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

FOURTH-STEP BRIEF OF CROSS-APPELLANTS

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SUMMARY OF ARGUMENT

The Layshock parents' opening brief explained the incontrovertible legal reasons that mandate reversal of the district court's dismissal of their due process claim. Parents have a well-established fundamental due process right to direct the upbringing of their children without undue interference from the government. The School District here violated the Layshock parents' due process rights when school officials impermissibly interfered in private Layshock family matters by punishing Justin for speech uttered in the family home — a place where school officials had no jurisdiction and where parents' rights with respect to their children are at their zenith.

The School District makes no effort to meaningfully respond to the Layshock parents' argument. It pays only lip service to the United States Supreme Court's consistent reaffirmation of parental due process rights and also ignores entirely this Court's decisions in *Anspach ex rel. Anspach v. City of Philadelphia, Department of Public Health*[1] and *Gruenke v. Seip*.[2] Rather than addressing the relevant legal principles, the School District devotes most of its response brief to citing a list of cases that address parents' rights to control what happens in the school. But these cases have no bearing on the question here because this case involves speech *outside* the schoolhouse gates and *inside* the family home — and thus, contrary to the School District's contention, does not involve the "public school context."[3]

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1 503 F.3d 256 (3d Cir. 2007).

2 225 F.3d 290 (3d Cir. 2000).

3 Reply Brief of Appellant/Brief of Cross-Appellee (hereinafter "Third Step Brief") at 15.

The School District also persists in arguing that it did not violate the Layshock parents' due process rights because its punishment of Justin did not preclude his parents from imposing their own punishment on him. According to the School District's logic, school officials may reach beyond the schoolhouse gates to punish public school children for behavior that occurs in a family's home so long as the parents are free to themselves mete out their own punishment. This argument ignores the core protections of the due process clause when it comes to the relationship between parent and child and, if followed to its logical extension, would always give the government the authority to impose its own standards of behavior on public school children, even when at home, regardless of their parents' wishes.

ARGUMENT

I. THE LAYSHOCK PARENTS HAVE A FUNDAMENTAL RIGHT TO DIRECT AND CONTROL THE DISCIPLINE OF THEIR CHILDREN FOR BEHAVIOR THAT OCCURS IN THEIR HOME

The School District punished Justin for speech he uttered at home. This case thus is different from all of the cases that the School District cites, which concern schools' ability to control the curriculum, dress code, and discipline of students when they are *in school.*[4] But while there may be good reasons to give school districts authority over students' conduct while they are in school, those rationales disappear once students exit the schoolhouse gates and return home to their parents' care. "[P]arents' claim to authority *in their own household* to direct the rearing of their children is basic in the structure of our society,"[5] and the

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4 Third Step Brief at 15.

5 *See Reno v. ACLU*, 521 U.S. 844, 865 (1997) (citation and internal quotations omitted) (emphasis added).

Constitution prohibits the government from interfering with that parental authority unless necessary to protect the welfare of the child.[6]

The School District, in citing only cases involving in-school conduct, ignores this Court's precedents, which recognize that 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."[7] But it is only "[d]uring this custodial time, in order to maintain order and the proper educational atmosphere, at times, [that school] authorities 'may impose standards of conduct that differ from those approved of by some parents.'"[8]

For instance, public-school officials do not violate parents' substantive due process rights by requiring students to abide by a school dress code while they are in school.[9] But after students exit the schoolhouse gate, it is their parents, not school officials, who have the authority to decide what clothing children will wear. Similarly, while parents do not have the unabridged right to

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6 *See Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

7 *Gruenke,* 225 F.3d at 304 (quotation marks and citations omitted).

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

9 *See, e.g.*, *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) (parent did not have fundamental rights to exempt child from school dress code); *Littlefield v. Forney Indep Sch. Dist.*, 268 F.3d 275, 288-91 (5th Cir. 2001) (uniform policy did not violate parent's fundamental right to direct upbringing and education of children).

determine the curriculum that their children will be exposed to while in school,[10] they do have the right to determine what lessons their children will be exposed to outside of school.

Consistent with these well-established principles, the Layshock parents had the authority to determine what sort of speech to allow Justin to engage in inside the Layshock family home.[11] Concomitantly, the School District's authority to discipline Justin was limited to conduct that occurred inside the schoolhouse gates.[12] That the School District's punishment of Justin for the MySpace profile did not prevent the Layshock parents from independently expressing either their own approbation or disapproval of Justin's speech is of no moment: Unless Justin's speech was subject to criminal sanction, it was his

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10 *See, e.g., Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (school did not violate parents' rights by requiring students to attend sexually explicit AIDS awareness assembly).

11 Although the School District attempts to portray Justin's conduct as occurring at school because he used his grandmother's computer to copy a photo of Trosch from the School District's website and paste the photo onto the MySpace profile, that act is not sufficient to convert off-campus speech to on-campus speech, for the reasons explained in Second Step Brief of Appellees and Cross Appellees. *See* Second Step Brief of Appellees and Cross Appellees at 42-43.

12 Parents' fundamental right to control the education of their children, on the other hand, does extend inside the schoolhouse gates. The School District relies on *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005), for the proposition that parents' fundamental right to control the education of their children "does not extend beyond the threshold of the school door," Third Step Brief at 18, but this Court has specifically rejected that proposition. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005).

parents — and his parents alone — who had the right to determine whether to tolerate such speech within the family home.

II. THE SCHOOL DISTRICT UNCONSTITUTIONALLY INTERFERED WITH THE LAYSHOCK PARENTS' RIGHT TO DETERMINE WHAT SPEECH TO ALLOW JUSTIN TO UNDERTAKE IN THEIR HOME

The School District argues that the Layshock parents' claim that school officials intruded on their fundamental right to parent "is essentially a redressing of Justin's First Amendment claim."[13] But the right of parents to "inculcate moral standards, religious beliefs, and elements of good citizenship"[14] by determining what speech is acceptable in the family home is separate and distinct from any right their children might have to engage in constitutionally protected expression. As the Supreme Court explained in *Prince v. Massachusetts*,[15] "two claimed liberties are at stake. One is the parent's, to bring up the child in the way [the parent desires], which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these [tenets and practices]."[16]

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13 Third Step Brief at 20.

14 *Gruenke*, 225 F.3d at 307 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)).

15 321 U.S. 158 (1944).

16 *Id.* at 164; *see also Parker v. Hurley*, 514 F.3d 87, 103-104 (1st Cir. 2008) ("The right of parents 'to direct the religious upbringing of their children' is distinct from (although related to) any right their children might have regarding the content of their school curriculum.") (quoting *Yoder*, 406 U.S. at 233); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 684 (7th Cir. 1994) ("parents have standing to raise their claim alleging a violation of the Establishment Clause because the impermissible establishment of

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The Layshock parents have claimed a violation of their due process right to direct the upbringing of their children — *i.e.*, to decide what sort of speech their children may engage in at home and what lessons to teach about that speech. Justin, on the other hand, has claimed a violation of his First Amendment right to engage in particular speech. Although the Layshock parents' claim and Justin's claim are both predicated on a theory that the School District acted outside of its authority, the Layshock parents and Justin have asserted violations of two different constitutional rights.

In addition to conflating the different rights asserted by Justin and his parents, the School District misunderstands the Layshock parents' claim. The crux of the Layshock parents' argument is not, as the District contends, "that the school discipline imposed interfered with their home discipline,"[17] but instead is that the School District's very imposition of discipline violated the Layshock parents' due process rights with respect to private family matters regarding the conduct of their children in the family home. It thus does not matter whether the School District's punishment of Justin had "a direct and substantial interference" with the Layshock parents' specific decisions regarding their discipline of Justin.[18] Rather, what matters to the due process analysis is whether the School District's punishment of Justin directly and substantially interfered in private family matters that were

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religion might inhibit their right to direct the religious training of their children").

17 Third Step Brief at 19.

18 *See id.* at 18.

beyond the purview of school officials' authority.[19] By punishing Justin for speech he uttered at home, the School District impermissibly exercised authority over Justin for conduct in a place where his parents' rights were at their zenith and, indeed, where school officials had no jurisdiction. And contrary to the School District's argument, its interference with the Layshock parents' right to direct the upbringing of their child violated their due process rights regardless of whether they were "free to condone the behavior of Justin and to assist him in championing his free speech rights."[20] The right of parents to allow their children to speak freely at home is fundamentally undermined if school districts can punish students for that at-home expression.[21]

CONCLUSION

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

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19 *See Gruenke*, 225 F.3d at 305 (when school's policies conflict with fundamental right of parents to raise and nurture their child, "primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest").

20 Third Step Brief at 20-21.

21 *See Anspach*, 503 F.3d at 266 (explaining that interference with parental rights occurs when a child is compelled, constrained, or coerced into a course of action by the government that both he and his parents object to and for which government lacks a compelling interest that outweighs the parental liberty interest in raising and nurturing their child).

state interference. As for Justin Layshock's appeal, this Court should affirm the judgment in his favor on his First Amendment claim.

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Dated: July 14, 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 Fourth -Step Brief of Cross-Appellants to be served upon the following counsel of record this 14th day of July, 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; John W. Whitehead, The Rutherford Institute, 1440 Sachem Place, Charlottesville, VA 22901; and Joanna J. Cline, Esquire, Pepper Hamilton LLP, 18th and Arch Streets, 3000 Two Logan Square, Philadelphia, PA 19103.

2. The Fourth-Step Brief of Cross-Appellants was filed with the Court by UPS Next Day Air on July 14, 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 fourth step briefs. The brief contains 2,065 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Fourth-Step Brief of 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 Fourth-Step Brief of Cross-Appellants filed with the Court was virus checked using Trend Micro OfficeScan, version 8.0 on July 14, 2008, and was found to have no viruses.

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