07-3885-CV

To Be Argued By:
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In The
United States Court of Appeals
FOR THE SECOND CIRCUIT

LAUREN DONINGER, P.P.A. as Guardian and Next Friend of AVERY DONINGER, a minor,
Plaintiff - Appellant,

v.

KARISSA NIEHOFF and PAULA SCHWARTZ
Defendants - Appellees,

AMERICAN CIVIL LIBERTIES UNION OF CT,
Amicus Curiae.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
(HON. MARK R. KRAVITZ, U.S. District Judge)

REPLY BRIEF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

DEFENDANTS' FACTUAL RECITATIONS DO NOT COMPORT WITH EITHER THE DISTRICT COURT'S FINDINGS, OR THE RECORD OF THIS CASE 1

I. THE DEFENDANTS' CLAIM THAT THE DISTRICT COURT "LACKS THE POWER TO GRANT INJUNCTIVE RELIEF" IS WITHOUT MERIT 6

II. THE PLAINTIFF HAS DEMONSTRATED A CLEAR OR SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS 8

III. PLAINTIFF DEMONSTRATED THAT HER FIRST AMENDMENT RIGHTS WERE VIOLATED BY THE DEFENDANTS 9

A. The Defendants Fail to Distinguish Relevant Decisions of this Court and the Supreme Court 9

B. The Defendants' Assertion of Actual Disruption is Belied By the Record 11

C. Assuming *Arguendo* That Avery's Blog Was Offensive to the Defendants, it Still Constituted Constitutionally Protected Speech 12

D. The Sixth and Ninth Circuit "Coach" Cases Do Not Support the Defendants' Claims 16

E. The Defendants Improperly Rely on "Good Citizenship" As Justification for Broad Censorship 20

F. The Defendants' Unpreserved Claim That Their Actions Can Be Justified On Independent Grounds Is Without Merit 22

IV. THE PLAINTIFF DEMONSTRATED SUCCESS ON HER EQUAL PROTECTION CLAIM 24

V. CONNECTICUT CONSTITUTIONAL CLAIM 24

CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL CASES

Adelphia Bus. Solutions Inc. v. Abnos, 482 F.3d 602 (2d. Cir. 2007) 23

Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) 1

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 9, 17

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 15

Cohen v. California, 403 U.S. 15 (1971) 15

Connick v. Meyers, 461 U.S. 138 (1983) 17, 18

F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) 12, 13

Frederick v. Morse, 551 U.S. ___, 127 S. Ct. 2618 (2007) 10

Gitlow v. New York, 268 U.S. 652 (1925) 22

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) 10, 15, 16, 19

Harris v. Diaz, 2004 U.S. Dist. LEXIS 25256, 2004 WL 2912888 (S.D.N.Y. December 14, 2004) 7

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 10

Lowery v. Euverard, 497 F.3d 584 (6th Cir. 2007) 17, 18, 19

Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006) 2

Mt. Health City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 23, 24

Paese v. Hartford Life Accident Insurance Co. , 449 F.3d 435 (2d Cir. 2006) 23

Pinard v. Clatsanie School District 6J, 467 F.3d 755 (9th Cir. 2006) ... 17,18

Schneider v. State, 308 U.S. 147 (1931) 20

Thomas v. Board of Ed., Granville Central School District,
607 F. 2d 1043 (2d Cir. 1979) 11

Tinker v. Des Moines Independent Community School District
393 U.S. 503 (1969) .... *passim*

Virginia v. Black, 538 U.S. 343 (2003) 15

Wisniewski v. Board of Education of the Weedsport Central
School District, 494 F. 3d 34 (2d Cir. 2007) 10, 11

STATE CASES

Lander v. Seaver, 32 Vt. 114 (1859) 21

State v. Pendergrass, 19 N.C. 365 (1837) 21

Wooster v. Sunderland, 27 Cal. App. 51 (Cal. App. 1st Dist. 1915) 21

FEDERAL RULES

Fed. R. Civ. Pro. 52 1

MISCELLANEOUS

Charles Dickens, *David Copperfield* (Bradbury & Evans, 1850) 22

IRCA webpage, http://www.fosi.org/irca/ 14

MSN ENCARTA DICTIONARY, htttp://encarta.msn.comencnet/features/
dictionary/dictionaryhome.aspx 14

ARGUMENT

_____The plaintiff, Lauren Doninger, hereby responds to the defendants' arguments set forth in their brief.

DEFENDANTS' FACTUAL RECITATIONS DO NOT COMPORT WITH EITHER THE DISTRICT COURT'S FINDINGS, OR THE RECORD OF THIS CASE.

At the outset, the plaintiff and defendants Schwartz and Niehoff apparently disagree on the standard of review from the denial of a preliminary injunction. While the plaintiff did identify the "abuse of discretion standard" as the proper level for this Court's review, Plaintiff's Brief ("Pl. Br.") p. 17, she also noted this Court's additional requirement that when an appellant seeks "vindication of rights protected under the First Amendment, [the Court is] required to make an independent examination of the record as a whole without deference to the factual findings of the trial court. . . . Such a 'fresh examination of crucial facts' is necessary even in the face of the 'clearly erroneous' standard of factual review . . . ." *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) (internal citations omitted), *cert. denied*, 520 U.S. 1251 (1997). The defendants refuse to recognize *Bery's* requirement, suggesting, instead, that the contradiction between Fed. R. Civ. Pro. 52 and independent appellate review in first amendment cases "is more apparent than real . . .." Def. Br. p. 25 n. 4. Nevertheless, this Court continues to recognize *Bery's* significance, characterizing it as being "at the forefront of the law concerning First Amendment protection for the sale of 'expressive

merchandise.'" *Mastrovincenzo v. City of New York*, 435 F.3d 78, 93 n. 10 (2d Cir. 2006). Therefore the plaintiff urges this court to conduct a thorough review of the entire district court record.

In any event, the defendants here do not practice what they preach, often disregarding key factual findings with which they disagree. The fact recitation in defendants' brief is replete with misrepresentations and assertions that are either without support in the record, or were rejected by the district court. For example, although the district court made no findings that Avery's blog caused disruption at the school, or even created the foreseeability or likelihood of such disruption,[1] plaintiff counts 24 occasions where the defendants state that Avery's blog (or the April 24th e-mail) was disruptive. In fact, no evidence exists that the blog resulted in a community or student reaction that required any response by school officials whatsoever. As Judge Kravitz found, quoting from an e-mail sent by Niehoff to the plaintiff, "Avery received a [punitive] consequence because she posted the extremely disrespectful blog . . .." Pl. Exh. 15(J.A. 41). There is no suggestion that the sanctions were due to any disruption of the school or inconvenience to the defendants' schedule. Therefore, it is entirely baseless for the defendants to argue

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[1] The district court found that although the defendants received phone calls and e-mails regarding Jamfest on April 25, 2007 "it is unclear which of those communications, *if any*, resulted from Avery's blog." J.A. 38. As the defendants repeatedly claim that the district court's factual findings are entitled to due deference, see Defendants' Brief (Def. Br.) at p. 25, it is inexplicable how they can ask this Court to ignore this crucial fact.

that Avery's blog was disruptive.

Moreover, the litany of so-called inconveniences set forth by the defendants in their brief at pp. 10-11 – assembly of students outside the principal's office, the decision to call Avery and other students away from class or a field trip to attend a meeting, Superintendent Schwartz's late arrival at a statewide conference, Principal Niehoff's decision to reschedule a teacher evaluation, fielding of phone calls and e-mails from taxpayers – are not connected with Avery's blog, and any voluntary choices made by the defendants to alter their schedules cannot under any theory constitute "substantial disruption" of the educational environment.

Inexplicably, the defendants claim that the plaintiff has not argued that any of the findings or conclusions by the district court are erroneous. Def. Br p. 25. Of course, many of the findings are not in dispute. Some, however, are, and have been noted in the plaintiff's brief, at pp. 13-15. In particular, the plaintiff disputes the findings that the internet blog was "school speech" because it was "reasonably foreseeable" that Schwartz would become aware of it and because it was "purposely designed by Avery to come onto the campus." Both of these findings are without factual basis in the record. The court held that "several" students posted comments to the blog. J.A. 37. However, there were only three postings, through May 15, 2007, when Niehoff printed them. Tr. 110; Pl. Exh. 2 (J.A. 66-68). Ironically, only the posting that referred to Schwartz as a "dirty whore" was identified as coming from a Lewis Mills High School student, and that individual

subsequently received an award that lauded her good citizenship. Tr. 110, 112.

As the plaintiff also explained in her original brief, the finding that the blog violated a clear "school policy of civility and cooperative conflict resolution" is without factual support in the record. The relevant portion of the student handbook is found in Plaintiff's Exhibit 10, and identifies "objectives" for the elected representatives of *Student Council* – not class officers. J.A. 81. Among those *objectives for Student Council* are the following: to "maintain a continuous communication channel from students to both faculty and administration;" to "offer a year-long program of social functions and community involvement project for the students;" and to "[d]irect students in the duties and responsibilities of good citizenship, using the *school environment as the primary training ground."* Id.. (emphasis supplied). Nothing suggests that these objectives apply to communications, speech or writings that occur outside the "school environment" at home, or are posted from home to the internet. The defendants took no action against Avery as an elected student council representative, even though "Jamfest" was a student council activity. Instead, they punished her as a class officer – something that had nothing to do with student council or "Jamfest." This demonstrated that the defendants' purpose was to humiliate Avery in a grandiose and public way for her "disrespectful" speech; not to "direct" or "train" her in good citizenship.

In addition, the school district's Policy No. 6145 pertaining to "eligibility to

represent the school" states that students elected to student offices "shall have and maintain good citizenship records." Def. Exh. J (J.A. 160). This term is not defined or explained anywhere, nor was it disclosed to the plaintiff as a justification for the action taken. The absurdity of the defendants' argument is set forth in the excerpt of Niehoff's cross-examination found in the Joint Appendix. Niehoff admits that the definition of "good citizenship" is "right there" in the policy, meaning that it is not defined further. Moreover, she states that even if Avery had replaced the word "douchebags" with terms such as "jerks," "meanies," "blankety-blanks," or used asterisks or "expletive deleted, " Avery would still fail her test for "good citizenship." J.A. 210-211. The mere fact that Niehoff and Schwartz, over objection, offered their own self-serving opinions on the meaning of "good citizenship"is irrelevant and deserving of no deferential "finding" of fact. There are probably hundreds of differing views on what "good citizenship" means.

Further, as the plaintiff set forth in her original brief, the district court, again without a factual basis, suggested that "several LMHS students" posted comments on the blog. J.A. 37. In fact, the uncontested evidence shows that only three persons total responded to the blog, and only one of these was identified as a student. One of the three was anonymous. Pl. Exh. 2 (J.A. 66-68); Tr. 110.

Finally, the defendants falsely argue that Avery's blog was "false" because it stated that "Jamfest is cancelled." Def. Br. p. 16. The district court held that "Avery strongly suggested in her email [sic] that Jamfest had been cancelled, full

stop . . ..” which “was at best misleading, and at worst, entirely false.” J.A. 50-51. Of course, the blog is in evidence and speaks for itself. The defendants’ characterization of its message is, itself, false, since the interpretation comes down to a matter of semantics.

One must look at the events as they unfolded and existed on April 24, 2007: Students were informed that “Jamfest” could not take place in the auditorium, and the offer of the cafeteria, as an alternative venue, was unacceptable to the performers due to the acoustics. Tr. pp. 79-80, 93-95, 258 . The student council advisor, Jennifer Hill, testified that due to the few available dates remaining in the school year, she perceived a real danger that “Jamfest” would be cancelled altogether. Tr. pp. 477-78. Moreover, Avery’s posting specifically held open the “slight[ ] chance” that “Jamfest” could be rescheduled some time after May 18, 2007. J.A. 68. In fact, T.F., the drafter of the April 24, 2007 e-mail and the current secretary of student council, testified to his belief that “Jamfest” “would be canceled [sic] at least for [April] 28th” if students were not allowed to use the auditorium. J.A. 154. Finally, the evidence remains *undisputed* that the event was, in fact, cancelled for April 28, but rescheduled the next day for June 8.

I THE DEFENDANTS’ CLAIM THAT THE DISTRICT COURT “LACKS THE POWER TO GRANT INJUNCTIVE RELIEF” IS WITHOUT MERIT.

Raising an issue for the first time on appeal, the defendants erroneously claim that issuing an injunction to “void” an election “simply cannot be done”

because another student was "duly elected in a school election that was never challenged." Def. Br. p. 21. They also claim that this other student "has a right to keep her duly elected position." *Id*. This, of course, is a specious argument because the undisputed evidence demonstrates that Avery, in fact, won the election, as a write-in candidate, even if her name was wrongfully removed from the ballot. As the defendants concede that she received the most votes, and failed to raise this jurisdictional issue in the district court, their claim has no merit.

In *Harris v. Diaz*, 2004 U.S. Dist. LEXIS 25256, 2004 WL 2912888 (S.D.N.Y. December 14, 2004), cited by defendants, the court dismissed a voter's challenge to a state senator election on mootness and federalism grounds, because the voter bypassed adequate remedies under New York's Election Law. The voter claimed that the candidate was not qualified because he was not a resident of the district. Because the district court held that the voter had a reasonable opportunity under state law to challenge the candidacy based upon residency, both before and after the election, it dismissed the case. *Id*. at *14-15.

While *Harris* is otherwise inapposite because this case involves speech-based disqualification and not technical requirements for office (e.g. whether Avery Doninger was either a student or a member of the Class of 2008), the defendants ignore the undisputed fact, both conceded by the defendants and found by Judge Kravitz, that Avery actually won the election for class secretary, but was prohibited from holding that office solely due to her speech. Thus, the fact that

the defendants have installed a "pretender" to the office of Class Secretary – the second-place candidate – should hold no concern to this Court. In any event, the defendants concede that Avery agreed to share the title of Class Secretary with the second-place candidate,[2] provided she be given the opportunity to deliver a speech and commencement address to which she was otherwise entitled.

The defendants also claim that the plaintiff's claim is moot because she failed to seek judicial relief before the election occurred. The defendants, however waited until seven days before the student elections – May 17th – to ban Avery from the contest, and then sent misleading, if not deliberately deceptive, e-mails to the plaintiff as late as two days before the May 25th vote, suggesting that they would "revisit" the issue at a meeting. See, Plaintiff's Exhibits 8, 9, 11, 12 (J.A. 79-80, 85-87). Indeed, Defendant Schwartz did not inform the plaintiff that the decision was final and "not negotiable" until June 11, 2007– more than two weeks after the "rigged" election results were announced. Pl. Exh. # 22 (J.A. 102). Therefore, the defendants' claim of mootness here borders on the frivolousness.

II. THE PLAINTIFF HAS DEMONSTRATED A CLEAR OR SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

The plaintiff and the defendant agree on the standards for injunctive relief in

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[2]Coincidentally, as precedent, the plaintiff presented evidence that the plaintiff's brother was the co-president of the Class of 2007. Pl. Exh. 29 (J.A. 125-126)

this case. It was enunciated in the Plaintiff's Brief at pp. 17-18. The defendants, however, continue their erroneous assertion that another student was the "duly-elected Senior Class Secretary." Def. Br. p. 24. Since the facts show that Avery won the election, despite her unconstitutional ban from the ballot, the defendants' unsupported claim to the contrary defies logic. *See* Section I, *supra*.

III. PLAINTIFF DEMONSTRATED THAT HER FIRST AMENDMENT RIGHTS WERE VIOLATED BY THE DEFENDANTS.

A. The Defendants Fail to Distinguish Relevant Decisions of this Court and the Supreme Court.

The defendants' review of cases from this Court and the Supreme Court addressing the first amendment rights of students, is seriously flawed and disingenuous. The defendants ignore the central holding in each of these important cases, and conflate the issues presented. This suggests that the defendants lack a basis understanding of the first amendment rights of students. Most importantly, they fail to grasp that their power over "offensive" student speech is limited to "[t]he determination of what manner of speech *in the classroom or in school assembly* is inappropriate . . .." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)(emphasis supplied). Thus they make the same unprecedented leap into blanket censorship that the district court made below, without explaining why this Court should follow suit.

For example, in discussing the same four Supreme Court cases on student speech analyzed by the plaintiff and the district court, the defendants ignore one

overriding principle: Student speech is analyzed under narrower standards "in light of the special characteristics *of the school environment*." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (emphasis supplied), *quoting Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Therefore, what may be subject to censorship in school is quantitatively and qualitatively different from similar enforcement outside the school community. Thus, the defendants' reliance on *Frederick v. Morse*, 551 U.S. ___, 127 S.Ct. 2618 (2007), affirming disciplinary action against a student who unfurled his "Bong Hits for Jesus" banner, is deficient because they fail to acknowledge that if Fraser displayed his message "in a public forum outside the school context, it would have been protected [speech]." *Id*. at 2622. Even the defendants' "distilled" lessons from *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006), set forth at page 29 of their brief, fail to concede the requirement of a campus nexus that allows school officials to assert authority over student speech, because "a school may not regulate student expression unless the regulation may be 'justified by a showing that the student['s speech] would materially and substantially disrupt the work or discipline of the school.'" *Id.* at 325.

Defendants' explanation of *Wisniewski v. Board of Education of the Weedsport Central School District*, 494 F.3d 34 (2d Cir. 2007), is incomplete, at they ignore a central holding of the case; *id*. at 39; that Wisniewski's instant

message icon *not only* reached the campus, but was likely to cause a *"substantial disruption within the school environment"* (and did so) – requiring application of the *Tinker* framework. The defendants discuss only the first prong of *Wisniewski* – the "reasonable foreseeability" of the communication coming to the attention of school authorities. Def. Br. p. 33. The plaintiff certainly concedes that in the twenty-first century, *any* electronic posting on *any* subject *might* reach school officials, particularly when a school administrator asks her adult son to troll the internet looking for her name. This does not, however, give school officials the power of censorship for communications they find offensive. In fact, this is no different than predicting that a satirical off-campus newspaper might reach school administrators – speech that is clearly beyond the reach of a principal's disciplinary powers. *See Thomas v. Board of Ed., Granville Central School District,* 607 F.2d 1043 (2d Cir. 1979).[3] Therefore, the *Tinker* disruption component is a critical finding that is not only glaringly absent from the facts of this case, but, alas, from the defendants' analysis, as well.

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[3] In their brief, the defendants make only two references to *Thomas, supra*, and both quote only from the concurring opinion of Judge Newman. They make no effort to either acknowledge this seminal precedent or distinguish its holding. Even if *Wisniewski, supra*, displaced and overruled *Thomas,* a position seemingly at odds with footnote 4 of Judge Newman's opinion, the failure of the defendants to address the "disruption" prong of *Wisniewski* dooms their claim.

B. The Defendants' Assertion of Actual Disruption is Belied By the Record.

The defendants further claim that the need to question Avery and the other student council leaders about their April 24th e-mail is some evidence of the blog's disruptive impact on the school is particularly specious. See footnote 1, *supra.* Since the defendants did not learn about the livejournal.com posting until weeks later, and then waited eight more days to discuss it with Avery, their claim – in contravention of the district court finding – that it caused disruption is just patently false, providing no basis to justify discipline. See *Amicus* Brief of the Center for First Amendment Rights, Inc. (hereinafter "CFAR") at pp. 17-19. Moreover, the defendants misstate the record when they claim that the blog was "extensively distributed" and that "certainly more than fifteen people read" it. Def. Br. pp. 34-35. No evidence supports these assertions at all. Only *three* people were known to have viewed the posting. Pl. Exh. 2 (J.A. 67). The defendants' reference to page 56 of its supplemental appendix fails to support their contrary claim.

C. Assuming *Arguendo* that Avery's Blog was Offensive to the Defendants, it Still Constituted Constitutionally Protected Speech.

The defendants also argue that the use of the term "douchebags" was "unquestionably vulgar," citing to the on-line MSN ENCARTA Dictionary; Def. Br. p. 36. They then conclude, citing *F.C.C. v. Pacifica Foundation*, 438 U.S.

726, 746 (1978), that "Avery's vulgar speech is not protected by the First Amendment." Def. Br. p. 38. Once again, the defendants fail to grasp the heightened constitutional protection given to impolite words – even obscenity – in the course of communication. They fail to distinguish between the broadcast industry regulations examined in *Pacifica* and written journals created by individuals. While the plaintiff assumes *arguendo* that the term "douchebags" may be offensive or even "inappropriate" in certain contexts, and that Schwartz was offended by the reference, that does not lessen the importance or constitutional protection of Avery's blog; nor does it diminish the role of the plaintiff as parent in deciding what – if any – consequences would befall her daughter for typing it.

First, the plaintiff rejects the characterization that Avery's posting – including the use of the term "douchebags" – was inherently "vulgar." The term regularly appears in prime-time network television shows. To be sure, the defendants cite to the on-line ENCARTA Dictionary as its source for the proposition that the term is "highly offensive" and "taboo." Def. Br. p. 36. What the defendants neglect to mention is that the ENCARTA website is a resource *for school children*. Its website content policy states, in relevant part:

> Encarta takes seriously its responsibilities both to encourage learning and to respect the role of parents in their children's education. We have rated our dictionary content according to the guidelines of the Internet Content Rating Association (ICRA). You can set your Internet browser to help block potentially objectionable material,

including dictionary entries that may be considered offensive.

http://encarta.msn.com/encnet/features/dictionary/dictionaryhome.aspx.

The aforementioned ICRA, in turn, is an organization geared towards *children's* access to the internet:

> ICRA (formerly the Internet Content Rating Association) is part of the Family Online Safety Institute, an international, non-profit organization of internet leaders working to develop a safer internet. . . ICRA has long believed that self-regulation leads to the best balance between the free flow of digital content and *protecting children from potentially harmful material*.
> Users, *especially parents of young children*, can then use filtering software to allow or disallow access to web sites based on the information declared in the label. A key point is that ICRA does not rate internet content - the content providers do that, using the ICRA labeling [sic] system. ICRA makes no value judgement about sites.

http://www.fosi.org/irca/ (emphasis supplied).

Thus, the defendants' reference choice hardly qualifies as authoritative on the subject of vulgarity, and certainly does not apply either to Livejournal.com's website or to Avery's specific posting from home. Moreover, defendants ignore the fact that a primary purpose of ENCARTA as an on-line resource is to "respect the role of parents in their children's education" – something lacking in their

actions toward Avery in this case.[4]

Anticipating the defendants' instant argument, the plaintiff set forth in her original brief, at pages 24-27, how Avery's internet blog was a political message designed to address the use of taxpayer-funded facilities and to rally public support by asking citizens to contact public officials. The blog, therefore, occupies the "highest rung of the hierarchy of First Amendment values. Yet, its political nature is *only* relevant because it is at the core of what the First Amendment was designed to protect; *Virginia v. Black*, 538 U.S. 343, 365 (2003); and its censorship deserves more scrutiny, perhaps, than other more mundane types of student speech. However, even if the Court were to conclude, to the contrary, that Avery's speech was not political in nature, the outcome here would be the same under *Guiles, supra,* 461 F.3d at 326 (rejecting notion that student's speech must address a matter of public concern in order to merit First Amendment protection and noting that "*Tinker* applies to all non-school-sponsored student

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[4] The defendants' reliance on a New York Times editorial as proof that the term "douche bag" is "vulgar," not only misses the point made in the editorial about the sanctity of speech, but is otherwise irrelevant to the instant analysis. Whether or not calling someone a "douche bag" during a heated argument might constitute "fighting words" (which fall outside first amendment protection under *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), this is clearly different than using a pejorative term to describe unidentified officials as part of a broader on-line posting seeking public reaction to an official's decision. *See, e.g. Cohen v. California*, 403 U.S. 15 (1971) (upholding the right of citizen to wear "Fuck the Draft" shirt in public area as a political statement, despite the high likelihood that the term will offend most citizens).

speech that is not [within the *Tinker* prohibitions]." *See*, *also*, CFAR Br. pp. 15-16. In any event, the defendants fail to address the *Guiles* Court's judicial limitation on – and the inability to give a "precise definition" of – what constitutes "plainly offensive" and "vulgar" language. Id. at 327. See also Pl. Br. pp. 43-44.

As *Amicus* CFAR argues, school officials could conceivably cross the campus boundary and reach into the plaintiff's home "only if the non-disruptive, off-campus vulgarity undermined the school's educational mission" – which necessarily ends at "the schoolhouse gate." CFAR Br., p. 13. The defendants' bold and unconstitutional reach into Avery's bedroom to censor and punish her for a written communication, is likely to cause (and may have already caused) a chill to countless other students, who will fear punishment for what they say or write outside school, because some priggish and thin-skinned school official may deem it "offensive." As *Amicus* Thomas Jefferson Center for the Protection of Free Expression (hereinafter "TJC") aptly notes, "The potential reach of such a concept seems virtually limitless. Every off-campus or underground newspaper or

magazine would seem equally vulnerable to school sanctions." TJC Brief, p. 11.[5]

D. The Sixth and Ninth Circuit "Coach" Cases Do Not Support the Defendants' Claims.

Next, the defendants make a peculiar argument and try to engraft a "public concern" argument on all student speech, based upon a pair of decisions – from the Sixth and Ninth Circuits, respectively – involving the relationship between school athletic team members and their coaches. The defendants misapply these holdings, and overstate their relevance to the plaintiff's case. *Pinard v. Clatsanie School Dist. 6J*, 467 F.3d 755 (9th Cir. 2006) involved a varsity high school basketball team's signed petition asking for their coach to be replaced, and their subsequent refusal to play in a scheduled game. *Id.* at 559-61. *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007) involved a petition by high school football players demanding that their coach be fired, and declaring their refusal to play for him if he remained. *Id.* at 585-86.

Although the Ninth Circuit acknowledged in *Pinard* that the students'

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[5] A plausible scenario suggested here by plaintiff illustrates the untenable nature of defendants' position. Conceivably, under the authority they proclaim, another student could lose her student council seat if the principal overheard her uttering an offensive word in the school parking lot. The defendants might even have a stronger argument because that speech occurred on campus. However, that position is not consistent with prior precedent. Unlike the captured audience in attendance during the assembly in *Fraser, supra*, public school officials cannot take random disciplinary action against students because they over hear some offensive words, even on campus outside of class or the auditorium, without running afoul of the first amendment. Otherwise any student could be targeted arbitrarily for discipline.

petition constituted first amendment activity, it found that the refusal to play in a scheduled game was sufficiently disruptive under the *Tinker* standard to allow for the students' suspension from the team. *Id.* at 768-70. Along the way, the Ninth Circuit rejected the district court's efforts to import a "public concern" analysis for student speech from the arena of public employment, specifically refusing to apply *Connick v. Meyers*, 461 U.S. 138, 149 (1983) to high school students. *Pinard, supra*, 467 F.3d at 765-67.[6] Similarly, in *Lowery, supra*, the Sixth Circuit found that the level of insubordination by team members challenged the coach's ability to effectively supervise the program, and that the resultant disruption of the special coach-player relationship was substantial enough so as not to run afoul of the first amendment. *Id*. at 600-01. The majority concluded that the students' petition would undermine the coach's authority and "sow disunity on the football team," utilizing the *Connick* model by analogy. *Id.* at 600. The *Lowery* majority, however, emphasized that it was not placing a "public concern" test on student speech. *Id.* at 598 n. 5. One judge refused to join the majority opinion, because of his opposition to the *Connick v. Meyers* analysis and the absence of disruption to

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[6] Although the defendants argue that Avery's participation in student government "can be analogized to the situation of a public employee," Def. Br p. 54, the analogy has no merit. The defendants have failed even to suggest how students in general, or elected student leaders in particular, have the same functional relationship with the superintendent of schools, as athletes have with their coaches. See Pl. Br. pp. 46-47; CFAR Br. pp. 16. The evidence of prior contact between the superintendent and Avery Doninger is non-existent.

the school. See *Lowery, supra*, 497 F.3d at 601-03 (Gillman, J. concurring).[7]

As the plaintiff notes, neither this Court nor the Supreme Court has ever suggested that a political or "public concern" standard applies to student speech – whether on or off campus. Indeed, *Guiles* suggests that it does not. Moreover, *Tinker* recognizes that personal intercommunication is an important part of the educational process, which schools must accommodate; *Tinker,* 393 U.S. at 511-12; and students may express their opinions, political in nature or not, as long as such expression does not materially or substantially interfere with pedagogical interests or class time. *Id.* at 512-13. As the school district champion a broad first amendment policy "to recognize and protect the rights of student expression" balanced only against the "orderly and efficient educational process and of a school environment suitable for the healthy growth and development of all students" to the exclusion of any other interests, Pl. Exh. 30 (J.A. 127), it would be inappropriate to engraft a "public concern" exception here, even if the plaintiff's statement was not political and had in fact occurred on campus. See footnote 5, *supra*.

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[7] Even under the *Lowery* standard, Avery's act did not amount to insubordination which challenged the superintendent's ability to do her job. All she did was draw some attention to an issue about which parents and taxpayers may wish to have a say – admittedly in a crude fashion. The defendants admit that part of their responsibility as public school administrators is to field issues from concerned parents and taxpayers, and the evidence fails to show that a single inquiry was attributable to Avery's blog..

E. The Defendants Improperly Rely on "Good Citizenship" as Justification for Broad Censorship.

The defendants next claim that they could censor and sanction Avery for her internet speech because it violated their "good citizenship" policy. Def. Br. pp. 42-50. The plaintiff and *amici curiae* have previously addressed this aspect of the district court claim in some detail, including the vagueness of the "good citizenship" standard; the fact that Avery's belief on April 24th about the cancellation of Jamfest – at least for April 28th – was essentially true, and that, in any event, vague "good citizenship" values can never be used as an excuse to censor off-campus speech. The plaintiff will not repeat her reply here.

Nevertheless certain points raised by the defendants at this juncture require a response.

First, the defendants – and the district court – rely on the fact that other students who testified – and the plaintiff in an e-mail – suggested that the use of the term "douchebag" in Avery's blog was, at least, "inappropriate." Their view is irrelevant on whether its use was, nevertheless, protected by the first amendment. Avery's internet blog is not subject to a *post hoc* public opinion poll to determine whether others would say the same thing under the same circumstances – particularly in light of the very public and severe punishment to which Avery was subjected. It is also not relevant whether the plaintiff, herself, thought it was improper. The only question, as far as she is concerned, is whether the defendants

had any right at all to take action against Avery for what she wrote. The answer is plainly that they did not.

Second, the defendants curiously rely on cases as old as 170 years to justify restrictions on the speech rights of public school students in order to pursue "the inculcation of the values of good citizenship and civility . ..." Def. Br. pp. 48-49. The facts in these cases are shocking, and reveal defendants' complete lack of understanding for the rights of students as they now exist. The first case, *State v. Pendergrass*, 19 N.C. 365, 366 (1837) involved physical abuse of a 6- or 7-year-old girl by a schoolmaster, who whipped her with a switch for being disobedient, that left marks on her body visible for two days. The second case, *Lander v. Seaver*, 32 Vt. 114, 115 (1859), involved a 11-year-old boy who was severely beaten at his home with a piece of rawhide by a schoolmaster after the boy called the schoolmaster "Old Jack Seaver" as he walked by the family farm. In that case, the Vermont Supreme Court affirmed a judgment against the schoolmaster because he had no right to come to the boy's home and assault him in that manner. The third case, *Wooster v. Sunderland*, 27 Cal. App. 51, 55 (Cal. App. 1st Dist. 1915) involved a student's expulsion, after he made "somewhat caustic" remarks at a student assembly about the unsafe nature of the school building, and convinced the student body to call on the board of education to approve school construction bonds, and for criticizing the board for an earlier ban on an annual (but apparently dangerous) student event called "donkey fight." *Id*. at 52-53. When summoned to

appear before the board and told to apologize, he refused, and was thereafter expelled. The court affirmed the expulsion.

While these defendants may long for the "good old days" of cruel and authoritarian Dickensian schoolmasters, like Mr. Creakle,[8] who punished impudence and protest by pupils – even small children – with physical abuse, deprivation or expulsion, and who believed they could act with impunity, the defendants here do not recognize the irony of relying on cases that pre-date the development of the incorporation of the first amendment into the concept of ordered liberty under the fourteenth amendment. Indeed, two of these cases pre-date the passage of the fourteenth amendment by decades! It was not until the twentieth century that the Supreme Court applied first amendment doctrine to the states. *See, e.g. Schneider v. State*, 308 U.S. 147, 160 (1931) (Court holds that first amendment applies to states); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Court "assumes" that first amendment freedom of speech and press are among the fundamental personal rights and liberties protected by the due process clause from impairment by the states).

F. The Defendants' Unpreserved Claim that Their Actions Can Be Justified on Independent Grounds is Without Merit.

The defendants also argue, for the first time on appeal, that even if Avery's constitutionally protected speech was a substantial or motivating factor in the

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[8]Charles Dickens, *David Copperfield* (Bradbury & Evans, 1850)

defendants' punitive sanctions, the action was "independently justified" on other grounds. Def. Br. p. 56. This claim lacks merit.

The defendants cite *Mt. Health City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274 (1977) for their eleventh hour claim. This Court normally will refuse to consider claims not raised in the district court. *Adelphia Bus. Solutions Inc. v. Abnos,* 482 F. 3d 602, 607 (2d. Cir. 2007); *Paese v. Hartford Life Accident Ins. Co.* , 449 F. 3d 435, 446 (2d Cir. 2006). Not only is the record devoid of any evidence to support alternative grounds, but it directly contradicts Niehoff's June 3, 2007 e-mail to the plaintiff that "Avery received [a punitive] consequence because she posted the extremely disrespectful blog . . .." Pl. Exh. 15 (J.A. 92). It also contradicts the district court's conclusion that Avery was "punished . . . for the manner in which she . . . chose to express [her] disagreement" with school administrators. J.A. 60. Thus, the court expressly acknowledged that the sanction was imposed due to Avery's expression. The entire injunction hearing revolved around the defendants' claim that they were justified in censoring and punishing Avery for the blog. Surely, the defendants, as public school officials, are not now suggesting that they could deliberately mislead the parent of a student concerning the reasons for school discipline, in order to avoid a possible adverse court ruling.

Any effort by the defendants to shift the grounds for their unconstitutional behavior at this late date is disingenuous, lacks credibility, and should be rejected. Even if this Court were to entertain such a pretextual argument, it would require

the development of a record where the defendants would have the burden of demonstrating that "independent grounds for discipline," Def. Br. p. 57, existed under *Doyle, supra*.

IV. THE PLAINTIFF DEMONSTRATED SUCCESS ON HER EQUAL PROTECTION CLAIM

In her opening brief, the plaintiff claimed that Avery was singled out for punishment and treated differently because of her protected speech. As noted in the previous section, even the district court conceded that Avery was punished "for the manner in which she . . . chose to express [her] disagreement" with the defendants. J.A. 60. The district court failed to analyze the plaintiff's claim under first amendment jurisprudence. The defendants likewise ignore the plaintiff's claim, again shifting the theory of the case by claiming that Avery's words attempted to "mislead" and "incit[e]" the public. Def. Br. p. 58. This arguments lack merit.

Defendant Niehoff wrote to the plaintiff that Avery's sanction was due to the publication of her "disrespectful" blog. As both motive and cause are admitted by the defendants, the plaintiff must prevail on her equal protection claim, as long as the on-line communication constituted constitutionally protected speech.

V. PLAINTIFF'S CONNECTICUT CONSTITUTIONAL CLAIM.

Finally, while the defendants correctly note that Connecticut appellate courts have not, to date, enlarged the Connecticut Constitutional protections of

speech for students beyond the parameters previously announced by the United States Supreme Court, Def. Br. pp. 59-60, that is not the end of the inquiry. If this Court should find, contrary to its own precedents and those of the United States Supreme Court, that the defendants' actions did not violate Avery's first amendment rights, then the plaintiff still requests that the matter be certified to the Connecticut Supreme Court because of the importance of the issue.

CONCLUSION

For the foregoing reasons, for the reasons set forth in plaintiff's original brief, as well as for all the reasons set forth in the briefs of *amici curiae*, the plaintiff respectfully requests that this Court reverse the decision of the district court.

THE PLAINTIFF-APPELLANT,
LAUREN DONINGER, P.P.A., as Guardian and Next Friend of AVERY DONINGER, a minor

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