.*, the district court also addressed whether Justin's profile caused substantial disruption to the school and concluded that it did not. *Id.* at 599-603.[15]

On the Layshock parents' claims, in contrast with its earlier recognition that parents may assert a claim on their own behalf for violation of

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14 *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp.2d 446, 455 (W.D. Pa. 2001); *Flaherty v. Keystone Oaks Sch. Dist.*, Civil Action No. 01-586, Ruling on Preliminary Injunction (A. 939-47); *Latour v. Riverside Beaver Sch. Dist.*, 2005 WL 2106562 (W.D. Pa. August 24, 2005).

15 Addressing its earlier ruling on the TRO motion, district court noted that "[t]he more fully developed summary judgment record now before the Court demonstrates that the disruption of school operations was not substantial." 496 F. Supp.2d at 594.

their due process right to raise their children free from government intervention, the district court granted summary judgment for the School District, finding that the Layshock parents had no constitutional due process claim independent from Justin's First Amendment claim. *Id.* at 606.

The School District timely appealed from the district court's decision to grant summary judgment in favor of Justin on his First Amendment claims. Thereafter, the Layshock parents filed a timely cross-appeal from the district court's entry of judgment against them on their due process claim.

SUMMARY OF ARGUMENT

The School District suspended Justin Layshock for ten days and relegated him to an academically inferior educational program because he mocked his high-school principal's "big" physique in an Internet posting made while sitting at his grandmother's home computer. The specific issues in this case are whether, by punishing Justin for speech he published at home, the School District violated Justin's First Amendment free-speech rights and his parents' Fourteenth Amendment due process rights to direct and control their child's upbringing. But this case also raises a more fundamental question: Does the considerable authority granted to school officials to censor students' speech while in school extend beyond the schoolhouse gate into the home and community?

Nearly forty years ago, the United States Supreme Court famously proclaimed in *Tinker v. Des Moines Independent Community School District* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." While steadfastly reaffirming this seminal holding, most recently in *Morse v. Frederick*, the Court nonetheless has justified curtailing students' free-speech rights to "facilitate education and maintain order" in school. Although the Supreme Court has never squarely decided where school authority stops — and parental authority begins — inherent in the Supreme Court's and this Court's student-speech cases is the elemental proposition that, when exiting the schoolhouse gates, students regain whatever rights they shed upon entry. The rationales that justify curtailing students' rights in school disappear when students return to the community and to the control of their parents.

The School District and its *amicus curiae*, the Pennsylvania School Boards Association ("PSBA"), leap-frog this threshold issue about school officials' authority over students' *out-of-school* speech and advance an unprecedented and

radical assertion that schools' substantial authority over students' in-school expression extends into the larger community and even students' homes. They justify the need for this far-reaching authority by pointing to school districts' responsibility for "imparting upon students lessons of civilized behavior" and "prepar[ing] students for life after graduation." But the future that the School District and PSBA seek to prepare students for is one in which they unquestioningly accept government censorship and restrictions on their constitutional rights. Instead of recognizing school districts' obligation to teach students the importance of exercising their free-speech rights, PSBA focuses on, for example, schools' need to prepare students to submit to restrictive environments, such as the military, in which their rights may be sharply circumscribed. While preparing students for life after graduation is certainly within school districts' authority, giving school officials power to limit students' rights consonant with military service, and especially to do so outside the schoolhouse, is inimical to the traditions of a free society. The School District and PSBA seek to empower school officials to engage in content, and even viewpoint, censorship that would be unconstitutional if employed by any other state actor.

The School District and PSBA claim that school officials need this far-reaching authority to combat the expansive reach of the Internet. But giving the School District the power it seeks would, in the district court's words, "authorize school officials to become censors of the world-wide web." It would also infringe the significant First Amendment protection that minors enjoy outside of school and contradict Pennsylvania law, which limits school officials' authority over students to "such time as they are under the supervision of the board of school directors and teachers." Further, according such expansive authority to school districts would usurp parents' Fourteenth Amendment right to direct and control their children's upbringing, making it possible for school officials to override the

right and authority of parents to inculcate in their children the most personal and important moral, political, and religious values.

Because the School District had no authority to punish Justin for the constitutionally protected speech he created and published in his grandmother's home, this Court should affirm the district court's decision concluding that the School District violated Justin's First Amendment rights. The result should be the same even if Justin's Internet profile were subject to *Tinker*'s in-school-speech standard. There is no basis to disturb the district's court's factual finding that Justin's profile did not cause sufficient disruption to meet *Tinker's* material and substantial disruption test. That conclusion is entitled to deference — and the School District does little, if anything, to challenge that finding on this appeal.

Finally, this Court should reverse the district court's holding that the School District did not violate the Layshock parents' Fourteenth Amendment rights. The School District's punishment of Justin for his conduct in the family home after school hours — when he was not under the supervision of the School District — violated the well-established right of parents to raise their children without undue state interference.

ARGUMENT OF APPELLEE JUSTIN LAYSHOCK

I. STUDENT SPEECH THAT OCCURS OUTSIDE OF SCHOOL IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION

This case involves speech by a student uttered ***outside*** the schoolhouse gate. It is not a case involving student speech at all, but rather speech by a minor who also happens to be a public-school student. Contrary to the School District's argument, the United States Supreme Court's rationales for upholding certain limitations on student speech made in the school setting are inapplicable to this case. Accordingly, the School District was without authority to punish Justin Layshock for a parody profile he created at home.

A. RESTRICTIONS ON MINORS' SPEECH OUTSIDE OF SCHOOL ARE SUBJECT TO STRICT SCRUTINY

The School District contends that it should have the same authority to punish students' speech *outside* of school as it has *inside* the school.[16] But expanding school officials' authority to discipline student speech to those times when students are not under school supervision would usurp the rights of their parents to direct their children's upbringing and would impose the more restrictive in-school standards on students' out-of-school speech. The School District here is not simply asking that it be permitted to punish students for engaging in out-of-school speech that is not constitutionally protected, such as fighting words or true threats. It is insisting that it be given the unprecedented authority to punish students for speech, such as profanity, that otherwise would be constitutionally protected. That argument contravenes well-established precedent holding that, outside the school environment, minors have substantial free-speech rights that

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16 *See* Sch. Dist. Br. at 8-9.

sharply limit all government officials, including school administrators, from engaging in the type of censorship the School District advocates.

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[17] Specifically, "minors are entitled to a significant measure of First Amendment protection."[18] That protection is not only for the individual minor's benefit; it is also "a necessary means of allowing her to become a fully enfranchised member of democratic society" — and consequently "[w]e not only permit but expect youths to exercise those liberties — to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view — so that they might attain the right to vote at age eighteen with the tools to exercise that right." [19]

Accordingly, any content- or viewpoint-based restrictions on minors' First Amendment rights are subject to the same standard as such restrictions on adults' First Amendment rights: strict scrutiny.[20] Under that standard, the

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17 *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (overruled in part by *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)); *accord Anspach ex rel. Anspach v. City of Philadelphia, Dept. of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007); *see also Tinker*, 393 U.S. at 511 ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect[.]").

18 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975); *see also Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) ("Children have First Amendment rights.").

19 *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1055-56 (7th Cir. 2004).

20 *See, e.g.*, *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 958-59 (8th Cir. 2003); *Kendrick*, 244 F.3d at 576-80; *Eclipse*

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government can restrict minors' First Amendment free-speech rights only if the limitation imposed is narrowly tailored to further a compelling governmental interest.[21] To be sure, courts apply a lesser standard of review to restrictions on the free-speech rights of students when they are in school.[22] But outside of school, any restriction on the First Amendment rights of minors must survive strict scrutiny.

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Enterprises, Inc. v. Gulotta, 134 F.3d 63, 67-68 (2d Cir. 1997); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992). Although courts have recognized that the government may have an interest that is sufficiently compelling to restrict the constitutional rights of children but not the rights of adults, and the Supreme Court has articulated three factors that might warrant differential treatment of a minor's speech, none of those factors are present here. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (factors that might warrant differential analysis of constitutional rights of minors and adults are (1) peculiar vulnerability of children; (2) their inability to make critical decisions in informed, mature manner; and (3) importance of parental role in child rearing); *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (government has compelling interest in protecting physical and psychological well-being of minors). Indeed, the third factor militates against the School District's argument that it can punish a student's speech in his home — where parents have authority over their children. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 864-65 (1997) (noting "consistent recognition of the principle that 'the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'") (citation omitted); Section IV, *infra* (parents' rights claim).

21 *See, e.g.*, *Interactive Digital Software*, 329 F.3d at 958-59.

22 *See, e.g.*, *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618, 2626-27 (2007) (students' free-speech rights can be circumscribed in light of special characteristics of school environment).

The School District's view — that it has authority over speech uttered by a student outside the schoolhouse gates and that minors' free-speech rights should be subject to the same limitations outside of school as they are in school — fails to acknowledge the significant First Amendment protection to which minors are entitled. Adoption of the District's approach would severely curtail the free-speech rights of minors based solely on their status as public-school students and create a two-tiered system of rights under which public-school students enjoy fewer First Amendment rights when they are not in school than do private and home-schooled students. The Constitution — and the Supreme Court's consistent reaffirmation of minors' rights — forbid this result.

B. SCHOOL OFFICIALS' AUTHORITY TO RESTRICT STUDENTS' FREE-SPEECH RIGHTS IS LIMITED TO EXPRESSION UTTERED IN SCHOOL

The School District's contention that school officials have the same authority to punish student speech outside of school as they do inside of school not only discounts the First Amendment rights of minors, but it also does not comport with the Supreme Court's reasoning in its student-speech cases. The School District ignores the Supreme Court's requirement that there be a connection between any limitations on students' in-school free-speech rights and the special characteristics of the school environment, and instead insists that it is school officials, not parents, who have authority to "protect[] minors from vulgar language and impart[] upon students lessons of civilized behavior" when students are not in school.[23] That argument directly contradicts the Court's admonition in *Morse v. Frederick* that school officials cannot punish vulgar or profane speech

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[23] Sch. Dist. Br. at 11.

outside the school context and is at odds with Pennsylvania law, which expressly limits school officials' authority over students' conduct to acts that occur in school.

1. The Supreme Court Has Justified Restrictions On Students' Free-Speech Rights While In School Based On The Special Characteristics Of The School Environment

Because this case involves student speech uttered outside the schoolhouse gate, it is different from every one of the United States Supreme Court cases involving student-speech rights. From the Court's first student-speech decision almost forty years ago holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[24] to the Court's decision last term reaffirming this core principle,[25] each of the Court's four student-speech cases has focused on school officials' control over *in-school* speech. And in each of these cases, the Supreme Court justified limits on students' in-school-speech rights based specifically on the special characteristics of the school environment.[26] The Court has never sanctioned any limitation on students' free-speech rights outside of the school environment.[27]

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24 *Tinker*, 393 U.S. at 506, 511.

25 *Morse*, 127 S.Ct. at 2622.

26 In upholding a school's punishment of a student for unfurling a banner advocating drug use during a school-sponsored field trip, the *Morse* Court recognized that "the rights of students must be applied in light of the special characteristics of the school environment." 127 S.Ct. at 2622 (citations and quotations omitted). In upholding censorship of school-sponsored student newspapers, the Court noted that "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate properly rests with the school board"). *Hazelwood Sch. Dist. v. Kuhlmeier* 484 U.S. 260, 267 (1988) (emphasis added). In *Bethel School District. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court held that lewd and profane speech "has no place" in a "high school assembly or classroom." *Id.* at 686-87. And *Tinker's* holding that schools can prohibit students from engaging in speech

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Thus, even though the United States Supreme Court has not specifically addressed whether school officials have the authority to punish off-campus student speech,[28] nothing in *Tinker* and its progeny even remotely suggests that they do or that the limitations on student-speech rights authorized in those cases extend outside the schoolhouse gates. Rather, *Tinker* and its progeny reflect a careful balancing of student-speech rights and the needs of the "public school setting." Those cases grant school officials the limited authority to punish speech under certain circumstances — even if that speech otherwise would be constitutionally protected — because of the need to "facilitate education and to maintain order" in a school environment.[29] This rationale is not implicated when a

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at school if it will cause a material and substantial disruption to the school day recognized school officials' "comprehensive authority … to prescribe and control conduct *in the schools*." 393 U.S. at 508 (emphasis added).

27 PSBA suggests that *Tinker* provides authority for schools to punish off-campus speech — and relies on the Court's statement that speech "in class or out of it, which for any reason — whether it stems from time, place or type of behavior — materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech" for that proposition. PSBA Br. at 10 (quoting *Tinker*, 393 U.S. at 513). PSBA's argument ignores entirely the context of the Court's statement. When read in context, the Court's reference to "in class or out of it" plainly refers to time in or out of the classroom, but still *during school*. *See Tinker*, 393 U.S. 512-13.

28 *See Morse*, 127 S.Ct. at 2624 ("There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.") (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

29 *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 253 (3d Cir. 2002).

student expresses himself in the family home — far from the public-school setting and during a time when the child is not under school officials' supervision.

Justice Alito's concurrence in *Morse* reinforces the point that the Court's student-speech-rights jurisprudence is necessarily based on the characteristics of the school environment:

> The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. … Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis. *For these reasons, any argument of altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on the special characteristics of the school setting.*[30]

This Court, too, has underscored the link between school officials' authority to regulate student speech and the need to maintain order in the school environment, explaining that "students retain the protections of the First Amendment, but the shape of these rights *in the public school setting* may not always mirror the contours of constitutional protections afforded in other contexts."[31] Indeed, this Court has expressed serious doubt about whether school officials have any authority over student speech beyond the schoolhouse doors.[32]

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30 *Morse*, 127 S.Ct. at 2637-38 (Alito, J., concurring) (emphasis added).

31 *Sypniewski*, 307 F.3d at 253 (emphasis added) (citation omitted).

32 *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 216 n.11 (3d Cir. 2001) (explaining in dicta that application of restrictions on student speech "to cover conduct occurring outside of school premises . . . would raise

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The School District nonetheless wants the authority to punish student speech wherever it occurs, but does not even attempt to explain how the "special circumstances of the school environment" rationale could be invoked to justify restrictions on students' out-of-school speech. Instead, the District quotes from the Supreme Court's exposition in *Fraser* that schools "must inculcate the habits and manners of civility" and from this Court's opinion in *Sypniewski* that "[s]chools are not prevented by the First Amendment from encouraging fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanctions" to defend its punishment of Justin for engaging in so-called vulgar speech outside of school.[33] But the School District omits the crucial component of those decisions that limits schools' authority to expression that takes place ***in school***.[34] So while school officials may discuss with the student how the out-of-school expression offended or affected others or inform the student's parents of their concerns about the speech, they cannot use their state-conferred authority as school officials to punish students for expression outside the

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additional constitutional questions" and noting with approval cases holding that "school officials' authority over off-campus expression is much more limited than it is over expression on school grounds") (internal citations and quotations omitted).

33 Sch. Dist. Br. at 11 (internal citations omitted).

34 *See Fraser*, 478 U.S. at 683 (giving schools authority to determine "what manner of speech *in the classroom or in school assembly* is inappropriate") (emphasis added); *Sypniewski*, 307 F.3d at 253 ("We have interpreted *Fraser* as establishing that 'there is no First Amendment protection for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech *in school*.'") (quoting *Saxe*, 240 F.3d at 213) (emphasis added).

schoolhouse gates. It is a student's parents (and "other, equally vital, institutions such as families, churches, community organizations and the judicial system"), not school officials, who are responsible for imparting lessons of civilized behavior once their child has exited the schoolhouse gate.[35]

2. The Supreme Court's Recent Decision In *Morse* Forecloses Application Of The *Fraser* Standard To Students' Out-Of-School Speech

The School District and its supporting amicus, PSBA, claim that "vulgar speech is not protected by the First Amendment" even when uttered by students outside of school.[36] But that contention is foreclosed by the Supreme Court's recognition in *Morse* that such speech is protected when made outside of school.

The *Morse* Court noted that *Fraser* drew an explicit distinction between in-school and out-of-school speech, and the Court emphasized the strict limits on a school district's authority to punish a student under *Fraser's* rationale: "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'"[37] The Court recognized that lewd and vulgar speech — which can be proscribed in school — is constitutionally protected outside the

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35 *Layshock*, 496 F. Supp.2d at 597.

36 Sch. Dist. Br. at 8-9; *see* PSBA Br. at 17.

37 *Morse*, 127 S.Ct. at 2626-27 (quoting *Tinker*, 393 U.S. at 506). *Morse* also noted that *Kuhlmeier* drew the same in- and out-of-school-speech distinction. *See Morse*, 127 S.Ct. at 2627 ("*Kuhlmeier* acknowledged that schools may regulate some speech '*even though the government could not censor similar speech outside the school.*'") (quoting *Kuhlmeier*, 484 U.S. at 266) (emphasis added).

school setting.[38] Consequently, the district court's conclusion that the School District had no authority to punish Justin for a "lewd and profane" profile he created at home and distributed to a few friends, but did not distribute in school, simply follows *Morse*.[39]

Morse also refutes the School District's contention that it was authorized to punish Justin's off-campus speech because it was "offensive" and contrary to the school's mission. Indeed, *Morse* rejected that rationale to justify punishment even for in-school speech. Chief Justice Roberts' plurality opinion declined to adopt the "broader rule [urged by the school district] that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*," concluding that "this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'"[40] Again, this is entirely consonant with black-letter First Amendment law, which protects "offensive" speech.[41] Justice Alito's concurrence in *Morse* also

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38 *See Cohen v. California*, 403 U.S. 24 (1971); *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003).

39 *Layshock*, 496 F. Supp.2d at 599 ("This Court has no difficulty concluding, and will assume arguendo, that Justin's profile is lewd, profane and sexually inappropriate. Nevertheless, *Fraser* does not give the school district authority to punish him for creating it. … [B]ecause Fraser involved speech expressed during an in-school assembly, it does not expand the authority of schools to punish lewd and profane off-campus speech. There is no evidence that Justin engaged in any lewd or profane speech while in school. In sum, the *Fraser* test does not justify the Defendants' disciplinary actions.").

40 *Morse*, 127 S.Ct. at 2629.

41 *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Saxe*, 240 F.3d at

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emphasized that "[t]he opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs."[42]

3. Pennsylvania Law Does Not Give School Officials Authority To Punish Students For Out-Of-School Speech

The School District's view that it has authority over students' out-of-school speech is foreclosed not just by the students' and parents' constitutional rights, but also by Pennsylvania law. State law limits school officials' power to discipline students to times when they are in school, on the way to school, and when they are participating in off-campus school-sponsored activities.

As the district court correctly observed, a school district's authority "is limited to that which is expressly or by necessary implication granted by the General Assembly."[43] Under Pennsylvania law, school districts are authorized to

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206. The School District's reliance on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is misplaced. *Pacifica's* holding was based on the fact that an unwitting listener could turn on the radio and "accidentally" encounter undesired or offensive speech. *Id.* at 748-49. The Supreme Court, moreover, has distinguished Internet communications — which "do not 'invade' an individual's home or appear on one's computer screen unbidden [and which] [u]sers seldom encounter … by accident" — from speech on the radio. *Reno*, 521 U.S. at 869 (citations and internal quotations omitted).

42 *Morse*, 127 S.Ct. at 2637 (Alito, J., concurring).

43 *Layshock*, 496 F. Supp.2d at 598 (citing *D.O.F. v. Lewisburg Area Sch. Dist. Bd. of Sch. Dirs.*, 868 A.2d 28, 33 (Pa. Commw. 2004)). In *D.O.F.*, the court overturned the school's punishment of a student who "smoked or attempted to smoke" marijuana on a school playground an hour and a half

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punish students only when they are "under the district's supervision at the time of the incident."[44] Thus, Pennsylvania school law makes PSBA's invocation of schools' "traditionally recognized authority" — which it never really defines — a non-starter.[45]

The School District latches on to the district court's observation that "the test for school authority is not geographical," but the District misunderstands the court's point.[46] A school's authority extends beyond the campus to encompass school-sponsored activities, like field trips and athletic competitions.[47] The dispositive point here is not a geographic one, but rather that schools' authority is

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after leaving a school function because he was no longer under the school's supervision. *D.O.F.*, 868 A.2d at 30. Even though that student engaged in illegal conduct — in contrast with Justin's constitutionally protected speech — the school district was not authorized to punish the student because his misconduct was outside of school.

44 *D.O.F.*, 868 A.2d at 35; *Hoke ex rel. Reidenbach v. Elizabethtown Area Sch. Dist.,* 833 A.2d 304, 313 (Pa. Commw. 2003). These court decisions merely reflect the Pennsylvania's Public School Code. *See* 24 P.S. § 5-510 ("any school district may … enforce such reasonable rules and regulations … regarding the conduct and deportment of all pupils … during such time as they are under the supervision of the board of school directors and teachers"); 24 P.S. § 13-1317 (authorizing teachers and other school officials to control students' conduct and behavior "during the time they are in attendance"). The authority extends to "the time necessarily spent in coming to and returning from school." *Id.*

45 *See* PSBA Br. at 1.

46 *See* Sch. Dist. Br. at 13 (citing *Layshock*, 496 F. Supp.2d at 598).

47 *Layshock*, 496 F. Supp.2d at 598; *see also Tinker*, 393 U.S. at 512-513.

limited to "such times as [students] are under the supervision of the board of school directors and teachers."[48]

Justin was not "under the supervision" of school officials when he created his profile — he was at his grandparents' home during non-school hours. Consequently, the School District had no authority to punish him as a matter not just of constitutional law, but also as a matter of Pennsylvania statutory law.

II. JUSTIN'S SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION BECAUSE IT WAS CREATED OFF-CAMPUS

The School District and PSBA have no choice but to advocate a dramatic expansion of school officials' authority over students' out-of-school speech because they recognize that Justin's parody profile is not in-school speech under any of the Supreme Court's or this Court's precedents. The School District and PSBA nevertheless attempt to camouflage this fact by characterizing Justin's speech as "school-related" or, alternatively, "directed at the school." Both efforts fail. Allowing school officials to impose content-based restrictions by censoring off-campus student speech that is related to or directed at the school violates the well-established First Amendment rights of minors.[49]

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48 24 P.S. § 5-510.

49 *See* Section IA, *supra*. Even if that content-based restriction could survive strict scrutiny (which it could not), it would nevertheless create a substantial risk of viewpoint discrimination by "invit[ing] school officials 'to seize upon the censorship of particular words as a convenient guise for barring the expression of unpopular views.'" *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1053 n.18 (quoting *Cohen*, 403 U.S. at 26).

A. THE SCHOOL DISTRICT DOES NOT HAVE AUTHORITY TO CENSOR STUDENTS' OFF-CAMPUS SPEECH EVEN IF IT IS POSTED ON THE INTERNET AND IS THEREBY ACCESSIBLE FROM SCHOOL COMPUTERS

As an initial matter, the School District's and PSBA's assertion that school officials should be granted authority to punish off-campus school-related or school-directed speech that is posted by students on the Internet because of that medium's expansive reach is wrong on the law. Contrary to the School District's suggestion, the "proliferation and prevalence of the internet"[50] do not diminish the constitutional protection for online expression.[51]

In *Reno v. American Civil Liberties Union*, the Supreme Court explained that the factors justifying expanded governmental regulation of broadcast media, *i.e.*, the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature, are not present in cyberspace. Thus, in contrast with some speech uttered in certain other mediums, speech made on the Internet receives *unqualified* First Amendment protection.[52]

The School District and PSBA, however, try to twist the Court's emphasis on the reach and availability of the Internet — which was an important factor in the *Reno* Court's decision to strike down federal regulation of Internet speech[53] — into a rationale for allowing school districts to censor students'

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50 Sch. Dist. Br. at 13.

51 *See Reno*, 521 U.S. 844.

52 *See id.* at 870.

53 The *Reno* Court recognized the Internet's "relatively unlimited, low-cost capacity for communication of all kinds" with which "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Id.* at 870.

Internet speech.[54] But the First Amendment does not permit the government to regulate a particular medium of speech solely because that medium is *more effective* than others. Indeed, courts turn a wary eye to government regulations that force a speaker to use a less effective medium of expression.[55]

The Supreme Court has also rejected the School District's argument that the potential for damage inflicted by Internet speech — due to its availability to "a global audience beyond the school community" — justifies giving government officials greater authority to censor online speech.[56] And although the School District and PSBA warn of the dangers of allowing students to express themselves online without fear of school district discipline,[57] "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[58]

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54 *See* Sch. Dist. Br. at 18-19.

55 *See City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (residential sign ordinance violated First Amendment with regard to noncommercial speech because it restricted speaker's audience, restricted effectiveness of speech, and relegated speakers to far more expensive means of communication); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (reduced effectiveness of message was important factor in deciding that content-neutral regulation failed to leave open ample alternative avenues for speech); *cf. Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004) (decision to allow less effective message rather than speaker's chosen message can indicate viewpoint discrimination).

56 *See Smith v. Doe*, 538 U.S. 84, 99 (2003) (upholding Internet posting of sex-offender-conviction information despite Internet's geographic reach that "is greater than anything which could have been designed in colonial times").

57 *See* Sch. Dist. Br. at 18-19; PSBA Br. at 23.

58 *Reno*, 521 U.S. at 885.

Finally, the School District's attempt to equate students' rights to engage in off-campus Internet speech with those of off-hours public employees is entirely without legal support. Relying on a United States Supreme Court decision upholding the discharge of a police officer who sold pornographic videos of himself in a police uniform over the Internet,[59] the School District compares its interests in limiting students' Internet speech to those of the police department in *Roe*.[60] But those interests are not analogous. At the outset, students are subject to compulsory school-attendance laws. Unlike the police officer in *Roe*, students cannot simply quit school if they are unhappy with the burdens placed on their out-of-school speech due to their status as public-school students.[61] And unlike public employees, students have a First Amendment right — both inside and outside of school — to speak on matters that are not of public concern.[62] It is thus of no consequence that Justin's parody was not speech on a matter of public concern. Nor does it matter that Justin "deliberately took steps to link his off-site internet activity to his school."[63] Unlike police officers, students are not agents of their

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59 *See City of San Diego v. Roe*, 543 U.S. 77, 78 (2004).

60 Sch. Dist. Br. at 20-22.

61 *See Morse*, 127 S. Ct. at 2637-38 (Alito, J., concurring) (recognizing that "[m]ost parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school").

62 *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 66 (9th Cir. 2006) ("Although *Connick*'s personal matter/public concern distinction is the appropriate mechanism for determining the parameters of a public employer's need to regulate the workplace, neither we, the Supreme Court nor any other federal court of appeals has held such a distinction applicable in student speech cases").

63 Sch. Dist. Br. at 21.

schools. No reasonable person who saw Justin's parody profile would believe that it was created by Trosch,[64] and Justin had no responsibility, as a student, to maintain the reputation of the School District when engaging in off-campus expression.

B. THE SCHOOL DISTRICT DOES NOT HAVE AUTHORITY TO PUNISH JUSTIN'S OFF-CAMPUS SPEECH BECAUSE IT IS "SCHOOL-RELATED" OR "SCHOOL-DIRECTED"

The School District and PSBA contend that the District had authority to punish Justin for the profile he created off-campus because the profile was "school-related." They claim that the fact the profile was about the principal was enough to establish a "sufficient nexus" between Justin's off-campus speech and on-campus activity.[65] But "school-related" speech is not a construct embodied in the Supreme Court's student-speech-rights jurisprudence — and the Court has never held that schools have authority over out-of-school speech because it is "school-related," whatever that may mean.[66] Rather, the Court consistently has spoken of "in-school" speech or "school-sponsored" speech and then has relied upon the "special characteristics of the school environment" to explain why school

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64 *See* Section IIIB, *infra*.

65 Sch. Dist. Br. at 14-15; PSBA Br. at 12-13.

66 The School District appears to define "school-related" as speech that is aimed at the School District community. Sch. Dist. Br. at 9. Thus, under the School District's broad conception of "school-related" speech, a student's letter to the editor of the local newspaper criticizing school officials or a petition circulated in the community condemning a teacher's behavior could be characterized as "school-related" and could thus be subject to punishment by the School District.

officials may punish certain in-school or school-sponsored speech that otherwise would be protected outside of the schoolhouse gates.[67]

Nothing in *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse* authorizes the expansion of a school district's authority over student speech uttered outside of the schoolhouse gates simply because it is "about" the school. And, contrary to the School District's assertions, *Fraser* and *Morse* do not permit schools to punish off-campus speech merely because it is "school-related."[68] *Fraser* addressed "the level of First Amendment protection accorded to [a student's] utterances and actions *before an official high school assembly attended by 600 students*."[69] The Court's holding therefore related to the "manner of speech *in the classroom or in school assembly*."[70] The crucial fact was not that the speech was "school-related," but that it occurred during school. As *Morse* explained, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[71] *Morse* thus confirms that schools cannot punish out-of-school speech, regardless of whether it is lewd, profane, or "school-related."

The School District and PSBA recognize that there is nothing in the United States Supreme Court's or this Court's precedents supporting their assertion that the School District can censor out-of-school speech that is school-related, and they therefore urge this Court to adopt the Pennsylvania Supreme Court's standard

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67 *See* Section IB, *supra*.

68 Sch. Dist. Br. at 10-11.

69 478 U.S. at 681 (emphasis added).

70 *Id.* at 683 (emphasis added).

71 127 S.Ct. at 2626.

in *J.S. v. Bethlehem Area School District*[72] for punishing students' out-of-school Internet speech.[73] But that case does not support the School District's punishment of Justin, and is wrongly decided in any event, as it extends school officials' authority beyond that permitted by United States Supreme Court precedent or Pennsylvania law.

First, the School District and PSBA read the Pennsylvania Supreme Court's decision in *J.S.* too broadly. PSBA claims that *J.S.* authorizes a school district to punish a student for lewd and profane speech off-campus whenever there is a "significant nexus or connection between the speech created off campus but directed to the school community."[74] It does not.

The Pennsylvania Supreme Court held in *J.S.* that, "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[75] Thus, under *J.S.*, the initial question to resolve in determining if school officials have authority to punish student speech is whether that speech is on or off campus.[76] The *J.S.* court determined that a website created by a student at home, but accessed and shared with other students at school, was in-school speech because there was "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[77] But the Pennsylvania Supreme

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72 807 A.2d 847 (Pa. 2002).

73 *See* Sch. Dist. Br. at 15-16; PSBA Br. at 3-4.

74 *Id.*

75 807 A.2d at 865.

76 *Id.* at 864.

77 *Id.* at 865.

Court upheld the school district's decision to punish J.S. not only because the website had a sufficient "nexus" to the school to be considered on-campus speech, but also because the website caused a material and substantial disruption to the school, disrupting the "entire school community" and causing a teacher to take a leave of absence requiring the employment of substitute teachers.[78]

Although PSBA suggests that *J.S.* authorized schools to punish "lewd, offensive, or profane" off-campus speech,[79] the court expressly declined to decide whether *Fraser* actually applied to the on-campus speech at issue.[80] The court noted that, unlike the speech in *Fraser*, a student's off-campus website is "not … expressed at any official school event or even during class, subjecting unsuspecting listeners to offensive language."[81] The court further explained that "questions exist as to the applicability of *Fraser* to the factual scenario."[82] Indeed, there is not a single federal court decision upholding a school district's punishment of a student for out-of-school speech under *Fraser*.[83] More importantly, to the extent

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78 *Id.* at 868-69.

79 PSBA Br. at 3.

80 *See J.S.*, 807 A.2d at 867-68.

81 *Id.* at 866.

82 *Id.* at 868.

83 *See Thomas*, 607 F.2d 1043 (discussed *supra*); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972) (in striking down a pre-distribution review requirement for student newspapers produced off-campus, the court stated: "It should have come as a shock to the parents of five high school seniors in the Northeast Independent School District of San Antonio, Texas, that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children's rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of

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J.S. could be read as authorizing punishment for lewd and profane speech outside of school, such an interpretation would contravene *Morse*, which held that Fraser's lewd speech would have been protected if he delivered it "in a public forum outside the school context."[84]

Accordingly, even if this Court adopted the *J.S.* standard for punishing off-campus speech that is accessed or brought onto school grounds by its originator, the School District's punishment of Justin for engaging in vulgar off-campus speech still would be unconstitutional. Justin used his grandmother's computer to post a parody profile of his principal, which was created off-campus, on MySpace.[85] Justin was punished by school officials for creating the profile, not

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authority is an unconstitutional usurpation of the First Amendment."); *Bowler v. Town of Hudson*, 514 F. Supp.2d 168, 179 (D. Mass. 2007) ("because the [students'] graphic and arguably 'offensive' speech was not actually displayed at school, *Fraser* does not support the school's censorship"); *Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F. Supp.2d 791, 799-800 (N.D. Ohio 2002) (school may not discipline student under *Fraser* for vulgar and offensive content posted on student website and accessed at school); *Klein v. Smith*, 635 F. Supp. 1440, 1442 (D. Me. 1986) (reversing suspension of student who gave "the finger" to teacher while off of school grounds and not during any school sponsored activity); *see also Saxe*, 240 F.3d at 216 n.11 (citing *Klein* with approval); *but see Doninger v. Niehoff*, F. Supp.2d 199 (D. Conn. 2007) (upholding school's revocation of student's participation in voluntary extracurricular activities for posting vulgar blog about school officials on Internet).

84 *Morse*, 127 S.Ct. at 2626 (citation omitted); *see also Coy*, 205 F. Supp.2d at 799-800. Even if Justin had accessed the profile during Spanish class, a fact that is disputed, there is no evidence that school officials even knew about it at the time, which precludes transforming this case into one involving in-school speech.

85 *See* Counterstatement of the Case, *supra*.

for accessing it at school or showing it to other students at school. And the profile caused no disruption in the school.[86] So while it is doubtful whether Justin's profile would even be considered in-school speech under *J.S.*, it is plain that it cannot be punished on the basis of its alleged vulgarity alone, even under *J.S.*

There is a second reason why this Court should not adopt the *J.S.* standard in this case: It extends school authority to punish off-campus student speech far beyond its permissible bounds. As discussed above, school officials in Pennsylvania are limited by both state law and the First Amendment when they seek to punish students for off-campus speech. When Justin posted the Trosch profile off of school grounds and during non-school hours, the School District had no authority over him and, thus, his expression was entitled to the same constitutional protection enjoyed by any other citizen.

The district court, therefore, correctly determined that the School District did not have authority to punish Justin for his off-campus speech. The court first noted that "[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web. Public schools are vital institutions, but their reach is not unlimited."[87] Then, the court relied on *Thomas*, to explain "[t]he purpose of this boundary on school authority":

> When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant

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86 *See* Section IIIA, *infra*.

87 *Layshock*, 496 F. Supp.2d at 597.

> school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.[88]

The district court's reliance on *Thomas* was particularly apt. In that case, the Second Circuit held that a school district violated the First Amendment free-speech rights of students who were punished for distributing an independent newspaper off of school grounds.[89] The court ruled that the school district had no authority to punish the students for speech that occurred off campus — "where the freedom accorded expression is at its zenith" — because any punishment of students for conduct outside of school "could only have been decreed and implemented by an independent, impartial decisionmaker."[90] Any other conclusion, the court warned, would give school officials "discretion to suspend a student who purchases an issue of National Lampoon … and lends it to a school friend" or to "consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television."[91] Indeed, it is not difficult to imagine that school officials, if given authority to do so, would punish students for marching in a gay rights parade or for expressing anti-homosexual messages outside of school.[92] Placing that sort of power in the hands

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88 *Id.* at 597-98 (quoting *Thomas*, 607 F.2d at 1052).

89 *See Thomas*, 607 F.2d 1043.

90 *Id.* at 1050.

91 *Id.* at 1051.

92 *See, e.g.*, *Nuxoll v. Indian Prairie Sch. Dist.*, ___ F.3d ___, No. 08-1050, 2008 WL 1813137 (7th Cir. April 23, 2008) (stating that rule banning derogatory comments in school about peoples' sexual orientation appeared to satisfy First Amendment).

of school officials would harm not only the First Amendment rights of public-school students, but the rights of their parents as well:

> 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.[93]

For these reasons, school officials are barred from punishing students' off-campus speech. Any other rule would subject students who engage in controversial speech outside of school to punishment by school officials. But that does not mean that school districts are foreclosed from taking any action in response to inappropriate, hurtful, or disruptive student speech. School officials can punish those students who actually cause disruption in school; they can inform students' parents if they have concerns about the students' off-campus speech; and they can even contact police if they believe that the expression constitutes harassment or a terroristic threat. But school officials' authority to use their state-conferred authority to punish ends when students exit the schoolhouse gate.

C. JUSTIN'S PROFILE IS NOT ON-CAMPUS SPEECH AND, IN FACT, THE SCHOOL DISTRICT DID NOT PUNISH HIM FOR ANYTHING HE DID ON CAMPUS

The School District's attempt to convince this Court that Justin's speech was subject to the School District's authority because Justin accessed the profile in school is not supported by the record. As a threshold matter, the School

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93 *Thomas*, 607 F.2d at 1051.

District did not punish Justin for any on-campus behavior, but rather for his off-campus conduct of creating the profile. As the district court concluded:

> [T]he actual charges made by the School District were directed only at Justin's off-campus conduct. On this record, there is no evidence that the school administrators even knew that Justin had accessed the profile while in school prior to the disciplinary proceedings.[94]

But even if the School District had known that Justin had accessed the profile at school, this *de minimis* on-campus activity would not justify the School District's actions.[95] The district court found that "[t]he only 'in-school' conduct in which Justin engaged was showing the profile to other students in the Spanish classroom" and noted that, "[i]n *Thomas*, the Second Circuit deemed more substantial on-campus activity to be 'de minimis.'"[96]

Nor does Justin's parody profile become "in-school" speech because he copied Trosch's picture from the School District's website and used it in the profile.[97] That act cannot transform the parody profile into on-campus speech. Justin obtained publicly available information — a photo of Trosch — from the School District's website for use in the profile he created. That is no more an act

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94 *Layshock*, 496 F. Supp.2d at 601 (citing *Thomas*).

95 *See Thomas*, 607 F.2d at 1050 ("all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate" and the on-campus activity was so "de minimis" that school officials did not have authority to punish students for it"); *see also Coy*, 205 F. Supp.2d at 800-801 (school officials could not discipline student for website created at home even if the student accessed the website in school).

96 496 F. Supp.2d at 600-01.

97 *See* Sch. Dist. Br. at 14 n.10 ("[v]isiting the [school] web site and removing the picture from the web site constituted on-campus behavior …").

of "on-campus" speech than going to the local library and photocopying a picture of the principal from an old yearbook or scanning into a computer a photo of the principal in a school newsletter that is delivered to one's home.[98] Indeed, under the School District's logic, a student who downloads the school lunch menu from the School District's website and describes the items to be served in an off-campus publication has engaged in on-campus speech.

III. JUSTIN'S SPEECH IS PROTECTED BY THE FIRST AMENDMENT EVEN IF IT IS CONSIDERED IN-SCHOOL SPEECH

Because Justin's expression occurred outside of school and was not part of any school-sponsored activity, school officials could not use their authority to punish him. But even if the School District had some authority to punish Justin for his off-campus speech based on the Supreme Court's in-school-student-speech-rights precedents, the District's actions still could not be justified.

A. JUSTIN'S SPEECH IS PROTECTED UNDER *TINKER* BECAUSE IT CAUSED NO DISRUPTION

Even under the lesser First Amendment protection accorded to public-school students' on-campus speech, the School District's punishment of Justin for creating a parody profile violated his free-speech rights. As explained above, *Fraser* — which is limited to lewd and vulgar remarks made to a captive audience

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98 The School District accuses Justin of "misappropriat[ing]" Trosch's photo. Sch. Dist. Br. at 2, 14. It is not clear whether the School District believes Justin to have committed the tort of misappropriation or a copyright violation when he posted Trosch's photo on the parody profile. Either way, the School District does not have authority to sanction a person solely because it believes that his use of a photo that is available on the District's public website has violated the District's or an administrator's rights. The District or Trosch must file an action in state or federal court to enforce those rights.

at a school-sponsored event — did not provide a basis for the School District to punish Justin.[99] *Kuhlmeier* — which addressed school-sponsored speech that might be "attributed to the school" — does not apply here.[100] *Morse* likewise provides no justification for the School District's actions because that case controls only speech reasonably viewed as promoting illegal drug use at a "school-sanctioned and school-supervised event."[101]

Nor can the School District justify its punishment of Justin under the *Tinker* standard, which holds that, to overcome a student's right to free expression, school officials must meet their burden to prove that the speech caused a material and substantial disruption to the school day.[102] As the district court correctly concluded based on a fully developed evidentiary record, Justin's speech caused no disruption to the school — let alone a material and substantial one.[103] Instead, the evidence demonstrated that the School District's real reason for punishing Justin was its view that the parody profile of Trosch was demeaning.[104] The First Amendment, however, forbids a school from punishing student speech simply because school officials found the speech offensive, embarrassing, or demeaning.[105]

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99 *See Fraser*, 478 U.S. at 685.

100 *Kuhlmeier*, 484 U.S. at 271.

101 *Morse*, 127 S.Ct. at 2622, 2625.

102 *See Tinker*, 393 U.S. at 509.

103 *Layshock*, 496 F. Supp.2d at 601.

104 *See* A. 501 (Trosch Dep.); *see also Layshock*, 496 F. Supp.2d at 593.

105 *See Morse*, 127 S.Ct. at 2629 (school officials may not punish speech that they find "plainly offensive"); *Tinker*, 393 U.S. at 509 (school districts cannot base restrictions on speech on the "mere desire to avoid discomfort

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The School District ignores these precedents and instead relies on the Second Circuit's decision in *Wisniewski v. Board of Education of the Weedsport Central School District*.[106] That decision, however, is difficult to reconcile with controlling precedent. In *Wisniewski*, the Second Circuit affirmed the dismissal of a student's First Amendment challenge to a school district's decision to punish him for creating at home and distributing via the Internet a "small drawing crudely, but clearly, suggesting that a named teacher should be shot and killed."[107] The Second Circuit did not base its decision on a finding that the drawing amounted to a true threat under *Watts v. United States*,[108] but instead purported to apply *Tinker* and reasoned that the school district could satisfy *Tinker's* standard based on a showing that there was a "reasonably foreseeable risk that the [drawing] would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school.'"[109]

The Second Circuit's "reasonably foreseeable" approach is inconsistent with both *Tinker* and this Court's decisions. *Tinker* does not sanction

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and unpleasantness"); *Saxe*, 240 F.3d at 215 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.") (citations omitted).

106 494 F.3d 34 (2d Cir. 2007).

107 *Id.* at 35.

108 394 U.S. 705 (1969).

109 *Wisniewski*, 494 F.3d at 38-39 (citations omitted). The student's drawing did in fact disrupt the normal operation of the school, as the teacher targeted by it asked and was allowed to stop teaching the student's class.

the "reasonable foreseeability" test fashioned by the Second Circuit. Rather, *Tinker* requires proof of much more — proof of either an actual substantial and material disruption or a concrete and particularized reason to anticipate that disruption would result from the student speech that is punished.[110]

In faithfully applying *Tinker*, this Court has explained that a school district must be able to point to a "*particularized reason* as to why it anticipates substantial disruption [resulting from the speech it intends to prohibit or punish]."[111] Even when a school seeks to justify regulation of student speech based on a claim that the expression sought to be suppressed is related to past expressions that have caused disruption, "it must do more than simply point to a general association. It must point to a *particular and concrete basis* for concluding that the association is strong enough to give rise to *well-founded fear of genuine disruption in the form of substantially interfering with school operations* or with the rights of others."[112]

In the end, while the profile undoubtedly was upsetting to Trosch, the School District's recourse was to discuss the matter with Justin, which they did (and Justin apologized), or with his parents, which they also did.[113] What the School District could not do was use its power as an agent of the State to punish

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110 *See Tinker*, 393 U.S. at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *see also Morse*, 127 S.Ct. at 2637 (Alito, J. concurring) (*Tinker* "permits the regulation of student speech that threatens a concrete and 'substantial disruption'") (quoting *Tinker*, 393 U.S. at 514).

111 *Saxe*, 240 F.3d at 217 (emphasis added); *see also Sypniewski*, 307 F.3d at 253 ("*Tinker* requires a specific and significant fear of disruption").

112 *Sypniewski*, 307 F.3d at 257 (emphasis added).

113 *See* A. 393-96, 243-25 (TRO Tr.).

Justin for his out-of-school speech poking fun at the principal, which caused no material and substantial disruption.

B. JUSTIN'S WEBSITE CONSTITUTES FIRST AMENDMENT PROTECTED SPEECH

The School District apparently recognizes that it cannot satisfy *Tinker*'s substantial and material disruption test because it devotes a considerable portion of its brief to various arguments that Justin's speech falls entirely outside of the First Amendment. These arguments are legally unsupportable.

1. The First Amendment Protects Profane, Vulgar, And Offensive Speech

The School District and PSBA repeatedly contend that the First Amendment does not protect "lewd," "profane," "vulgar," "offensive" and "mean-spirited" speech.[114] But such speech is fully protected by the First Amendment, even when uttered by minors.[115]

2. The First Amendment Protects Parodies

The School District argues that Justin's profile is entirely outside the protections of the First Amendment because it constitutes defamation.[116] Not so.

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114 *See e.g.* Sch. Dist. Br. at 29; PSBA B. at 17-19.

115 *See* note 41, *supra*.

116 Whether a statement is capable of defamatory meaning is a legal question to be resolved by a court. *See Beverly Enters. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) (citing *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996)). School districts are hardly equipped to make this legal determination. *Cf. Layshock*, 496 F. Supp.2d at 603 ("The School cannot usurp the judicial system's role in resolving tort actions for alleged slander occurring outside of school."); *Thomas*, 607 F.2d at 1051 (school officials "are generally unversed in difficult constitutional concepts such libel and obscenity").

As a matter of law, Justin's speech *is* parody — and it is settled law that parodies are protected speech under the First Amendment.[117]

One reason why parodies and satire are constitutionally protected and cannot form the basis of a defamation claim is because such expression "cannot 'reasonably [be] interpreted as stating actual facts' about an individual."[118] When determining whether speech reasonably can be construed as stating actual facts, the context of the speech must be considered.[119]

In *Falwell*, Hustler Magazine published a parody advertisement that included the Reverend Jerry Falwell's image and name. The parody included a mock interview with Falwell that suggested he had an incestuous relationship with his mother, portrayed Falwell and his mother as drunk and immoral, and suggested that he was a hypocrite who preached only when drunk.[120] Falwell sued Hustler Magazine for libel, invasion of privacy and intentional infliction of emotional

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117 *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

118 *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler*, 485 U.S. at 50).

119 *See, e.g., Greenbelt Coop. Pub. Ass'n. v. Bresler*, 398 U.S. 6, 13-14 (1970) (finding use of the word "blackmail" in context of city council debate protected by First Amendment because it was "no more than rhetorical hyperbole, a vigorous epithet" that nobody would believe to be an accusation of committing the crime of blackmail); *Beverly Enters*, 182 F.3d at 188 (finding no defamation for insulting speech during an argument that included the statement that certain people were "all criminals"; reasonable listener would interpret this as "a vigorous and hyperbolic rebuke, but not a specific allegation of criminal wrongdoing"); *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001) (allegedly defamatory statements must be "[v]iew[ed] … in their appropriate contexts); *Thomas Merton Center v. Rockwell Int'l Corp.*, 442 A.2d 213, 216 (Pa. 1981) (same).

120 *Falwell*, 485 U.S. at 48.

distress. The Supreme Court held that speech that "could not reasonably have been interpreted as stating actual facts" is protected by the First Amendment, even if the speech "is patently offensive and is intended to inflict emotional injury."[121] Hence, the Falwell parody could not form the basis of claims for libel, invasion of privacy, or intentional infliction of emotional distress.[122]

As explained, a defamation claim can succeed only if a reasonable person would believe the allegedly defamatory statement to be a serious assertion

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121 *Id.* at 50. Lower courts have followed Hustler to conclude that satire and jest — when viewed in context — constitute protected speech and cannot be characterized as defamatory. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005) (webpage that included picture of Evel Knievel with his wife and another young woman with caption "Evel Knievel proves that you're never too old to be a pimp" was constitutionally protected speech); *DiMeo v. Max*, 433 F. Supp.2d 523, 526-27 (E.D. Pa. 2006) (mean, vulgarity-laden comments posted on Internet bulletin board about host of wild New Year's eve party are, when viewed in context, not serious and thus not defamatory); *Busch v. Viacom Int'l, Inc.*, 477 F. Supp.2d 764, 775-76 (N.D. Tex. 2007) (product endorsement in satirical television show could not reasonably be interpreted as containing assertions of fact).

122 *Falwell*, 485 U.S. at 57. Although *Falwell* involved speech offensive to a public figure, its core holding regarding the constitutional protection afforded to speech that cannot be reasonably understood as describing actual facts extends to speech about non-public figures and applies with equal force here. *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982) (rejecting argument that "this constitutional doctrine should apply only to public figures" because "there is no such limitation"). Thus, whether Trosch, as a high school principal, is a "public figure" is irrelevant to the inquiry here. Further, there is no requirement that speech must pertain to political or social issues in order to be entitled to First Amendment protection. *See e.g. Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

of fact. That is the standard under both Pennsylvania and federal law.[123] The Trosch profile is absurd on its face. A. 897-900. The first words, at the top of the web page next to Trosch's picture, read: "I…AM…SUCH…A…BIG…HARD-ASS!!!!!" The theme of "big" virtually jumps off the page. No one could possibly believe that Trosch's eye color, hair, height, handedness, heritage, achievement goal, overused phrase, first waking thoughts, bedtime, favorite foods and drinks, and everything else about him is "big" or some variation of the word. It is simply nonsensical. Consequently, no reasonable person could possibly believe these statements were made by Trosch or that they were truthful statements about Trosch.

ARGUMENT OF CROSS-APPELLANTS CHERYL AND DONALD LAYSHOCK

IV. THE SCHOOL DISTRICT VIOLATED THE LAYSHOCK PARENTS' DUE PROCESS RIGHTS WHEN IT PUNISHED JUSTIN FOR HIS CONDUCT IN THE FAMILY'S HOME

The School District's punishment of Justin for his conduct in the Layshock family home after school hours — when Justin was *not* under the supervision of the School District — not only violated Justin's First Amendment rights, but also violated his parents' constitutional right to direct the upbringing of their children free from government intervention. The district court erred in concluding otherwise.

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123 *See Greenbelt Coop. Pub. Ass'n.*, 398 U.S. at 13-14; *Pring*, 695 F.2d at 442; *Savitsky v. Shenandoah Valley Pub. Corp.*, 566 A.2d 901, 905 (Pa. Super. 1989).

A. PARENTS HAVE A CONSTITUTIONAL RIGHT TO DIRECT THE UPBRINGING OF THEIR CHILDREN WITHOUT GOVERNMENT INTERFERENCE

"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."[124] The United States Supreme Court has consistently affirmed parents' fundamental right to direct the upbringing of their children free from government intervention. As the Court most recently explained in *Troxel v. Granville*:[125] "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[126] This Court likewise has emphasized that "[t]he right of parents to raise their children without undue state interference is well established."[127]

An essential component of parents' right to raise their children is the recognition that "it is the parents' responsibility to inculcate moral standards,

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124 *Pierce v. Soc'y of the Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 535 (1925).

125 530 U.S. 57 (2000).

126 *Id.* at 66; *see also id* at 65 ("the liberty interest . . . of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court") (citing cases).

127 *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000); *see also Anspach*, 503 F.3d at 261 ("The Supreme Court has long recognized that the right of parents to care for and guide their children is a protected fundamental liberty interest. … That constitutional protection is deeply rooted in this Nation's history and tradition.") (citations and internal quotations omitted).

religious beliefs, and elements of good citizenship."[128] Parents' control over their children's moral education is at its zenith in the family home: Indeed, "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."[129] So while school officials may have the authority to discipline students for inappropriate behavior during the school day, they must yield to parental decision-making authority regarding out-of-school conduct and matters involving private family affairs. As this Court explained, a school's authority over children is limited to "*some* portions of the day [when] children are in the compulsory custody of state-operated school systems. In that setting, the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[130] But it is only "*[d]uring this custodial time*, in order to maintain order and the proper

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128 *Gruenke*, 225 F.3d at 307 (citations and internal quotations omitted).

129 *Reno*, 521 U.S. at 865 (1997) (citation and internal quotations omitted); *see also Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children").

130 *Gruenke*, 225 F.3d at 304 (emphasis added) (quotation marks and citations omitted). This Court further explained that "[f]or *some* purposes, then, school authorities act *in loco parentis*", but also admonished that "[p]ublic schools must not forget that '*in loco parentis*' does not mean 'displace parents.'" *Id.* at 304, 307; *cf. Thomas*, 607 F.2d at 1051 ("Parents still have their role to play in bringing up their children, and school officials are not empowered to assume the character of Parens patriae"). Although the district court may have been correct to conclude that "schools act *in loco parentis* and have the authority to impose discipline on students," that principle has no bearing here, where the speech occurred in the home. *See Layshock*, 496 F. Supp.2d at 606.

educational atmosphere, at times, [that school] authorities 'may impose standards of conduct that differ from those approved of by some parents.'"[131]

Accordingly, once the child has exited the schoolhouse gates, school officials are forbidden from exercising their state-conferred power over that child to intervene in a matter properly under the jurisdiction of the parents. Such interference amounts to an "arrogation of the parental role" and violates a parent's constitutional rights.[132]

B. THE SCHOOL DISTRICT'S PUNISHMENT OF JUSTIN UNCONSTITUTIONALLY INTERFERED WITH THE LAYSHOCK PARENTS' RIGHT TO REGULATE THEIR CHILD'S OUT-OF-SCHOOL CONDUCT

Justin created and posted the parody profile on the Internet after school hours at his grandmother's home. The Layshock parents thus had a constitutionally protected "right to choose the proper method of resolution" in responding to Justin's creation and posting of the profile.[133] The School District, on the other hand, had no authority to interfere with the Layshock parents' rights by punishing Justin for his off-campus, after-school conduct. Its decision to do so

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131 *Anspach*, 503 F.3d at 266 (quoting *Gruenke*, 225 F.3d at 304) (emphasis added).

132 *Gruenke*, 225 F.3d at 306. In *Gruenke*, this Court held that a parent's contention that "the management of this teenage pregnancy was a family crisis in which the State . . . had no right to obstruct the parental right to choose the proper method of resolution" and that her daughter's swim coach had interfered with that right by insisting that the girl take a pregnancy test alleged a violation of parental due process rights. *Id.*

133 *Id.* at 306.

amounted to an unconstitutional intrusion into the private affairs of the Layshock household and a usurpation of the authority reserved to the Layshock parents.[134]

Although the district court recognized that parents have a protected liberty interest in the upbringing of their children, it dismissed the Layshock parents' claim because of its flawed understanding of parents' fundamental rights. First, the court failed to recognize the Layshock parents' challenge to the School District's punishment as a Fourteenth Amendment substantive due process challenge, and second, the court wrongly held that the School District did not usurp the Layshock parents' rights because the School District's punishment did not prevent Justin's parents from imposing their own discipline.

First, the district court incorrectly construed the Layshock parents' claim as an action to vindicate Justin's First Amendment rights.[135] But Justin's First Amendment free-speech rights and his parent's due process rights are separate and independent constitutional rights, and there is no authority to support the district court's view that the School District's actions could not give rise to two separate and independent constitutional violations. Indeed, in denying the School District's motion to dismiss the Layshock parents' claim, the district court recognized that parents may assert a claim on their *own* behalf for a violation of their due process right to "raise, nurture, discipline and educate their children"

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134 *Id.* at 303-04 ("[C]hoices about … family life, and the upbringing of children are among associational rights this Court has ranked as of basic importance in our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect.'") (quoting *M.L.B v. S.L.J.*, 519 U.S. 102, 116 (1996)).

135 *See Layshock*, 496 F. Supp.2d at 606 ("the parents have no valid independent right of recovery which is not merely duplicative of Justin's First Amendment claim").

based on a school district's punishment of their child for out-of-school speech.[136] That is the correct approach. Because it is uncontroverted that the School District punished Justin for out-of-school speech and not for anything he did while in school, the Layshock parents have established that the District interfered with their fundamental right to parent.

Second, in concluding that the Layshock parents "were unable to articulate how the school's action interfered with their parental discipline of Justin,"[137] the district court mistakenly imposed on the Layshock parents the burden to show that the School District's punishment prevented them from imposing their own discipline. Nothing in the Supreme Court's or this Court's parental-due-process jurisprudence required the Layshock parents to show that their efforts were hindered by the School District's decision to punish Justin. Instead, the Layshock parents were only required to show that the School District's punishment of Justin for out-of-school speech conflicted with their fundamental right to raise and nurture their child.[138] By suspending Justin and exiling him to

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136 *See* A. 84-99 (March 31, 2006 Order) (adopting Chief Judge Ambrose's opinion in *Flaherty v. Keystone Oaks Sch. Dist.*, Civ. A. No. 01-586, at 4-5 (W.D. Pa. April 22, 2002)).

137 *Layshock*, 496 F. Supp.2d at 606.

138 *See Gruenke*, 225 F.3d at 305 (when "school's policies might come into conflict with the fundamental right of parents to raise and nurture their child …, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest"). The gravamen of the constitutional violation in *Gruenke* was not that the parents were deprived of their ability to make a decision that their daughter would *not* take a pregnancy test, but rather that the swim coach had no right to involve himself in that private family matter at all. That same reasoning applies to this case

alternative education for a profile he created at home, the School District sent the message to Justin that his conduct in creating and posting the profile was so depraved that he was not entitled to participate in his normal classes and activities. While the School District may have authority to send that message to students who engage in "lewd, vulgar and plainly offensive speech" in school, it is the parents who decide whether their children may engage in such speech at home.[139] The School District usurped the Layshock parents' right to decide whether to condone Justin's out-of-school conduct, and in doing so, violated their fundamental right to control Justin's upbringing.[140]

The district court's reliance on *C.N. v. Ridgewood Board of Education*[141] — which involved a claim by parents that an in-school survey on

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139 *Cf. Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (noting that state law prohibiting sale of pornographic materials to minors did not conflict with "parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" because prohibition against sales to minors did not bar parents who so desired from purchasing materials for their children).

140 That Justin's parents disapproved of the profile and grounded him is of no consequence. It was their right, not the School District's, to determine what message to send to Justin concerning his conduct. Indeed, a contrary result would allow school officials to usurp parents' authority and punish students for using vulgar language outside of school if their parents happened to disapprove of such language but forbid school officials to do the same if the student's parents condoned the language. Moreover, the Layshock parents remained "powerless to erase their child's suspension" and placement in alternative education. *See Thomas*, 607 F.2d at 1053 n.18 (explaining that school suspension of students for off-campus speech interferes with "proper role of parents"; for example, "a parent who believed [an off-campus publication] was a harmless prank is powerless to erase his child's suspension.").

141 430 F.3d 15 (3d Cir. 2005).

topics such as drug and alcohol use, sexual activity, and personal relationships interfered with their fundamental right to parent — was misplaced. *C.N.* involved a school district's actions during the school day, which is a time when school officials have some authority to teach students about sexuality and drug use, as well as standards of civility.[142] In contrast, the School District's decision to reach outside of the schoolhouse gates and into the private affairs of the Layshock home "strike[s] at the heart of parental decision-making authority."[143] Moreover, as this Court clarified in *Anspach*, a dispositive question in assessing a parental due process claim is whether the School District's actions involved "constraint or compulsion."[144] Here, there can be no doubt that the School District's actions — suspending Justin, placing him in alternative education program, and prohibiting him from participating in the school's standard curriculum and school activities — amounted to compulsion, constraint, and coercion.

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142 *See Gruenke*, 225 F.3d at 304 ("for some portions of the day, children are in the compulsory custody of state-operated school systems. In that setting, the state's power is 'custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.' For some purposes, then, 'school authorities act[ ] *in loco parentis*.'") (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995); *see also Fraser*, 478 U.S. at 684.

143 *C.N.*, 430 F.3d at 184.

144 *Anspach*, 503 F.3d at 264. In that case, this Court found that a public health clinic did not violate a parent's constitutional rights when it provided emergency contraceptives without parental permission to a minor who requested them. This Court distinguished *Gruenke*, explaining that the swim coach in *Gruenke* "took action in tandem with his authority as the minor's swim coach" and acted against the minor's express wishes. *Id.* at 266. The health clinic in *Anspach*, by contrast, had no authority over the minor and the health clinic's actions failed to suggest that the minor "was in any way compelled, constrained or coerced into a course of action she objected to." *Id.* at 266.

The district court's denial of the Layshock parents' motion for summary judgment and grant of the School District's motion for summary judgment on the issue of the Layshock parents' parental due process rights should therefore be reversed.

CONCLUSION

For all of the foregoing reasons, the district court's judgment for Justin Layshock on his First Amendment claim should be affirmed, and the judgment for the School District on the Layshock parents' Fourteenth Amendment claim should be reversed.

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Dated: May 22, 2008

CERTIFICATES

Kim M. Watterson, one of the attorneys for Appellee and Cross-Appellants, hereby certifies that:

1. I caused two true and correct copies of the foregoing Second-Step Brief of Appellee And Cross-Appellants to be served upon the following counsel of record this 22nd day of May, 2008, by UPS Next Day Air: Anthony G. Sanchez, Esquire, Andrews & Price, 1500 Ardmore Boulevard, Suite 506, Pittsburgh, PA 15221; Sean A. Fields, Esquire, Pennsylvania School Boards Association, 400 Bent Creek Boulevard, P.O. Box 2042, Mechanicsburg, PA 17055; and John W. Whitehead, The Rutherford Institute, 1440 Sachem Place, Charlottesville, VA 22901.

2. The Second-Step Brief of Appellee And Cross-Appellants was filed with the Court by UPS Next Day Air on May 22, 2008, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

3. I am admitted to the bar of the Third Circuit.

4. This Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing second-step briefs. The brief contains 16,359 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Second-Step Brief of Appellee And Cross-Appellants filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Second-Step Brief of Appellee And Cross-Appellants filed with the Court was virus checked using Trend Micro OfficeScan, version 7.3 on May 22, 2008, and was found to have no viruses.

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Kim M. Watterson