IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

B.L., a minor, by and through her father, LAWRENCE LEVY, and her mother, BETTY LOU LEVY,	)	Civ. No. 3:17-cv-1734-ARC
Plaintiff,	)	(Hon. A. Richard Caputo)
v.	)	
MAHANOY AREA SCHOOL DISTRICT,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF B.L.'S MOTION FOR SUMMARY JUDGMENT

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QUESTION INVOLVED

Whether the Mahanoy Area School District ("MASD" or "the District") violated the First Amendment when it suspended B.L., a high school cheerleader, from the cheerleading squad because of a Snapchat post that said "fuck school fuck softball fuck cheer fuck everything," which she created and shared with her friends on a weekend, off campus, using her personal cell phone when she was not participating in any school activities.

Suggested answer: Yes.

INTRODUCTION

After discovery, the evidence in the record does not differ meaningfully from the evidence presented at the preliminary injunction hearing, which led the Court to conclude that Plaintiff B.L. was likely to succeed on the merits of her First Amendment claim. *See* Mem. Op., ECF 12.

It is an open question in the Third Circuit whether a school district may *ever* punish students for off-campus speech, even upon a showing that the speech is likely to cause substantial, material disruption to school activities.[1] But the Court

[1] *See J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, J., concurring) (writing separately to answer the question left open by the majority—whether schools can punish students for out-of-school speech); *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219–20 (3d Cir. 2011) (en banc) (Jordan, J., concurring) (observing that neither *J.S.* nor *Layshock* answers the open question of whether *Tinker* can be applied to out-of-school speech).

need not answer that question, because even assuming schools had such a power, the District plainly cannot exercise it here.

First, Third Circuit precedent makes clear that school districts do not have the power to punish students for out-of-school speech because the speech is disrespectful or profane—even if the speech connects to the school in some way. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920, 923 & n.12, 925, 933 (3d Cir. 2011) (en banc); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209, 219 (3d Cir. 2011) (en banc). The record is unambiguous that B.L. was punished because she used profanity while also referring to "cheer." Pl.'s Stmt. Undisputed Facts Supp. Pl.'s Mot. for Summ. J. (hereinafter "Stmt. Facts") ¶¶ 54–58.

Second, the District's witnesses have disavowed any expectation that B.L.'s Snap would cause disruption. Stmt. Facts ¶¶ 62–63. Indeed, the record does not reveal any basis for the District to anticipate substantial, material disruption, and shows that in fact, no substantial, material disruption occurred. Stmt. Facts ¶¶ 59–63. Accordingly, the District cannot meet the standard announced in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

Third, courts have not distinguished between different forms of punishment in deciding whether punishing a student for her speech violates the First Amendment.[2] There is no basis in law or fact for applying a new rule here.

The Court need not look further than *J.S.* and *Layshock* to decide this case. However, the District's punishment of B.L.'s private out-of-school speech pursuant to the "respect" and "negative information" provisions in the cheerleading rules is also unconstitutional for the additional reason that these provisions discriminate based on viewpoint and are so vague and subjective that they vest District officials with virtually unbridled discretion to decide which speech to punish. *See Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1888–92 (2018); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (June 19, 2017).

For all of these reasons, the Court should grant summary judgment for the Plaintiff.

[2] *See, e.g., K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 102–05 (3d Cir. 2013); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (en banc); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 922 (3d Cir. 2011) (en banc); *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 393 (E.D. Pa. 2011), *aff'd*, 725 F.3d 293 (3d Cir. 2013) (en banc).

FACTUAL BACKGROUND[3]

The Defendant School District punished Plaintiff B.L. for venting her frustration with life after a particularly difficult week by sharing with her friends a Snapchat post that said "fuck school fuck softball fuck cheer fuck everything" superimposed over a photo of her and a friend at a convenience store with their middle fingers raised. Stmt. Facts ¶¶ 32–37, 41–49, 52–58.

Posts on Snapchat are designed to be temporary and ephemeral. *Id.* ¶ 38. Snapchat posts do not appear on the internet—one must have the Snapchat smartphone "app" to view Snaps—and they are self-deleting. *Id.* ¶¶ 39–40. Snapchat users can send a Snap to specific Snapchat friends, who will be able to access it for up to 10 seconds, or a Snapchat user can post a Snap to their "Story," where it will be viewable by their Snapchat friends for 24 hours. *Id.* ¶ 39.

B.L. created the Snap in question on a weekend, on her own time, off campus, using her own phone. *Id.* ¶¶ 42–46, 48. Her Snap did not in any way depict or specifically mention her school or her school's cheerleading team. *Id.* ¶ 47. Her punishment was doled out by the cheerleading coaches pursuant to two provisions of the school's "Cheerleading Rules": one that requires cheerleaders to

[3] Plaintiff hereby incorporates its detailed Statement of Undisputed Facts that is being filed simultaneously with this brief. *See* Pl.'s Stmt. of Undisputed Facts Supp. Mot. for Summ. J., Dec. 20, 2018 ("Stmt. Facts").

"have respect" and not use "foul language and inappropriate gestures," and another that prohibits placing "negative information" about cheerleading "online." *Id.* ¶ 58.

The District has disavowed having any reason to believe that B.L.'s Snap would disrupt any classroom or school activities. *Id.* ¶¶ 62–63. B.L.'s punishment was not based on the Snap's impact on students; indeed, the Snap did not actually cause any material disruption of school activities. *Id.* ¶¶ 59–61.

B.L. and her parents made repeated requests that the District reconsider B.L.'s punishment, initiating multiple conversations about the issue with the cheerleading coaches, the athletic director, the high school principal, the superintendent, and the school board, all of whom stood by the coaches' decision. *Id.* ¶¶ 68–74.

Plaintiff B.L. commenced this action through her parents by Verified Complaint. ECF 1. This Court entered a Temporary Restraining Order directing the District to restore B.L. to the cheerleading squad. ECF 5. After holding an evidentiary hearing and oral argument on Plaintiff's motion for a preliminary injunction, this Court issued a Memorandum Opinion granting Plaintiff's motion and entered an Order preliminarily enjoining the District from punishing B.L. for her Snap. ECF 12; ECF 13. Defendant filed an answer to the complaint and demanded a trial by jury. ECF 16.

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

A movant is entitled to summary judgment if it shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is "material" only if it has the potential to alter the outcome of the case. *See NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 475 (3d Cir. 2011) (citing *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006)).

In First Amendment cases, the government bears the burden to justify its restriction on speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816-817 (2000) (citations omitted); *accord Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc). Where, as here, the non-moving party bears the burden of proof at trial, the movant is entitled to summary judgment if the non-moving party fails sufficiently to establish the existence of an essential element of its case. *Goldenstein v. Repossessors Inc.*, 815 F.3d 142, 146 (3d Cir. 2016) (citing *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014)).

Because the undisputed record makes clear that the District violated Plaintiff B.L.'s First Amendment rights when it punished her for her out-of-school speech, Plaintiff is entitled to summary judgment.

II. THERE ARE NO APPLICABLE EXCEPTIONS TO THE FIRST AMENDMENT THAT WOULD ALLOW THE DISTRICT TO PUNISH B.L.'S OUT-OF-SCHOOL SPEECH.

The First Amendment limits public schools' power to punish students for their speech. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506–09 (1969). Although ordinarily the government may not prohibit profanity[4] or disruptive speech that falls short of incitement or "fighting words"[5] without meeting strict scrutiny, the Supreme Court has recognized some narrow school exceptions to ordinary First Amendment jurisprudence to allow schools to punish students' disruptive or profane in-school speech. *See Tinker*, 393 U.S. at 506–09; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).[6]

None of those exceptions apply in this case.

It is questionable whether a school may ever rely on school speech jurisprudence to justify punishing a student's *out-of-school* speech. And the

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[4] *See Cohen v. California*, 403 U.S. 15, 22–26 (1971).

[5] *See, e.g., Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[6] As this Court observed in the Memorandum Opinion granting Plaintiff's motion for preliminary injunction, the Supreme Court has recognized other exceptions that allow schools to censor certain kinds of speech (including speech that may appear to be school-sponsored and references to illegal drug use), but they do not apply in this case. *See* Mem. Op., ECF 12, at 5 n.6*; Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

District plainly cannot meet the strict scrutiny that would apply to the Cheerleading Rules outside of the school context. Indeed, the Cheerleading Rules would be unconstitutional under any mode of First Amendment analysis because they are viewpoint discriminatory and vest the cheerleading coaches with virtually unbridled discretion to make subjective decisions about what is "negative" speech.

A. The *Fraser* Exception for Profane Speech Does Not Apply to Out-of-School Speech.

The Supreme Court in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), held that schools may punish students for lewd speech and profanity used during school without having to demonstrate that the profanity would be disruptive.

However, the *Fraser* exception does not extend to out-of-school speech. Schools have no power to punish *out-of-school* speech because it is lewd or profane. *See J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (en banc) (noting that "*Fraser* does not apply to off-campus speech" and holding that *Fraser* did not justify a school's punishment for "profane language outside the school, during non-school hours"). The Supreme Court observed that, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse v. Frederick*, 551 U.S. 393, 405 (2007). As the Third Circuit explained, "[t]he most logical reading" of this statement is that it "prevents the application of *Fraser* to speech that takes place off-campus, during

non-school hours, and that is in no way sponsored by the school." *J.S.*, 650 F.3d at 932 n.12. Thus, the Third Circuit sitting *en banc* has twice held that schools violated the First Amendment when they punished students for profane, offensive social media posts mocking specific school administrators that students created on their own time. *See J.S.*, 650 F.3d at 929 (holding that an online parody profile of the principal created outside of school "could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,'" despite the "unfortunate humiliation" it caused the principal); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 209 (3d Cir. 2011) (en banc) (holding that the school violated the First Amendment by punishing a student for out-of-school, online speech the principal deemed "degrading," "demeaning," "demoralizing," and "shocking").

B.L.'s Snap was unambiguously out-of-school speech. She took the photo and created the Snapchat post off-campus, on a weekend, at a time when she was not participating in school activities. Stmt. Facts ¶¶ 42–46, 48. She limited access to the post to only her Snapchat friends. *Id.* ¶ 46. B.L. was not wearing her cheerleading uniform or representing the school. *Id.* ¶ 47. Accordingly, *Fraser* does not apply, and the District cannot punish her for using profanity.

Moreover, B.L.'s Snap had an even more tenuous connection to the school than the fake Myspace profiles of school principals at issue in *J.S.* and *Layshock*.

B.L. did not mention any person, and did not even refer to her school or her team in particular; the Snap referred generically to "school," "softball," "cheer," and "everything." Stmt. Facts ¶ 46. The Snap contained no school uniforms, logos, or insignia associated with the school. *Id.* ¶ 47.

As the Third Circuit explained in *J.S.* and *Layshock*, this is not enough of a nexus to school to convert a student's out-of-school speech into "in-school" speech such that *Fraser* would apply. *Fraser* does not help the District on these facts.

B. The *Tinker* Exception for Disruptive Speech Does Not Apply to B.L.'s Snap.

It is an open question whether school officials may *ever* punish a student for out-of-school speech without violating the First Amendment. *J.S.*, 650 F.3d at 926 n.3; *B.H.*, 725 F.3d at 303 n.9 ("We have not yet decided whether *Tinker* is limited to on-campus speech."); s*ee also J.S.*, 650 F.3d at 937–40 (Smith, J., concurring) (analyzing *Tinker* and its progeny and concluding that student speech doctrine does not apply to off-campus speech and that "ordinary First Amendment principles" apply instead). But assuming schools did have the authority to punish students for their out-of-school conduct (which is debatable), it is clear that they would have to satisfy the *Tinker* standard. *J.S.*, 650 F.3d at 928–33; *see also id.* at 927 (acknowledging that "*Tinker* sets the general rule for regulating school speech").

The rule announced in *Tinker* is that, generally, public schools may not punish speech unless the speech creates a risk of substantial, material disruption to school activities—a high bar. *Tinker*, 393 U.S. at 509.

The mere fact that speech is offensive is not enough to demonstrate a likelihood of substantial, material disruption. In *Tinker*, the Court explained that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not a sufficient justification for punishing student speech. *Tinker*, 393 U.S. at 509; *J.S.*, 650 F.3d at 926; *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) ("The Supreme Court has held time and time again, both within and outside of school context, that the mere fact that someone might take offense at the content of the speech is not a sufficient justification prohibiting it.").

Thus, the Third Circuit in both *J.S.* and *Layshock* ruled that the offensive nature of the plaintiffs' Myspace posts about their school principals was not a sufficient basis for their schools to forecast substantial, material disruption from the out-of-school speech—particularly given that only a limited group of the plaintiffs' friends was able to access the social media content. *J.S.*, 650 F.3d at 921, 929; *Layshock*, 650 F.3d at 208.

Here, the record makes clear that it was the profanity used in B.L.'s Snap, rather than the anticipated effect of the Snap on school activities, that formed the

basis for B.L.'s punishment. Stmt. Facts ¶¶ 58–63. The testimony of all of the District witnesses makes clear that the District had no reason to anticipate that B.L.'s Snap would be disruptive, and that B.L.'s Snap did not actually cause substantial, material disruption (or anything close to it). *Id.* ¶¶ 60–63. The totality of the "disruption" in the record caused by the Snap was that several students persisted in asking Ms. Luchetta-Rump what she was going to do about the Snap, which "briefly" took her attention away from her class. *Id.* ¶ 61. As the Third and Eleventh Circuits have observed, "Student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to 'a showing of mild curiosity' by other students, 'discussion and comment' among students, or even some 'hostile remarks' or 'discussion outside of the classrooms' by other students." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 321–22 (3d Cir. 2013) (en banc) (quoting *Holloman v. Harland*, 370 F.3d 1252, 1271-72 (11th Cir. 2004)). Here, the record indicates no more than "general 'rumblings' in the school" about the speech, which the Third Circuit held in *J.S.* was not substantial, material disruption. *J.S.*, 650 F.3d at 922–23.

In sum, even assuming that schools can punish out-of-school speech that causes disruption to school activities, the District plainly cannot sustain B.L.'s punishment on this basis because the District cannot meet *Tinker* on this record. Punishing B.L. under these circumstances is inconsistent with the limitations on

school authority set forth in *Tinker* and subsequent cases. *See J.S.*, 650 F.3d at 928–29; *Layshock*, 650 F.3d at 219.

C. The First Amendment Prohibits Punishment for Speech, No Matter What the Punishment Is.

The District will no doubt argue that the Court should carve out a new exception to the First Amendment that would allow schools to punish students for profane or disrespectful out-of-school speech as long as the punishment is removal of a privilege, rather than suspension or expulsion from class. Such an exception would fly in the face of decades of First Amendment jurisprudence. Indeed, the *Tinker* Court itself stated that students' free speech rights apply not only in the classroom, but "on the playing field" as well. *Tinker*, 393 U.S. at 512–13.

The Supreme Court and Third Circuit's analyses of whether a student's First Amendment rights were violated have never turned on the nature of the punishment. Courts have struck down punishments for speech that included not only expulsion or suspension from school, but also being banned from all extracurricular activities,[7] being banned from graduation,[8] being placed in an alternative education program,[9] and being prohibited from attending a school

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[7] *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 210 (3d Cir. 2011) (en banc).

[8] *Id.*

[9] *Id.*

dance,[10] without drawing any distinctions between these various forms of punishment. In *K.A. v. Pocono Mountain School District*, the plaintiff student, a fifth grader, had not been suspended or expelled from school, but only prohibited from distributing invitations to a Christmas party at her church. *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 102–05 (3d Cir. 2013). The Court nonetheless applied the *Tinker* framework, and held that the plaintiff was likely to succeed on her First Amendment claim. *Id.* at 107–12.

III. THE "NEGATIVE INFORMATION" AND "RESPECT" PROVISION ARE UNCONSTITUTIONALLY VAGUE AND DISCRIMINATE BASED ON VIEWPOINT.

Because none of the recognized student speech exceptions apply when a school district punishes students for their out-of-school speech on their own time, the Mahanoy Area School District's censorship is subject to the same standards as any general law or government regulation punishing pure speech. *See J.S.*, 650 F.3d at 936–40 (Smith, J., concurring).

In *J.S.*, Judge Smith wrote a concurrence joined by four other judges to answer the question left open by the majority—whether schools can punish students for out-of-school speech. *See J.S.*, 650 F.3d at 936. He analyzed *Tinker*

[10] *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 922 (3d Cir. 2011) (en banc); *B.H. v. Easton Area Sch. Dist.*, 827 F. Supp. 2d 392, 393 (E.D. Pa. 2011), *aff'd*, 725 F.3d 293 (3d Cir. 2013) (en banc).

and its progeny and concluded that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 937–40. He therefore applied "ordinary First Amendment principles," rather than the more deferential school speech cases, to the school's punishment of J.S. for her out-of-school speech. *Id.* at 940. He concluded that under ordinary First Amendment principles, the school could not punish J.S. *Id.* at 940–41.

The District's punishment of B.L. under the "respect" and "negative information" provisions is quite obviously unconstitutional under ordinary First Amendment principles. The government cannot generally punish people for swearing. *See Cohen v. California*, 403 U.S. 15 (1971). And it most certainly cannot do so pursuant to rules that are viewpoint discriminatory and so vague that they vest government officials with essentially unfettered discretion to decide what speech to punish.

A. The "Respect" and "Negative Information" Provisions Discriminate Based on Viewpoint

Singling out certain viewpoints for censorship is almost invariably unconstitutional. *See, e.g.*, *Pittsburgh League of Young Voters Educ. Fund v. Port Auth.*, 653 F.3d 290, 296 (3d Cir. 2011) (observing that "[v]iewpoint discrimination is anathema to free expression") (citing *R.A.V. v. St. Paul*, 505 U.S.

377, 382 (1992); *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

Rules that prohibit students from posting "negative information" online or expressing "disrespect" but do not prohibit them from posting "positive information" or expressing "respect" are unquestionably viewpoint discriminatory. Shortly after B.L. created the Snap in question, the Supreme Court struck down a an "anti-disparagement" clause that denied protection to trademarks that the government deemed offensive to a substantial percentage of any group of people. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (June 19, 2017). The Court rejected the government's argument that the regulation was viewpoint neutral because it "evenhandedly prohibits disparagement of all groups." *Id*. The Court explained that censoring speakers on more than one side of an issue can still be viewpoint discrimination, and held that denying protection to trademarks that were likely to offend was "viewpoint discrimination in the sense most relevant here: giving offense is a viewpoint." *Id*. The "respect" and "negative information" provisions suffer the same flaws as the rule at issue in *Matal* and are likewise viewpoint discriminatory.[11]

[11] The "respect" and "negative information" provisions also discriminate based on the identity of the speaker. A football player could post something like B.L.'s Snap without being kicked off the football team. And a student in Interact Club—a service club that B.L. participated in that serves meals to elderly people, similar to

B. The "Respect" and "Negative Information" Provisions Are Vague and "Incapable of Reasoned Application"

The record makes clear that determining whether speech violates the "respect" and "negative information" provisions is an extremely subjective exercise and that the coaches do not have any guidelines that would help them—let alone anyone else, including their students—predict what speech will violate these provisions and what speech will not. Stmt. Facts ¶¶ 21–31. According to the coaches, saying, "I don't really like cheerleading that much anymore" would violate the "negative information" provision, but criticizing the selection process for cheerleaders, or observing that cheerleaders are at high risk for eating disorders, would not. *Id.* ¶¶ 27–29.[12] There is no discernible principle to make sense of these outcomes, and Ms. Luchetta-Rump struggled to explain her thinking. *See id.* ¶¶ 27–28.

Meals on Wheels—could post something like B.L.'s Snap without having the privilege of participating in Interact Club stripped from them. The fact that the District's rules treat similar—or even identical—speech differently depending on the identity of the speaker is evidence of viewpoint discrimination. *Pittsburgh League of Young Voters Educ. Fund*, 653 F.3d at 297–98.

[12] Notably, the District changed its mind as to whether B.L. separately violated the "respect" provision when she questioned the selection process by commenting on the fact that she had been told she had to do a year of JV before making varsity but another cheerleader made varsity as a freshman. *See* Stmt. Facts. ¶ 29 & n.2. This demonstrates the vagueness of the provision and difficulty of applying it consistently or predictably.

In a long line of cases stretching back decades, courts have struck down regulations of speech on the ground that they were vague and therefore vested officials with too much discretion to decide how to censor speech.[13] This is because "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). As the Third Circuit has observed, indeterminate, content-based regulation of speech "'may authorize and even encourage arbitrary and discriminatory enforcement' by failing to 'establish minimal guidelines to govern . . . enforcement.'" *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 246 (3d Cir. 2002) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

The Supreme Court's recent decision in *Minnesota Voters Alliance v. Mansky* sheds further light on the First Amendment vagueness doctrine. In that case, the Court struck down on First Amendment grounds a Minnesota statute

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[13] *E.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 537–38 (1981) (Brennan, J., concurring) (observing that "[a]ccording such wide discretion to city officials to control the free exercise of First Amendment rights is precisely what has consistently troubled this Court in a long line of cases") (collecting cases); *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998) ("The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors." (citation omitted)).

prohibiting the wearing of a "political badge, political button, or other political insignia" in a polling place. *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1883 (June 14, 2018) (quoting Minn. Stat. § 211B.11(1) (2017)). The Court held that this provision was "not capable of reasoned application," *id.* at 1892, as demonstrated by the plain text of the statute and Minnesota's inability to articulate any principled way of interpreting and applying it. The Court observed:

> [The statute] does not define the term 'political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs," Webster's Third New International Dictionary 1755 (2002), or anything "[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state," American Heritage Dictionary 1401 (3d ed. 1996).

Id. at 1888; *see also id.* ("Under a literal reading of [the dictionary definitions of 'political,'] a button or T-shirt merely imploring others to 'Vote!' could qualify.").

Here, the "negative information" and "disrespect" provisions can undoubtedly encompass even more speech than the ban on "political" speech that the Supreme Court struck down as unconstitutionally vague in *Mansky*. And the record does not reveal "any sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 138 S. Ct. at 1888. The provisions are thus "not capable of reasoned application." *Id.* at 1892.

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court enter summary judgment in Plaintiff B.L.'s favor, against Defendant Mahanoy Area School District.

Dated: December 20, 2018

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of Local Rule 7.8(b), in that it does not exceed 5,000 words, exclusive of tables and certifications. According to the word count feature of Microsoft Word 2010, the body of this brief contains 4,504 words.

Dated: December 20, 2018

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