No. 19-1842

OARDS ASSOCIATION ,
PENNSYLVANIA PRINCIPALS ASSOCIATION , NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS , NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS , AND AASA, THE SUPERINTENDENTS ASSOCIATION
IN SUPPORT OF MAHONEY AREA SCHOOL DISTRICT

Francisco M. Negrón, Jr., Chief Legal Officer*
National School Boards Association
1680 Duke Street, FL2
Alexandria, VA 22314
(703) 838-6722

*Counsel of Record
Attorney for *Amici Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, no *Amicus* issues stock or is a subsidiary or affiliate of any publicly owned corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES:

shaping the long-term impact of school improvement efforts. As the national representative for its members at the federal level, NAESP supports, through legislation and *amicus curiae* briefs, school leaders' autonomy to ensure a strong school culture, which includes the enforcement of rules around extracurricular activities.

The National Association of Secondary School Principal (NASSP) is the leading organization of and voice for principals and other school leaders. Reflecting its long-standing commitment to student leadership development, NASSP administers the National Honor Societies and National Student Council. NASSP values student activities and feels that they are a critical component of a student's education, but school leaders must be able to establish reasonable requirements for a student's participation in them. School leaders must also have the ability to place reasonable limitations on student behavior, including student speech.

AASA, The School Superintendents Association represents more than 13,000 school system leaders and advocates for the highest quality public education for all students. Public school officials, including superintendents, rely on their ability to regulate student athletes' offensive and disrespectful speech that interferes with the school's mission in extracurricular activity participation, a practice recognized by an established body of law recognizing that students involved in extracurricular

activities may agree to be bound to a higher degree of regulation as a condition of participation.

This case directly impacts the ability of public school officials to effectively operate extracurricular programs that enrich the experience of students with special opportunities to lead and to learn teamwork, and that are a source of pride to entire communities. The decision below deviates from other case law recognizing school officials' authority to regulate student speech in the context of participation in extracurricular activities. If the District Court's decision is affirmed, public school officials in this circuit will have diminished authority to enforce extractedopdegu/MCID 0re9.5 ( )](c)3

acknowledge acceptance of them when they choose to participate. The District Court's decision to brush aside this tenet of public school jurisprudence should not be upheld. The nature and extent of a student's speech rights in this case must be weighed against the nature of the deprivation – removal from the cheer team. That deprivation simply does not invoke the protections applied in cases where a student has been excluded from his or her education for a period of time. It is crucial, therefore, that this Court take into account the nature of the deprivation here and the students' agreement to an elevated standard of behavior, so that school districts in the Third Circuit may continue to teach respectful behavior, build team morale, and inculcate the responsibilities of leadership for students who participate in extracurricular activities.

The District Court discounted these considerations and found that: (1) a high school student and her parents cannot legally make such commitments and follow a higher code of conduct without an arms-length transaction and the assistance of counsel if the effect would be to waive some degree of the student's expressive rights; and (2) conditioning participation on agreement to somewhat more limited expressive freedom is inherently coercive. Thus, the District Court has ruled that the Constitution prohibits a public school from saying to a student, in essence: "If you want to represent our school and be a member of this extracurricular team, you must promise you will not verbally attack the team or the school in public or do other

things that set a bad example, and if you break that promise you might not be permitted to continue as a member."

Amici urge the Court to adhere to precedent and to consider the ramifications to school leaders throughout this Circuit when it decides this case, and apply a standard recognizing the unique nature of participation in extracurricular activities.

ARGUMENT

I. COURTS RECOGNIZE PUBLIC SCHOOL OFFICIALS' AUTHORITY TO SET BEHAVIORAL STANDARDS AS A CONDITION OF PARTICIPATION IN EXTRACURRICULAR ACTIVITIES

It is widely recognized that public schools may impose behavioral standards for student participation in extracurricular activities. At middle and high schools throughout the nation, student-participants voluntarily agree to codes of conduct more stringent than the discipline codes that apply to their behavior during the school day. Student athletes, debaters, musicians, and robotics team members all understand that when they represent their school in competition or practice, they assume responsibility for respectful speech and sportsmanship during the competitions and practices themselves, and in their free time.

Coaches of many extracurricular activities warn their student-participants not to "trash talk" other teams, to drink, to do drugs, or to make a spectacle of themselves online, or risk losing the privilege of representative status for their schools. Whether these expectations appear in formal behavior contracts, codes of conduct, official

school policies, or informal team guidelines, student-participants understand that their positions on their school squads depend on good behavior. Numerous high school athletes have found themselves dismissed from school teams for after-hours shenanigans, and courts routinely support school officials' authority to do so. *See, e.g.*, *Smith v. Chippewa Falls Area Unified School Dist.*, 302 F.Supp.2d 953 (W.D. Wis. 2002) (student disqualified from interscholastic athletic competition for attending a party where alcohol was served); *Butler v. Oak Creek-Franklin School Dist.*, 116 F.Supp.2d 1038 (E.D. Wis. 2000) (student suspended from participation on athletic teams for the school year for violations of the school's athletic code); *Jordan v. O'Fallon Township High Sch. Dist.* 203, 302 Ill.App.3d 1070, 706 N.E.2d 137 (1999) (student barred from participating in interscholastic athletics as punishment for violating school's zero-tolerance drug and alcohol policy); *Palmer v. Merluzzi*, 689 F.Supp. 400 (D. N.J. 1988) (student suspended from participating in extracurricular events for 60 days for smoking marijuana and drinking beer on school property).

So, too, courts consistently acknowledge school officials' authority to impose behavioral standards as a condition of extracurricular participation. Because participation in extracurricular activities does not carry the weight of a property interest associated with attendance at public school, the scope of behavior schools may address is broader, and the level of due process required is much lower. *See*,

e.g., *Mears v. Bd. of Educ. of the Sterling Reg. High Sch. Dist*., No. 13–3154, 2014 WL 1309948 (D.N.J. Mar. 31, 2014) (student had no property interest in participation in school extracurricular activity); *Angstadt v. Midd-West Sch. Dist*., 286 F.Supp.2d 436 (M.D. Pa. 2003), *aff'd*, 377 F.3d 338 (3d Cir. 2004) (no fundamental constitutional right to participate or to compete in sports or extracurricular activities); *Marner v. Eufaula City Sch. Bd*., 204 F.Supp.2d 1318 (M.D. Ala. 2002) ("The priviirnepriprcprs pa02.1 (t(pr)-4i)-8.5 (pc)(pr)-4o s s sprsc.poTd[(()-4

The Sixth Circuit has recognized this point in a case where members of the football team circulated a petition against the coach. *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007). There, the Court found that students do not have a general constitutional right to participate in extracurricular athletics, observing that student speech arising

of First Amendment protection given to speech depends upon the context." *Lowery*, 497 F.3d at 587.

> This case is not primarily about Plaintiffs' right to express their opinions, but rather their alleged right to belong to the Jefferson County football team on their own terms. The specific question presented by this case is whether Plaintiffs had a right to remain on the football team after participating in a petition that stated 'I hate Coach Euvard [sic] and I don't want to play for him.'"

Id. at 589. In this case, we have a similar yet more profane statement, "fuck cheer," posted on Snapchat rather than circulated in a petition.

A. Extracurricular Coaches in Public Schools Must Be Able to Maintain Team Cohesion and Morale

Recognizing the educational value of hearing and evaluating competing viewpoints, courts recognize that students enjoy First Amendment freedom to express opinions in a variety of school contexts. But many courts have found that the unfettered freedom to speak profanely and disrespectfully in matters related to a school team, even off-campus, can be detrimental to a coach's efforts to develop and execute a strategy to build team cohesion, morale, and success, and thus are subject to greater school regulation. *Johnson*, 323 F.Supp.3d 1301(student dismissed from cheer team for social media post denied injunctive relief); *Stokey v. North Canton Sch. Dist.*, No. 5:18–CV–1011, 2018 WL 2234953 at *5 (N.D. Ohio May 15, 2018) (noting that while in the classroom it is "appropriate for students to learn to express and evaluate competing viewpoints….[,] it can be detrimental to an athletic team

that depends on the coach to develop and execute a strategy to win") (citing, *inter alia*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, (1995)); *Wooten v. Pleasant Hope R-VI Sch. Dist.*, 139 F.Supp.2d 835 (W.D. Mo. 2000) ("coaches must have discretionary decision-making authority to act in the best interests of the team, even if that has a negative effect on an individual team member").

Although a school may be prohibited from suspending a student from the regular academic program for expressing opinions, it is not prohibited from dismissing a student from participation in an activity when his or her actions are insubordinate. "When a student 'fail[s] to comply with the obligations inherent in the activities themselves,' removal from the activity is appropriate." *Johnson*,

Given the unique status student-participants possess as ambassadors of their respective schools, it is not unreasonable for schools to seek and expect a higher standard for their speech in order to best represent the school to the community. In this case, the cheerleading team rules (signed by B.L. and her mother) state, "Please have respect for your school, coaches, teachers, other cheerleaders and teams. . . . Good sportsmanship will be enforced, this includes foul language and inappropriate gestures." Appellant's Br (e)na'r (e18.1 (il)8.2 (na)if)12.2 (or)3.6 897 gu ot4 Tc 0

There is nothing new about the idea that minors can make knowing and voluntary waivers of constitutional protections, including waiver of their *Miranda* rights and consent to searches of their persons and belongings, even without parents present. The First Amendment is not different in this regard; expressive conduct is not beyond the reach of a person's voluntary acceptance of reasonable limits on expression and other behavior reflective of a particular privileged status.

As illustrated by the more limited free speech protection government employees must accept on or off the job as a condition of enjoying the benefits of government employment, the waiver need not be particularly knowing. It is a condition that simply comes with the territory whether or not employees realize it when they voluntarily accept government employment. *Werkheiser v. Pocono Tp*., 780 F.3d 172 (3d Cir. 2015); *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010); *Alderman v. Pocahontas Cnty. Bd. of Educ*., 675 S.E.2d 907 (W.Va. 2009); *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10th Cir. 1998). Thus, even absent affirmative assent to written behavior standards governing students voluntarily holding positions of special privilege and status in extracurricular activities, the application of the First Amendment to them should not be the same as when students enrolled only in the compulsory academic program are concerned.

II. OFF-CAMPUS ONLINE STUDENT SPEECH THAT IS LEWD, OBSCENE, DISRESPECTFUL, AND TARGETED AT THE SCHOOL COMMUNITY CAN LEAD TO "DISRUPTION" OR A REASONABLE FORECAST THEREOF

Even if this Court decides to limit the authority of school officials to impose behavioral standards on student-participants in extracurricular activities, it should recognize that when students violate the conditions and behavioral

Where district courts have applied the

the workplace context. If an employee is speaking in his or her role as employee, there is no First Amendment protection. If she speaks as a citizen, her speech may still be regulated when necessary to preserve workplace efficiency and morale:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.

Connick, 461 U.S. at 151-152.

Courts have extended similar deference to coaches in public school extracurricular programs. When a student-participant is speaking as a member of the extracurricular team, that speech – like other conduct – is subject to heightened regulation. The protection of student speech in the extracurricular setting may be limited in a reasonable manner to preempt disruption to the team and to prevent the undermining of team morale. School districts should not have to wait for the disruption to undermine extracurricular programs before addressing profane and harmful speech.

CONCLUSION

The First Amendment provides a right to speak, but does not insulate all speech from all consequences that may result. Indeed, the body of law interpreting free speech rights addresses to what extent consequences for a given instance of speech amount to a deprivation of constitutional freedoms, and to what extent such

deprivations may be justified. One is likely to be subject to liability for defamation if one posts false accusations about a public official. One is likely to be prosecuted for a hate crime if one defaces a person's home with racial epithets. And one may reasonably expect to be dismissed from the cheerleading squad if one directs offensive online comments to the team.

The District Court's ruling disregarded the nature of the deprivation (dismissal from an extracurricular activity), saying it had no bearing on whether the student's First Amendment rights were violated. That position is antithetical to the body of law addressing extracurricular activities and its underpinnings: that public school officials may regulate student-participant conduct to a greater extent than that of other students. Students voluntarily subject themselves to higher regulations for the privilege of participation in activities that instill team pride, discipline, and leadership status in the student body. Public school coaches must not be made to wait for on-field fistfights stoked by late-night, online trash-talk before they can enforce their rules against such online baiting. Violation of such sensible rules is disruption enough.

Based on the foregoing, and the reasons explained in the Appellant's Brief, *Amici* respectfully request that this Court overturn the decision below.

Respectfully submitted,

/s/ Francisco M. Negrón, Jr. (FL 939137)
Chief Legal Officer
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

July 3, 2019

CERTIFICATE OF COMPLIANCE

1. Pursuant to L.A.R. 28.3(d), I hereby certify that the attorney for Amicus Curiae is a member of the bar of the U.S. Court of Appeals for the Third Circuit.
2. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5691 words.
3. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point.
4. Pursuant to L.A.R. 31.1(c), I certify that this document has been filed in electronic and paper form, and the text of the electronic brief is identical to the text in the paper form.
5. Pursuant to L.A.R. 31.1(c), I certify that a virus detection program has been run on the file and that no virus was detected. The virus detection program utilized was Symantec Endpoint Protection and Microsoft Advanced Threat Protection and Exchange Online Protection.

Dated: July 3, 2019

/s/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

Molly Tack-Hooper
MTack-Hooper@aclupa.org
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
P.O. Box 60173
Philadelphia, PA 19106
Attorney for Appellee

David W. Brown, Esq.
dbrown@levinlegalgroup.com
Levin Legal Group
1800 Byberry Road
1301 Masons Mill Business Park
Huntingdon Valley, PA
Attorney for Appellant

Michael I. Levin, Esq.
mlevin@levinlegalgroup.com
Levin Legal Group
1800 Byberry Road
1301 Masons Mill Business Park
Huntingdon Valley, PA
Attorney for Appellant

John G. Dean, Esq.
Jgd@elliottgreenleaf.com
Elliott Greenleaf & Dean
201 Penn Avenue, Suite 202
Scranton, PA 18503
Attorney for Appellant

/s/ Francisco M. Negrón, Jr.
FRANCISCO M. NEGRÓN, JR.
Attorney for Amicus Curiae