No. 11-461

In the Supreme Court of the United States

KARA KOWALSKI,

Petitioner,

v.

BERKELEY COUNTY SCHOOLS, *et al.*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* MARION B. BRECHNER FIRST AMENDMENT PROJECT

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MOTION FOR LEAVE TO FILE BRIEF OF MARION B. BRECHNER FIRST AMENDMENT PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of The Rules of the Supreme Court of the United States, Movant Marion B. Brechner First Amendment Project hereby requests leave to file the accompanying *amicus curiae* brief in this case. The proposed brief will be submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioner Kara Kowalski has consented to the filing of this brief. In contrast, Respondents Berkeley County Schools; Manny P. Arvon, II, Superintendent of Berkeley County Schools, in his official capacity; Ronald Stephens, Principal of Musselman High School, individually and in his official capacity; Becky J. Harden, Vice Principal of Musselman High School, individually and in her official capacity; Buffy Ashcraft, Cheerleading Coach, individually and in her official capacity; and Rick Deuell, Assistant Superintendent of Berkeley County Schools, in his official capacity, have withheld consent.

INTEREST OF AMICUS CURIAE

As set forth in the accompanying brief, Movant is a non-profit, non-partisan organization committed to protecting First Amendment free speech rights, including those of public school students. Counsel for Movant is the Movant's director and has published multiple law journal articles directly related to the issues now before the Court.

ISSUES ADDRESSED BY MOVANT IN BRIEF

At the heart of this case is the First Amendment right of freedom of speech and, in particular, the free speech rights of minors who engage in off-campus expressive activities on the Internet yet who are punished on campus by public school authorities for that same expression. The threshold question presented by Petitioner is whether the First Amendment permits a public school to discipline a student for speech that occurs off-campus and not at a school-sponsored event, and that is not directed at the school.

Movant's proposed brief addresses this important question in three different ways. First, Movant's proposed brief contends that Petitioner's writ should be granted in order to fill a gaping void in this Court's student-speech jurisprudence and to provide clear guidance to minors, public school officials, and lower courts. This Court has yet to address the issue now before it, resulting in splits of authority at the lower court levels both as to whether schools can punish minors for such speech in the first place and then, if they are allowed to punish them, what the appropriate legal standard is to apply to determine whether such punishment violates the First Amendment speech rights of minors.

Second, Movant's brief explores the implications of the above-mentioned precedential void under the qualified immunity doctrine. In particular, Movant's proposed brief contends that Petitioner's writ should be granted because confusion about the proper legal standard to apply when analyzing cases of on-campus punishment for off-campus expression allows school

officials to squelch the off-campus speech of minors posted on the Internet without fear of personally paying monetary damages.

Third and finally, Movant explains that the range of on-campus punishment for off-campus speech scenarios is rapidly growing beyond that in Petitioner's case. From cyberbullying to sexting, schools are seeking ways to punish students for their off-campus speech activities. The Movant's proposed brief contends that this expansion of off-campus, high-tech speech in new directions further compounds the reasons for this Court to grant the Petitioner's Petition for a Writ of Certiorari and to begin to address these issues.

ASSISTANCE TO BE RENDERED TO THE COURT BY MOVANT

Movant, which specializes in First Amendment speech issues and which produces more than a half-dozen articles of legal scholarship published in law journals each year, provides an academic perspective from the realm of higher education on the issues in this case. Movant's director and counsel of record, Clay Calvert, has published extensively in law journals on the issues raised by *Kowalski* and addressed in this brief. That scholarship, as well as that of other legal scholars, is heavily utilized in this brief to provide views beyond those offered by the parties to this case.

In addition, Movant's proposed brief raises important arguments not fully addressed by Petitioner. In particular, Movant's proposed brief examines the problems wrought by the doctrine of qualified immunity to scenarios like that involving

Petitioner. In addition, Movant's proposed brief demonstrates that the off-campus speech, on-campus punishment scenario at issue in Petitioner's case is rapidly expanding into other areas of First Amendment law affecting minors, such as cyberbullying and sexting, thus compounding the reasons for the Court to grant the Petitioner's Petition for a Writ of Certiorari.

CONCLUSION

Movant is gravely concerned about the punishment of minors for engaging in off-campus speech in the Petitioner's case and in others like it that are proliferating across the country. Movant respectfully requests it be granted leave to file the attached *amicus curiae* brief in order to present additional arguments and viewpoints as to why the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS*[1]

This brief, filed in support of Petitioner Kara Kowalski, is submitted to the Court with the consent of counsel for Petitioner and without the consent of Respondents, who withheld consent. As detailed below, *amicus* is committed to protecting the free speech rights of public school students – rights that are safeguarded by the First Amendment to the U.S. Constitution and that are central to this case. Because of the immense potential impact this litigation could have on the First Amendment speech rights of minors across the nation who create Internet-transmitted speech while off campus, yet who are punished for it on campus by school officials, *amicus* has a strong and direct interest in the outcome of this case.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a non-profit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press,

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[1] Pursuant to this Court's Rules 37.2(a) and 37.2(b), counsel of record for all parties received timely notice of the intention of *Amicus Curiae* to file this brief under these Rules. Counsel for Petitioner consented to the filing of this brief. Counsel for Respondents withheld consent. Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

freedom of petition and freedom of thought. The Project's director has published numerous law journal articles on the free speech rights of public school students in the Internet era, including articles about the key issues raised directly in the Petitioner's case.

SUMMARY OF ARGUMENT

This case provides the Court with a propitious opportunity to resolve an issue that: 1) repeatedly arises again and again throughout the United States today; 2) will continue to arise for the foreseeable future; 3) leaves both students and school officials frustrated by a lack of clarity on the scope and limits of the off-campus speech rights of minors; and 4) has left lower courts fractured badly and groping for help in recent years about the correct legal standard to apply.

In particular, the issue is whether or not this Court's aging ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which involved the on-campus speech rights of public school students, is applicable more than forty years later to a very different and very modern high-tech context, namely to speech that is created off campus by minors, at home and on their own time, and that is posted on the Internet or is otherwise conveyed via electronic communication technologies such as instant messaging. *See Wisniewski v. Bd. Educ. Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) (student was suspended for sharing over the Internet with schoolmates an instant messaging icon).

The *Kowalski* case provides a clean, ready set of facts for squarely addressing this modern situation

because the Petitioner, a public high school student at the time of the incident in question, "pushed her computer's keys in her home" to create a MySpace.com discussion-group webpage. *Kowalski v. Berkeley Cnty. Schs.*, No. 10-1098, 2011 U.S. App. LEXIS 15419, *19 (4th Cir. July 27, 2011). Despite the fact that the Petitioner "was not physically at the school when she operated her computer to create the webpage," *Id.* at *24, the U.S. Court of Appeals for the Fourth Circuit nonetheless upheld school officials' on-campus punishment of the Petitioner and, in doing so, applied a variation of the *Tinker* standard because the speech posted on the webpage disparaged one of the Petitioner's schoolmates.

Yet, less than two months prior to the Fourth Circuit's ruling in *Kowalski*, and in a very similar off-campus-created, student-speech scenario, five judges from the U.S. Court of Appeals for the Third Circuit reached the exact opposite conclusion in the *en banc* decision in *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011). Those five judges found that *Tinker* does not apply to off-campus speech and that, instead, "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *J.S., supra* at 936 (Smith, J., concurring, and joined by Judges McKee, Sloviter, Fuentes, and Hardiman). In other words, the quintet of Third Circuit judges held not only that *Tinker* is not applicable to off-campus speech scenarios, but also that minors are citizens, not students, when they are away from campus and thus schools have no authority over their speech beyond the general principles that apply to adults, such as libel and true threats.

This split of authority and disagreement among appellate court judges within a single two-month period in 2011 illustrates why the Court should grant Petitioner's Petition for a Writ of Certiorari in the instant matter. *Kowalski* is indicative of what one commentator in 2009 called a "pervasive and pernicious First Amendment problem cropping up at schools across the country that the High Court has never considered." Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 First Amend. L. Rev. 210, 211 (2009).

Indeed, similar situations will continue to arise in the near future, just as they have for the past decade. *See* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 Boston U. J. Sci. & Tech. L. 243, 286 – 287 (2001) (examining in 2001 an early wave of off-campus, high-tech student speech cases, and asserting that "[g]iven the pervasiveness of the Internet and World Wide Web, the problems encountered by administrators in the cases described in this article are not likely to disappear anytime soon. Indeed, it seems very likely that more students will turn to the Web to express their feelings"). Minors are not going to abandon the use of new media technologies that they embrace to exercise their First Amendment rights, nor are they likely to stop making the same kind of sophomoric comments about teachers and fellow students as they have done since long before the Internet. As one professor recently observed:

> Computers, mobile phones, and cameras play an integral role in the way young people

> communicate with each other and the world at large. Students have always made fun of their teachers and harassed their classmates, but school officials generally did not learn about it. Now school officials frequently find this material simply by logging onto the Internet. Speech that in another time would escape the school's notice now has become the basis for suspensions, expulsions, and other significant punishment.

Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 Fla. L. Rev. 1027 (2008).

School officials will continue to censor such speech for a myriad of reasons and, in turn, judges will need to wrestle with the legal battles that inevitably follow. Those judges will need guidance from this Court about the correct rule or rules to apply in order to make those decisions in a consistent manner. Currently, as *Amicus* points out in Part II of the Argument, some of those judges today allow school officials to wiggle of the hook of personal monetary liability for punishing such speech under the doctrine of qualified immunity. A clearly established rule for the off-campus speech, on-campus punishment scenarios in cases like *Kowalski* will eliminate this result under qualified immunity.

The bottom line is that teens and technology have outstripped the law in this area. The Court should grant Petitioner's Petition for a Writ of Certiorari to begin the work of playing legal catch-up.

ARGUMENT

I. The Writ Should be Granted to Fill a Void in this Court's Student-Speech Jurisprudence and to Provide Clear Guidance to Minors, Public School Officials, and Lower Courts

The primary reason why the Court should grant the Petitioner's Petition for a Writ of Certiorari was succinctly captured by the observation of a federal district judge in August 2011: "The Supreme Court has not considered whether *Tinker* applies to expressive conduct taking place off of school grounds and not during a school activity and has in fact noted that '[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.'" *T.V. v. Smith-Green Cmty. Sch. Corp.*, NO. 1:09-CV-290-PPS, 2011 U.S. Dist. LEXIS 88403, *31 (N.D. Ind. Aug. 10, 2011) (quoting *Morse v. Frederick*, 551 U.S. 393, 401 (2007)).

Indeed, the latter reference is to this Court's fourth and most recent venture into the realm of the First Amendment speech rights of public school students, *Morse v. Frederick*, 551 U.S. 393 (2007). *Morse*, as Chief Justice John Roberts observed in writing the Opinion of the Court, pivoted on "student speech at a school event." *Id.* at 403. The other trio of cases involved: 1) the on-campus wearing of black armbands in political protest in *Tinker*; 2) a sexually lewd, on-campus speech made in front of a captive audience of students in *Bethel School District 403 v. Fraser*, 478 U.S. 675 (1986); and 3) articles that were censored from a school-sponsored student newspaper in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

As one federal appellate court recently remarked, all four of this Court's previous rulings "arose either at school or at a school sponsored event." *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 760 (8th Cir. 2011). None of those cases, in other words, dealt with the off-campus, high-tech speech at issue in *Kowalski* and myriad other recent cases. *See, e.g., J.S.*, *supra*; *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *Doninger v. Niehoff,* 642 F.3d 334 (2d Cir. 2011); *Wisniewski v. Bd. Educ. Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

In brief, there is a vast void in the Court's student-speech jurisprudence that calls for clarification. The Court thus should grant the Petitioner's Petition for a Writ of Certiorari to fill that void and, in the process, to provide clear guidance. That guidance is essential for several stakeholders: 1) public school students, who need to know what they can and cannot say on off-campus-created webpages and via other forms of electronic media without running afoul of the wrath of school officials; 2) school officials, who seek to punish students for such expression without violating the students' First Amendment speech rights; and 3) lower court jurists, who seek and need guidance about the correct standard of judicial review that governs situations in which school officials attempt to punish minors for off-campus-created, Internet-posted expression. As addressed in Part II below, the confusion among lower courts on this issue has allowed school officials to escape personal liability, under the doctrine of qualified immunity, when they unjustly punish students for such expression because the law simply is not clearly established in this area.

Lower court jurists are puzzled about what standard to apply in cases like the instant matter in *Kowalski*. As one federal appellate court judge recently wrote in a similar case, "there remains an issue of high importance on which we are evidently not agreed" and that "is whether the Supreme Court's decision in *Tinker v. Des Moines Independent Community School Dist*., 393 U.S. 503, (1969), can be applicable to off-campus speech." *Layshock v. Hermitage Sch. Dist*., 650 F.3d 205, 220 (3d Cir. 2011) (Jordan, J., concurring).

Some lower courts are now using – misusing, in fact – the rule from *Tinker* in situations and scenarios that this Court in 1969 could hardly have imagined. In particular, they are incorrectly applying *Tinker* to censor off-campus student expression that is posted on the World Wide Web.

Tinker was never designed to be applied to off-campus speech scenarios. *Tinker* dealt with speech that took place on campus – the wearing of black armbands while on school property to protest the war in Vietnam. *Tinker*, *supra* at 504. Justice Abe Fortas made it clear that the *Tinker* Court was measuring and defining the scope of First Amendment speech rights for students "in light of the special characteristics of the school environment." *Id.* at 506. In contrast, when minors are at home using their own or their families' computers, they are far, far removed from the school environment.

Counsel for *amicus* argued in a recent article that there is yet another reason why those courts that have deployed *Tinker* to punish off-campus speech are incorrect:

> Individuals (teachers, principals, or students) who are defamed by the off-campus, Internet postings of students already have sufficient remedies at their disposal in the form of civil libel suits that can be filed against those who post defamatory information. It is tantamount to judicial overkill for courts to allow not only defamation suits but also in-school punishment for such off-campus expression. Courts should not allow schools to exert a second form of punishment (suspension or expulsion, for instance) when a libel suit will suffice to make whole the individuals who are harmed.

Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed But Still Standing*, 58 Am. U. L. Rev. 1167, 1178 (2009).

The bottom line is that there is confusion and disagreement as to what standard – be it *Tinker* or otherwise – applies in off-campus, high-tech speech cases involving minors when schools attempt to punish them for such expression. *Amicus* respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari in *Kowalski* to resolve this confusion and to provide clear guidance in the future for students, school officials and lower court jurists.

II. Clear Guidance is Needed to Eliminate the Abuse of the Qualified Immunity Doctrine by School Officials Who Punish Students for Off-Campus Created Speech Yet Evade Monetary Liability Because the Right in Question is Not Clearly Established

This Court observed in 2011 that "[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011). This doctrine "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

Counsel for *amicus* asserted in a 2009 article that the muddled state of affairs regarding the power of school administrators over the off-campus, high-tech speech of minors leads to a troubling result under the qualified immunity doctrine:

> [P]ublic school officials can squelch off-campus student speech posted on the Internet and get away with it, at least without fear of paying monetary damages, because the extent of First Amendment protection for such expression simply is not clearly established by the courts. In a bizarre sense, then, it helps school officials' censorial powers that the Supreme Court has yet to hear a case to clarify this muddled area of

> the law; that is the beauty of ambiguity, at least from the perspective of those tasked with educating the nation's youth. Although qualified immunity does not protect against equitable remedies like injunctive relief, it certainly eliminates the risk and cost of paying monetary damages from the calculus involved in deciding whether to censor Internet-based speech.

Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies From 2009*, 8 First Amend. L. Rev. 86, 89 (2009).

Counsel for *amicus* contended in the same article that "it is time for the Supreme Court to enter into the fray to resolve the confusion and to bring uniformity so that both students and principals know the legal boundaries and so that the doctrine of qualified immunity can no longer be abused in the name of censorship." *Id.* at 108. Two years after publication of that article, the urgency for the Court to address this issue is even greater, as the Fourth Circuit's *Kowalski* opinion and the Petitioner's Petition for a Writ of Certiorari to this Court illustrate.

For instance, the U.S. Court of Appeals for the Second Circuit in April 2011 in *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), held that defendant school officials were protected by the doctrine of qualified immunity when they prevented a student-plaintiff from running for Senior Class Secretary as a direct consequence of her off-campus Internet speech. *Id.* at 351. In another recent case in which qualified immunity shielded school officials from monetary

liability for punishing a student for speech she created while off campus and posted on the Internet from her home computer, the district judge succinctly explained that qualified immunity was applicable because the case did not fall within any of this Court's quartet of students-speech rulings. *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010). In doing so, the judge remarked that "the Supreme Court has yet to address whether off-campus speech posted on the Internet, which subsequently makes its way to campus either by the speaker or by any other means, may be regulated by school officials. *Tinker* only addressed student speech originating on campus." *Id.* at 1125.

Amicus fears that public school officials embrace the ambiguity and uncertainty in this area because it reduces the chances of personal liability when they punish students for their off-campus expression. Until this Court clearly establishes a rule for such cases, some school officials might well continue to take advantage of the qualified immunity doctrine by claiming they had no idea of what to do in this muddled area of law.

III. The Writ Should be Granted Because the Range of Off-Campus Speech Scenarios is Rapidly Growing and Needs to be Addressed

In addition to off-campus-created websites that mock, disparage or otherwise annoy schoolmates and/or teachers, even newer forms of off-campus, high-tech expression exist that further militate in favor of the Court granting Petitioner's Petition for a Writ of Certiorari. In particular, school officials are concerned today with both off-campus cyberbullying and sexting.

See Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 BYU Educ. & L. J. 75, 124–125 (2011) ("Concerns associated with cyberbullying only began to emerge in the public arena around 2004. The sexting concern exploded into public awareness in 2008"). *See generally* Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 CommLaw Conspectus 1 (2009) (providing an overview of the sexting phenomenon).

One legal commentator observes that "what little precedent exists regarding both off-campus student speech and cyberspeech is riddled with contradictions. This makes predicting how courts will treat cyberbullying, and thus advising clients, especially difficult. Cyberbullying cases are further complicated by the fact that most cyberbullying acts occur off campus, arguably beyond the school's authority." Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 Barry L. Rev. 103, 119 (2009).

States nonetheless are providing school officials the statutory power to regulate such off-campus cyberbullying. *See* John O. Hayward, *Anti-Cyber Bullying Statutes: Threat to Student Free Speech*, 59 Clev. St. L. Rev. 85, 93 (2011) (observing that the cyberbullying statutes of "eleven states extend the reach of school officials world-wide by prohibiting cyber bullying originating away from school, i.e., not on school premises or at a school bus stop, or at a school sponsored activity or function and outside of school hours, and that "Five of them (Arkansas, Massachusetts, New Hampshire, Oklahoma,

Pennsylvania) specifically mention that cyber bullying is prohibited away from school if it disrupts school activity").

By granting Petitioner's Petition for a Writ of Certiorari, the Court can take the first step forward in defining where the limits exist on school officials' power over off-campus, high-tech student speech in all of these scenarios.

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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