

**IN THE  
SUPREME COURT OF THE UNITED STATES**

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James Wright, Principal, Faber High School and Faber School District,  
*Petitioner,*

v.

Rob Rogers,  
*Respondent.*

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**BRIEF FOR RESPONDENT**

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Washington, DC 20016

## **QUESTION PRESENTED FOR REVIEW**

**Has a school principal violated a student's First Amendment right to freedom of speech when the principal punished the student for criticizing the principal on the student's personal Internet site when the student 1) created the site off-campus with no school supervision or resources; 2) engaged in critiquing the administrator's decisions regarding a controversy created by the principal; and 3) used non-violent language in the statement that mirrored what he had experienced on a school-sponsored visit to a prison without resorting to inappropriate language.**

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### **JURISDICTION STATEMENT**

A Formal Statement of Jurisdiction has been omitted in accordance with the rules of the Washington College of Law Alvina Reckman Myers First-Year Moot Court Competition.

### **CONSTITUTIONAL PROVISION**

This argument is based on the First Amendment to the Constitution of the United States, which is stated in Appendix I.

## STATEMENT OF THE CASE

Petitioner James Wright (“Petitioner”), principal of Faber High School, suspended Respondent Rob Rogers (“Rogers”), a politically active eighteen-year-old senior high school student, for five days because Rogers criticized Petitioner on the website. Joint Appendix (“J.A.”) at (2). Rogers created the web site, “www.FaberHighSchool.com,” through a private Internet service provider with his own computer at his own home. J.A. at (2). Further, Rogers received no resources or instruction in establishing or maintaining the web page. J.A. at (2). The only connection that the site has with the school is that Rogers asked once for Petitioner’s approval of the site after Rogers had established it; and Petitioner initially asked Rogers to set up the site, after which Petitioner forgot about the proposition. J.A. at (2-3). After Rogers set up his web page, months after the time when Rogers and Petitioner discussed its creation, many students accessed the site to obtain information about football games and current events. J.A. at (3). The web site did not have a disclaimer. J.A. at (3).

After the web site was functional, Rogers went to a prison on a school-sponsored field trip designed to deter students from engaging in criminal activity. J.A. at (3-4). According to Petitioner’s wishes, the prison officials subjected Rogers and the other students to a full-body cavity strip search without the consent of the students. J.A. at (4). Rogers wrote an editorial about the incident in which he described explicitly what happened in anatomically accurate language. J.A. at (4). In the editorial, Rogers expressed the seriousness of his humiliation by asking Petitioner whether Petitioner would like to be subjected to the same kind of treatment. J.A. at (4-5).

After checking the web site, Petitioner discovered Rogers' editorial. J.A. at (4). Petitioner suspended Rogers the next school day for five days for threatening and harassing a faculty member in violation of the school code.<sup>1</sup> J.A. at (4). Even though Petitioner reportedly was upset, scared, and had trouble sleeping; Petitioner did not contact law enforcement, nor did Petitioner take time away from work. J.A. at (4-5). Petitioner did not want to "submit to [Rogers']...sophomoric intimidation tactics." J.A. at (5).

The strip searches generated the attention of media, which caused uproar in the community. J.A. at (5). The controversy encouraged discussion of the field trip in and out of school. J.A. at (5). The in-class discussions mainly took place in civics classes that frequently address current events pertaining to constitutional issues. J.A. at (5). Debates did occur in classes other than civics classes, and the students engaged in debate acknowledged Rogers' editorial. J.A. at (5). Students reported that they were inspired by Rogers' editorial and were eager to see Petitioner brought to justice. J.A. at (5).

Rogers appealed to the School Board and won a stay of the suspending petition to the District Court. J.A. at (5). The District Court upheld Rogers' suspension, finding that Rogers' editorial constituted school-sponsored speech that warranted school regulation. J.A. at (20). The Court of Appeals overturned the decision of the District Court, holding that Rogers' editorial deserved the full protection of the First Amendment, as the editorial was not school-sponsored, was not disruptive, and was not threatening. J.A. at (19). Both parties have stipulated to the facts stated here and waived challenges to any other procedural or substantive arguments so as to focus only on the analysis of the First Amendment issues raised in this case. J.A. at (5).

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<sup>1</sup> Section 4 of the Faber High School Code of Conduct provides: "Any student who threatens or abuses any teacher, administrator, or any other staff member employed by Faber High School, verbally or otherwise, shall be suspended

## **SUMMARY OF THE ARGUMENT**

Rogers' speech warrants the full protection of the First Amendment. Speech that is not school-sponsored is wholly protected by the First Amendment. Because Rogers created the editorial completely on his own with his own resources and because he did not receive any constant supervision for creating or maintaining the site, Rogers' web site and editorial are not school-sponsored speech and therefore deserve the protection of the First Amendment.

Speech that is not substantially and materially disruptive of the learning process also merits the protection of the First Amendment. Because Rogers' speech did not substantially or materially disrupt school activities and did not provide the school with a reason to fear a specific type of future disruption, Rogers' site should not be regulated by Petitioner. Therefore, this Court cannot deprive Rogers of protection under the First Amendment because his speech was disruptive.

Even though Rogers' speech deserves the protection of the First Amendment because the school is not justified in regulating his speech, Rogers' editorial still must not threaten Petitioner so as to cause the language to fall outside of the category of speech that the First Amendment protects. Rogers' speech was not threatening, as he did not directly threaten Petitioner nor incite others to do so. Additionally, Rogers' editorial did not advocate for Petitioner's immediate harm. In fact, Rogers did not promote that Petitioner be harmed at all. Because Rogers' editorial did not threaten Petitioner, it should receive the full protection of the First Amendment.

## ARGUMENT

### **I. ROGERS' SPEECH DESERVES BROAD PROTECTION UNDER THE FIRST AMENDMENT BECAUSE HIS SPEECH WAS NOT CONNECTED TO A SCHOOL-SPONSORED ACTIVITY.**

#### **A. Because Rogers' editorial appeared on the web page that Rogers created and maintained with his own resources and without any school guidance, the web page was not part of the school's curriculum or extracurricular activities.**

In deciding Hazelwood School District v. Kuhlmeier, the Supreme Court did not establish a rigid test for determining what constitutes school-sponsored speech. 484 U.S. 260 (1988). Nevertheless, the Court in Kuhlmeier indicated that school-sponsored speech is that which the school promotes in school-sponsored activities. Id. at 270-71. Kuhlmeier established that school-sponsored activities are “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” Id. at 271. In Saxe v. State College Area School District, the Third Circuit enunciated the Kuhlmeier standard in defining school-sponsored speech as that which “a reasonable observer would view as the school’s own speech.” Saxe, 240 F.3d 200, 214 (3d Cir. 2001).

Federal courts have recognized that student expression that is not part of a formal curriculum or extracurricular program is not school-sponsored, even when certain speech occurs on campus. Compare Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) (finding that a magazine produced off-campus and brought on-campus is not school-sponsored) and Bystrom v. Fridley High School, 686 F. Supp. 1387 (D. Minn 1987) (finding that a paper made off-campus and distributed on-campus is not school-sponsored) with Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (considering that the plaintiff’s on-campus speech that he prepared for a school assembly was school-sponsored). Specifically, school officials’ ability to censor students usually extends

to activities such as student speeches at assemblies, theatrical productions, and publications made by students at school. Kuhlmeier, 484 U.S. at 271.

Rogers' web site was not part of the school curriculum, unlike the student assembly speech in Poling and the newspaper created with school funds by a journalism class under the guidance of a teacher in Kuhlmeier. Kuhlmeier, 484 U.S. 263-64; Poling, 872 F.2d at 762-63. Rogers created the web site on his own computer at home without receiving any assistance or resources from the school staff. J.A. at (3). Additionally, the record does not reflect that Rogers or his classmates accessed Rogers' site at school or that any students brought hard copies of the site onto campus; therefore, it would have been clear to the reasonable observer that the speech was not school-sponsored. J.A. at (2-5).

The only possible connection between the school and the web site lies in the fact that Petitioner suggested the idea to Rogers. Petitioner suggested that Rogers create a web site when Rogers visited Petitioner at the end of the school year. J.A. at (2-3). Rogers did not act immediately on the idea and waited to create the web site early in the next school year. J.A. at (3). Moreover, the record reflects not only that Petitioner failed to follow up to check on Rogers' progress in creating the site, but also that Petitioner actually forgot about the idea of Rogers' setting up a web site. J.A. at (3). Petitioner's lack of involvement is not tantamount to the supervision that the District Court imputes to Petitioner. J.A. at (9). Because Petitioner neither guided nor participated in the site's creation, the District Court did not accurately find that the activity was school-sponsored when the Court found that Petitioner "directed" and "oversaw" the web site's creation. J.A. at (9).

An additional reason why this Court should not find that the web site is school-sponsored is that the Court of Appeals correctly recognized that the domain of the web site

“www.FaberHighSchool.com” has a “.com” domain. J.A. at (23). Many internet users are aware of the fact that the “.com” domain is reserved for businesses and private individuals. As a result, the “reasonable observer” of the web page would not associate Rogers’ site with the school.

**B. The fact that Rogers’ web page addressed other students does not convey that Rogers’ editorial was school-sponsored speech.**

The District Court found it significant that Rogers addressed his “fellow students” on the web site, suggesting that one would reasonably assume that the page represents a school-sponsored forum based on the premise that Rogers addressed a student audience. J.A. at (8). The fact that others may believe that Rogers addressed his fellow students does not provide evidence that the editorial was school-sponsored. See Killion v. Franklin Regional School District, 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) (finding the fact that the intended audience for the student’s insulting list was inconsequential in determining whether or not the list was school-sponsored speech). See also Emmett v. Kent School District, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (holding that despite the intended audience of a student’s site consisted of students, the site was not connected to any class or school project). This Court must not rely on such evidence in making its decision as to whether Rogers’ speech was school-sponsored.

**C. Even if Rogers’ editorial were school-sponsored, Petitioner would not be authorized to censor the speech because Petitioner had no legitimate reason for proscribing the speech.**

In Kuhlmeier, the Supreme Court held that when student expression is school-sponsored, the school can regulate such expression only when the regulation is “reasonably related to legitimate pedagogical concerns.” Kuhlmeier, 484 U.S. at 273. In the subject case, the Court of Appeals identified that Petitioner tried to exploit Rogers’ work to improve Petitioner’s reputation around school in Petitioner’s attempt to secure his job. J.A. at (22). In light of the finding of the

Court of Appeals, the District Court's assertion that Petitioner's punishment of Rogers was related to a legitimate pedagogical concern is unconvincing. The Supreme Court has held that part of the purpose of the classroom is to serve as a "marketplace of ideas." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). As such, school officials must not censor ideas that are controversial or cause the administration to be uncomfortable. Id. at 512-13. Because Petitioner was censoring Rogers for engaging in controversial speech and therefore had no legitimate reason to censor the editorial, this Court must uphold the Court of Appeals decision that Rogers' speech should not be banned on these grounds.

**II. BECAUSE ROGERS' SPEECH WAS NOT SUBSTANTIALLY OR MATERIALLY DISRUPTIVE, THE SCHOOL MAY NOT REGULATE ROGERS' SPEECH.**

**A. Petitioner did not provide sufficient evidence that the content of Rogers' web site would substantially or materially interfere with school activities.**

A school can regulate student expression that is not school-sponsored if the expression is materially and substantially disruptive of the educational process or if the expression interferes with the rights of other students. Tinker, 393 U.S. at 509. The Tinker standard is particularly difficult to meet when courts apply it to cases in which an official has regulated a student's speech because the speech puts the school at risk of suffering from potential disruption. Id. at 511. The Tinker standard requires that those who censor student expression must have clear reason to believe that the regulated conduct will cause substantial disruption. Id. Consequently, school officials who control student speech cannot base their restrictions on an "undifferentiated fear or apprehension of disturbance." Id. at 508.

The Seventh Circuit applied the Tinker standard in Boucher v. School Board of the School Dist. of Greenfield, 134 F.3d 821 (7th Cir. 1998). In Boucher, the court found that the

school could prohibit the distribution of a student's underground paper that described in accurate detail how to damage the school's computer system. Id. The defendants in Boucher met the Tinker burden by substantiating their fear of potential disruption with concrete evidence of the potential for the specific disruption that computer failure would cause. Id. at 827-28. The current case differs from Boucher in that Petitioner did not present the District Court with specific, concrete reasons for fearing that Rogers' web site would interfere with learning at school. The District Court's vague finding that Rogers' site "could be disruptive on campus" is speculative at best. J.A. at (10). This Court should uphold the finding of the Court of Appeals that established that Petitioner's argument that the controversy might "evolve into *something* which would be difficult to control" is a vague description that does not meet the specificity requirement enunciated in Tinker. 393 U.S. at 511; J.A. at (29).

Federal courts have recognized that school officials who censor students for potentially disruptive speech may meet the Tinker burden by basing their decisions upon past events. See West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) (finding appropriate a school's decision to censor a student's display of a Confederate flag because of hostile confrontations resulting from past exhibition of the flag by students); see also Killion, 136 F. Supp. 2d at 455-56 (determining in part that school officials could not censor a student who emailed offensive parodies of his coach in part because there was no evidence of substantial disruption caused by similar antics that occurred in the past). In the subject case, the record does not indicate that similar events occurred in the past or that similar events disrupted school activities in the past; therefore, Petitioner should have to satisfy the high burden of demonstrating that Rogers' site could cause a specific substantial and material disruption to justify Petitioner's claim.

**B. Rogers' editorial did not cause substantial or material disruption in the school.**

The record reflects that participants in class discussions about the strip searches acknowledged Rogers' editorial. J.A. at (3). Yet, this fact does not indicate that Rogers' web site caused the disruption. J.A. at (2-5). As the Court of Appeals noted, the disruption in class was attributable to the controversy surrounding Petitioner's program. J.A. at (2-5, 28-31). Rogers' web site was merely one aspect of the controversy. Further, as the Court of Appeals recognized, the record shows that most on-campus discussions occurred in civics classes that normally address Constitutional issues as part of their course of study. J.A. at (3). Any discussion of Rogers' web site was not a disruption in light of the context of the situation, and discussion of Rogers' web site was certainly not enough to amount to a substantial and material disruption of school functions. The Court of Appeals also noted that even if Rogers' comments were the cause of school debate, Petitioner's censorship of the speech would not be valid under Tinker, which explicitly protects political speech and free discourse in the classroom. 393 U.S. at 512 ("The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas which discovers truth out of a multitude of tongues...") (quoting Shelton, 364 U.S. at 487).

**C. Federal and state courts have been reluctant to uphold school officials' repression of off-campus speech on the grounds that the speech is disruptive to school activities.**

Several lower court decisions have not held that speech generated off-campus disrupts school activities. See Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995) (finding that a list created off-campus and distributed at school was to receive the full protection of the First Amendment); see also Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979) (declining to uphold a school's effort to censor a vulgar underground publication that a student created away from school); see

also Emmett, 92 F. Supp. 2d at 1090 (finding that a student's personal web site did not interfere sufficiently with school activities to warrant proscription by the school officials).

One case that is similar to the case at hand is Beussink v. Woodland R-IV School District in which the court found it likely that the student would succeed on the merits of his claim challenging his punishment. 30 F. Supp. 2d 1175, 1179 (E.D. Mo. 1998). In Beussink, the student created his web site off-campus and another student downloaded the site in the school's computer lab. Id. The site contained vulgar language and criticized the school staff. Id. at 1177. The court found that the disruption was not substantial enough to substantiate the constitutionality of school censorship. Id. at 1180. The court in Beussink cited Tinker in noting that the principal's fear that the web page would cause future disruption was invalid because the principal was merely "upset" by the content of the web page. Id. citing Tinker, 393 U.S. at 509).

The subject case is similar to Beussink in that Rogers created and maintained his personal site away from school. No students viewed Rogers' site at school, however. J.A. at (2-5). As the court in Beussink decided that a school could not censor a student's web site despite the fact that students did access it at school, this Court should find that Rogers deserves the full protection of the First Amendment.

O'Brien v. Westlake City Schools is particularly instructive in that it distinguishes between speech on the Internet and speech that occurs at school. No. 1:98CV647 (E.D. Ohio 1998). The court found that the vulgar content of the student's web site was produced off-campus and therefore protected by the First Amendment. Id. at 18. If, however, the student had spoken obscenely toward his teacher, the court considered that the school would have the right to censor the student's speech. Id. In the subject case, the speech did not appear on-campus; therefore, the Court cannot punish Rogers for producing his editorial because he did not bring it

to school. Compare Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (finding that schools can regulate school-sponsored or personal student speech only when the speech occurs at school).

A Pennsylvania court held that schools could legally restrict off-campus student speech. J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412 (Pa. Commw. Ct. 2000). The facts of this case are considerably different from the present case, however. In J.S. v. Bethlehem Area School District, a student created a personal web site that was graphic in expressing that he wanted to commit or see others commit violence toward specific teachers. Id. at 415-18. The student even solicited money for a hitman to kill a teacher. Id. at 416. As a result of viewing the web site, the teacher was unable to complete the school year and took a medical leave of absence for the following year. Id. at 421. The extreme nature of the content of the student's web page caused a severe disruption—a teacher's year-long leave of absence. In the subject case, however, Petitioner did not take off even one day from school; therefore the effect of Rogers' editorial on Petitioner did not cause a substantial or material disruption.

### **III. ROGERS' SPEECH WAS NOT THREATENING AND THEREFORE DESERVES THE FULL PROTECTION OF THE FIRST AMENDMENT.**

The Supreme Court has been cautious in upholding the restraint of speech that seems threatening. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Consequently, the Court may uphold regulation of seemingly threatening speech only when a compelling governmental interest requires that the speech be outlawed. Id.

**A. Rogers' editorial was not threatening because it was not a serious expression of intent to harm or assault Petitioner.**

The Ninth Circuit set forth a test for determining whether speech amounts to a true threat: whether a reasonable person in the speaker's position would foresee that his or her speech would be construed by those to whom the speaker communicates the statement as a serious expression of intent to harm or assault. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996). Lovell held that a student's comment that she was "so angry [that] [she] could just shoot someone" was unequivocal and specific enough for the reasonable person in her position to believe that she intended to threaten physical violence toward her guidance counselor. Id. at 369, 372. To the contrary, Rogers did not communicate a threat directly to Petitioner, and Rogers did not use any violent language. Moreover, the reasonable person in Rogers' position would likely have been very upset and would have voiced his concerns in a similar way, especially because Rogers is politically active and is accustomed to garnering support for his causes. Based on this standard, any attempt to characterize Rogers' speech as a true threat would be tenuous at best.

The Court of Appeals noted that Petitioner did not even notify the police or take time away from work after he discovered Rogers' web site. J.A. at (26). Further, the Court of Appeals interpreted Petitioner's consideration of Rogers' language as a "sophomoric intimidation tactic" as an indication that Petitioner did not feel threatened by Rogers' speech. J.A. at (26). If Petitioner did fear for his physical safety, he probably would have notified the authorities. This Court must take into consideration Petitioner's reaction when it establishes how a reasonable person would have acted in this situation.

**B. Rogers' speech did not directly threaten Petitioner.**

In NAACP v. Claiborne Hardware Co., the Court upheld a boycott organizer's right to announce at a public rally that he would "break the necks" of those who did not participate in the

boycott. 458 U.S. 886, 902 (1982). The Court in Claiborne held that the organizer's speech should not be subject to censorship because the organizer did not authorize, ratify, or directly threaten acts of violence. Id. at 929.

In light of the reasoning of the Supreme Court in Claiborne, Petitioner's claim that censorship of Rogers' speech was constitutional because Rogers allegedly threatened his safety is not valid. The language of Rogers' editorial does not unequivocally threaten direct violence toward Mr. Wright. J.A. at (17-18). Rather, Rogers' language expresses anger because of the humiliation that he suffered as a result of the unwanted physical intrusions that the police officers inflicted upon him. J.A. at (17-18). Rogers only suggests that Petitioner should experience the same degrading treatment in order to understand the humiliation that Rogers suffered. J.A. at (17-18). Rogers' language does not even explicitly advocate violence, whereas the language in Claiborne openly called for harm to occur to a specific set of individuals. Claiborne, 458 U.S. at 928-29; J.A. at (17-18). At most, Rogers' editorial was political hyperbole and not a true threat. See Watts v. United States, 394 U.S. 705 (1969) (holding that a protester who insinuated that he would kill the President was entitled to protection under the First Amendment because the context surrounding the protester's comment revealed that his expression was mere "political hyperbole" and not a true threat on the life of the President). Because the Supreme Court did not uphold the censorship of the organizer's language in Claiborne, this Court must not find that Rogers' speech posed a true threat to Petitioner.

**C. A reasonable person could not have inferred that Rogers advocated violence toward Petitioner.**

In Planned Parenthood v. Am. Coalition of Life Activists, the Ninth Circuit held constitutional a web site that published the names, photographs, and addresses of doctors and advocated that these doctors be stopped from performing abortions. 244 F.3d 1007. The court in

Planned Parenthood did not find that the site included inferred threats on the lives of the doctors because the defendants did not specify who would commit violence, nor did they explicitly mention violence at all. Id. at 1017-18. Rogers' statement is similar in that he did not advocate for violence. Rogers simply demanded that Petitioner be brought to justice. J.A. 18. Rogers did not advocate the use of violent means to effect this result. J.A. 18. Even this Court were to construe the totality of the argument as one that advocates violence, this Court could not approve of the censorship of Rogers' speech because Rogers did not name any particular person to commit the alleged violence nor indicate a specific time for carrying it out. See Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that in order for the Court to regulate threatening insightful speech, such speech must be specific in advocating for immediate action).

Further, this Court must find that Rogers' speech was not threatening because the speech was not communicated directly face-to-face, by telephone, or by letter. Rogers posted the language on his personal web site. See Planned Parenthood, 244 F.3d at 1019 (considering that the defendants' speech on the Internet was not threatening in part because it was not directly communicated to the plaintiffs). Additionally, this Court must consider that Roger communicated through his web site concerning a matter that affected the entire school. See Id. (noting that speech that is made through "normal channels of group communication" and "concerning matters of public policy" receives the maximum level of protection by the First Amendment.)

## **CONCLUSION**

Petitioner violated Rogers' First Amendment right to freedom of speech when Petitioner punished Rogers for criticizing Petitioner on Rogers' personal Internet site when the student 1) created the site off-campus with no school supervision or resources; 2) critiqued the administrator's decisions regarding a controversy created by Petitioner; and 3) used non-violent language in the statement that mirrored what he had experienced on a school-sponsored visit to a prison without resorting to inappropriate language.

Respectfully Submitted,

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*Attorney for Respondent*