DOCKET NO. 08-4138

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

J.S., a minor through her parents, TERRY SNYDER and STEVEN SNYDER, individually and on behalf of their daughter,
Plaintiffs-Appellants-Petitioners

v.

BLUE MOUNTAIN SCHOOL DISTRICT,
Defendant-Appellee-Respondent

On Appeal From The Judgment Of The United States District Court
For The Middle District of Pennsylvania Dated September 11, 2008
At Civil Action No. 3:07cv 585

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING *EN BANC*

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INTEREST OF AMICUS

Amicus[1] Juvenile Law Center[2] is an advocacy organization that brings a unique perspective and a wealth of experience in providing for the education, care, treatment, and rehabilitation of youth in schools and the juvenile justice and child welfare systems, tying in principles of adolescent development and social science. *Amicus* Juvenile Law Center is concerned that the panel opinion below in *J.S. v. Blue Mountain Sch. Dist.*, 2010 U.S. App. LEXIS 2388 (3d Cir. Feb. 4, 2010), is a dramatic shift away from existing First Amendment protection for speech by youth that occurs outside of school. Further, the questions of law before this Court are closely tied to important and pressing public policy concerns related to normal adolescent development and the Constitutional rights of children.

IDENTITY OF AMICUS

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile

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[1] *Amicus* files this brief and accompanying motion for leave to file with the consent of Appellant/Petitioner and Appellee/Respondents pursuant to Fed. R. App. P. 29. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] The authors would like to extend their gratitude to Terry Schuster, Esq. and Kristina Moon, Esq. for their assistance with this brief.

justice systems to promote fairness, prevent harm, ensure access to appropriate services and create opportunities. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. Juvenile Law Center urges this Court to consider the research on adolescent development and the important First Amendment protection for children's speech that is implicated in this case.

SUMMARY OF ARGUMENT

While perceived by adults as offensive or vulgar, much teenage behavior and expression among their peers is a normative feature of adolescent identity development. Recent research on brain development suggests that adolescent speech deemed objectionable by adults is not only normal, but driven by brain systems that cause teenagers to be sensitive to social status and the rewards of playing to their peers. It is also widely known that teenagers say and do outrageous things among their friends.

Teenagers mocking school administrators is not a new phenomenon. When these expressions contain sexual content, adults commonly imbue them with significance or meaning not shared by the teenagers themselves. Juvenile attempts at humor that, for example, make unspecific joking references to sex addiction, are hardly on par with serious accusations against a school official for child abuse.

Given that this speech is normal, and made outside of the school setting, suspending a student for uttering the speech is unjustified. The panel majority's expansive opinion below stretches the limited power of school officials to punish student speech beyond reasonable bounds. Allowed to stand, it opens the door to an unprecedented era in which adolescents can be punished for expression that is normal for teenagers, if sometimes uncomfortable for adults. The decision below thus has the potential to drastically alter the First Amendment rights of minors outside of the school setting, and therefore warrants further consideration via rehearing *en banc*.

ARGUMENT

I. REHEARING IN *J.S. V. BLUE MOUNTAIN SCHOOL DISTRICT* IS WARRANTED BECAUSE THE PANEL'S MAJORITY OPINION GIVES GOVERNMENT OFFICIALS BROAD UNCHECKED POWER TO PUNISH NORMAL,

NON-THREATENING ADOLESCENT SPEECH MADE OUTSIDE THE SCHOOL SETTING.

Reconsideration by the full Court will be ordered when it is necessary (1) to secure and maintain uniformity of decisions in this court,[3] or (2) where the proceeding involves a question of exceptional importance. Fed. R. App. P. 35; 3d Cir. L.A.R. 35.1. The panel's opinion in *J.S. v. Blue Mountain Sch. Dist.* must be reconsidered by this Court because the extraordinary reach of the panel's decision leaves substantial speech unprotected under the First Amendment, raising a question of "exceptional importance" about teenagers' First Amendment rights to free expression outside of school. Further, the kind of expression exercised by J.S. in this case – and by many teenagers in this country – is a normal and necessary part of their adolescent social development. When exercised outside the

[3] *Amicus Juvenile Law Center* supports and adopts the arguments of Appellant/Petitioner that reconsideration *en banc* is also warranted under the first prong, because the dueling panel decisions in *J.S. v. Blue Mountain Sch. Dist.*, 2010 U.S. App. LEXIS 2388 (3d Cir. Feb. 4, 2010) and *Layshock v. Hermitage Sch. Dist.*, 2010 U.S. App. LEXIS 2384 (3d Cir. Feb. 4, 2010) create confusion and uncertainty for lower courts regarding the extent to which student speech using digital media outside of the school setting is protected by the First Amendment, and because *J.S.* is inconsistent with Third Circuit precedents in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), and *Sypniewski v. Warren Hills Reg. Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002). This brief, however, focuses on the second prong of Federal Rule of Appellate Procedure 35.

school and without meaningful threat to any school personnel, the expression at issue in *J.S.* is indeed protected by the First Amendment.

A. The Expression Proscribed by the Panel's Decision is a Normal and Natural Means of Dealing with Authority Figures and Other Emotional Stressors.

Adolescence is a time of tremendous growth and personality development, involving struggles with popularity and relational aggression, confusion about sexual thoughts, and conflict with authority figures. Communication among teenagers plays an important role in this development. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027, 1079 (2008). Teenagers use digital media to connect with friends and often engage in cathartic storytelling or other (more vulgar) juvenile expressions, as a way to deal with authority figures and other emotional stressors. *Id*.; Judith G. Smetana et al., *Adolescent Development in Interpersonal and Social Contexts*, 57 Ann. Rev. Psychol. 255, 259 (2006).

Because teenagers using these forums are still learning how to interact with their peers, it should come as no surprise that much of their expression is inappropriate or offensive to adults. "Unlike adults in the workplace, juveniles have limited life experiences . . . upon which to establish an understanding of appropriate behavior." *Davis v. Monroe Cty. Bd. of Educ.*,

526 U.S. 629, 672-73 (1999) (Kennedy, J., dissenting). In their communications with each other, teenagers understandably "practice newly learned vulgarities, tease and embarrass each other, [and] share offensive notes." *Id*. at 673. The fact that these communications sometimes contain offensive sexual content is not unexpected, given that normal exploration of sexual identity during adolescence involves posturing related to sexual knowledge and turning to similarly situated peers for acceptance, approval, and social status. *Id*.; Rachel Simmon, Odd Girl Out: The Hidden Culture of Aggression in Girls, 43 (2002). Moreover, it is widely known that teenagers sometimes talk and act in vulgar or even outrageous ways both in and out of school – as any parent of a teenager can confirm. Parents may not like it; they may dread the day their son or daughter turns thirteen; but certainly they can attest to the behavior being normal and expected.

B. Outrageous and Vulgar Speech Among Teens in Groups is Developmentally Driven and Reinforced by Brain Circuitry that is More Sensitive and Easily Aroused During Puberty.

Recent research on adolescent brain development suggests that outrageous and vulgar speech during adolescence (in or out of school) is likely to be normative, developmentally driven, and to some extent inevitable. Laurence Steinberg, *Risk Taking in Adolescence*, 16(2) Current Directions Psychol. Sci. 55, 56 (2007). Although a teenager's logical-

reasoning abilities are more or less fully developed by mid-adolescence, her psychosocial capacities (impulse control, emotional regulation, and resistance to peer influence) are still immature. *Id*. Because the regions of the brain that are activated during exposure to social stimuli during adolescence overlap with those that are sensitive to rewards, outrageous speech that teenagers use to experiment with social status is most often made in group forums. In fact the mere presence of peers makes the socially rewarding aspects of the behavior more salient by activating the circuitry associated with rewards. *Id*. at 56-57. When teenagers share vulgar or tasteless jokes with friends, the behavior is normal, and largely driven by these brain systems that are more sensitive and easily aroused during puberty. *Id*.

C. Teenagers' Mockery of School Administrators is Hardly Novel, and is Qualitatively Different from Serious Accusations Against Those Administrators.

Although social networks, blogs, and text messaging are recent technological innovations, prior generations of teenagers engaged in similar communication and expression using less technologically advanced means. Today's teenagers employ digital media to discuss, and sometimes mock, people and events in their daily lives, including people and events at school. Susan Herring, *Questioning the Generational Divide: Technology Exoticism*

and Adult Constructions of Online Youth Identity, in Youth, Identity, and Digital Media 71, 77 (David Buckingham ed., 2008). Making fun of teachers is not new; what *is* new with the advent of digital media technology is that adults can see what teenagers are saying much more easily. Before the internet, school officials would have to confiscate passed notes, illicit underground newspapers, or the occasional personal diary inadvertently brought to school. Now, school officials can simply log onto the internet to see the same juvenile expressions. Papandrea, *supra*, at 1037.

Not only is this adolescent chatter no different than expressive conduct in generations past, it is also no more threatening. For the most part, the tasteless jokes on social networking sites that have recently become the subject of student speech cases do not involve unprotected speech, but rather unpleasant speech that offends school officials or makes them uncomfortable. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527, 542-44 (2000) (discussing lower federal court cases addressing on-line student speech). Obscenity and sexual content in adolescent speech is often imbued by adults with significance that it lacks for teenagers. Charles Moser et al., *Situating Unusual Child and Adolescent*

Sexual Behavior in Context, 13 Child Adolesc. Psych. Clin. N. Am. 569, 582 (2004).

Adolescent speech that mocks school administrators, such as the parody MySpace profile at issue in *J.S. v. Blue Mountain Sch. Dist.*, is qualitatively different from serious accusations against those officials. Juvenile attempts at humor that make unspecific joking references to sex addiction are hardly on par with serious accusations against a school administrator for child abuse. As Circuit Judge Chagares recognized in his dissent below, the profile J.S. created was so juvenile and nonsensical that no reasonable person could take its contents seriously; indeed, no one did. *J.S. v. Blue Mountain Sch. Dist.*, 2010 U.S. App. LEXIS 2388 at ** 59, 77, 82, 84 (3d Cir. Feb. 4, 2010) (Chagares, J., concurring in part and dissenting in part). The speech at issue here is clearly and easily distinguishable as normal (though offensive to some) adolescent chatter.

The punishment of out-of-school speech – which in another time would have escaped the school's notice – by imposing suspensions or other school disciplinary measures, creates an unacceptable risk that the government will punish simple, everyday communication between and among adolescents. This is particularly alarming when there is no evidene that the speech caused any actual disruption. While this speech may be

offensive and irritating, it is hardly so severe and pervasive as to warrant removing a child from school or preventing her from participating in school activities and continuing with her coursework.

D. The Special Characteristics of the School Environment Do Not Justify Suspensions and Other Harmful Punishments for Normal Adolescent Speech Made Outside That Environment.

Granting school administrators some deference to determine what speech is materially disruptive is appropriate with respect to speech occurring in school during school hours. The educational process often requires a quiet and orderly environment, and school officials have expertise regarding the conduct of a classroom. They generally have to make quick decisions about what to tolerate and what to condemn. While students are in school, their teachers and administrators exercise a form of custody over them and they might properly be considered a "captive audience"; this may warrant some limitations on their classmates' expressive rights that would otherwise not be tolerated by the First Amendment. Papandrea, *supra*, at 1088.

Expansive court rulings such as *J.S.*, however, which permit schools to punish off-campus speech merely on a "reasonable possibility" of future disruption, *see* 2010 U.S. App. LEXIS 2388 at ** 2, 30, 34, 55, extend the

rationale for control over student speech well beyond permissible constitutional boundaries. Middle school teachers know and expect that any fight, break-up, or rumor among students that originates outside of school will cause students to talk in classrooms and in the hallways. These minor disruptions are normal, and do not rise to the standard set forth in *Tinker*. Papandrea, *supra*, at 1065-1069. Teenagers' speech outside of school frequently concerns topics related to their classmates and teachers. Given this reality, it is hard to imagine when normal adolescent speech would not present a reasonable possibility of future disruption, the standard set forth in the panel decision.[4] *J.S.*, *supra*, at ** 2, 30, 34, 55. Such a far-reaching exception would swallow the rule of affording youth free speech rights, and therefore cannot be sustained.[5]

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[4] The court may find it necessary to carve out exceptional instances in which a school should have the power to intervene in student digital speech that constitutes cyber-bullying. Such exceptions should be narrowly drawn to avoid giving school officials the power to punish normal, non-threatening adolescent speech like that of J.S.

[5] It is important to note that limiting school officials' authority to punish out-of-school speech does not leave these officials powerless to address issues that arise with such speech. School personnel may, for example, speak with the student and his/her parents to voice their concerns with respect to the speech at issue. Any individual may file a complaint with the police regarding speech that allegedly rises to the level of harassment under the penal laws. School officials can even file defamation actions, as the principal considered doing in *Layshock v. Hermitage Sch. Dist.*, 2010 U.S. App. LEXIS 2384, at *6 (3d Cir. Feb. 4, 2010).

II. IF ALLOWED TO STAND, THE PANEL'S MAJORITY OPINION POSES A GRAVE THREAT TO THE FREE SPEECH RIGHTS OF ADOLESCENTS; THIS COURT SHOULD NOT ALLOW THEIR FIRST AMENDMENT RIGHTS TO BE SO DRASTICALLY LIMITED WITHOUT FURTHER CONSIDERATION.

The United States Supreme Court has never held that minors do not enjoy full speech rights outside the school setting. Papandrea, *supra*, at 1071-1076 (examining Supreme Court cases related to the First Amendment rights of minors outside of school). Although the Court has tolerated some restrictions that serve to protect minors from indecent and pornographic speech, it has never permitted restrictions on children's expression when it is the minor herself speaking. *Id*. at 1076, 1089. Indeed, in most of the student speech cases, members of the Court have pointedly noted that the expression at issue would plainly be protected had it occurred in a non-school setting. *See*, *e.g.*, *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected.") (Roberts, C.J., for the majority); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) ("If respondent had given the same speech outside of the school environment, he could not have been penalized simply because the government officials considered his language to be inappropriate.") (Brennan, J., concurring).

Rehearing in J.S.'s case is warranted because the panel's majority opinion expands the authority of school officials to clamp down on normal adolescent out-of-school expression entirely at odds with current jurisprudence in this area. *See* Fed. R. App. P. 35. If allowed to stand, the panel's majority opinion would expose adolescents to school-based punishments and discipline for speech and expression that is normative for all adolescents and an expected part of their journey from adolescence to adulthood. No special characteristic of the school environment warrants placing such broad unchecked power in the hands of government officials. The panel's opinion poses a grave threat to the free speech rights of adolescents generally. *See id*. The Court should not allow the First Amendment rights of minors outside of the school setting to be so drastically limited without further consideration.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Juvenile Law Center, respectfully requests that this Court grant Appellant/Petitioner's petition for rehearing *en banc*.

CERTIFICATE OF BAR MEMBERSHIP

I, Lourdes Rosado, Esq., do hereby certify, pursuant to Local Appellate Rule 28.3(d) that I and Marsha L. Levick, Esq. are both members in good standing of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I, Lourdes Rosado, Esq., do hereby certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that this Corrected Brief of Juvenile Law Center as *Amicus Curiae* on Behalf of Appellants' Petition for Rehearing *En Banc* contains 2,811 words, excluding the parts of the document that are exempt under F.R.A.P. 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I, Lourdes Rosado, Esq., do hereby certify this 10th day of March, 2010, pursuant to L.A.R. Misc. 113, that an electronic copy of this Corrected Brief of Juvenile Law Center as *Amicus Curiae* on Behalf of Appellants' Petition for Rehearing *En Banc* has been uploaded to the CM/ECF system for the Third Circuit and is available for viewing and downloading to all counsel of record.

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CERTIFICATE OF VIRUS SCAN

I, Lourdes Rosado, Esq., do hereby certify, pursuant to 3rd Circuit L.A.R. 31.1 (c), that this electronic Corrected Brief of Juvenile Law Center as *Amicus Curiae* on Behalf of Appellants' Petition for Rehearing *En Banc* has been successfully scanned for viruses, using Symantec Corporate Version 10.1.8.

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