No. 24-1770

In the United States Court of Appeals
FOR THE NINTH CIRCUIT

B.B., A MINOR BY AND THROUGH HER MOTHER, CHELSEA BOYLE; AND CHELSEA BOYLE, AN INDIVIDUAL, PLAINTIFF-APPELLANT,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT, ET AL., DEFENDANT-APPELLEE

On appeal from the United States District Court for the Central District of California, Case No. 8:23-cv-00306-DOC-ADS

AMICUS BRIEF OF LIBERTY JUSTICE CENTER, SUPPORTING APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest law firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018).

This case interests amicus curiae because LJC believes in a robust right of free speech and is concerned that this right is being eroded on school campuses across the country. For example, LJC represents a child who was punished with three days out-of-school suspension for asking a question that included the legal term "illegal alien." *See C.M. v. Davidson County Board of Education*, 24-CV-380 (M.D.N.C.). LJC also represents an Oregon educator and mother who was censored and temporarily banned from local school board meetings for violating a

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

policy that effectively proscribes criticizing administrators. *Scherer v. Gladstone School District*, Case No. 3:24-cv-00344-YY (D.Or.). Therefore, proper resolution of this case will further LJC's ability to defend the free speech rights of its clients.

STATEMENT OF THE ISSUES

1. Whether B.B. was punished for her speech in violation of the First Amendment under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
2. Whether Defendant-Appellee Becerra retaliated against B.B. for her speech in violation of the First Amendment.

INTRODUCTION

Public school administrators wield extraordinary power over more than 65 million children. Like all state actors, they must exercise that power within the Constitution's guideposts. When they fall short, it is incumbent upon courts to step in and protect the rights of children.

The district court abdicated that duty when it declined to "second-guess" the Capistrano School District because the Constitution requires that Capistrano be "second guessed" here: the school introduced a young child to the complex topic of racial discrimination in American policing,

then punished her for expressing a personal and empathetic response to that lesson. That child was punished not for harming her fellow students, but for transgressing the hypersensitive political views of the state agents exercising power over her.

The district court's belief that school administrators are entitled to near-total discretion is dangerous. That approach threatens to undermine critical precedent such as *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), and *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Such deference will only embolden administrators to censor and punish, leading in turn to more lawsuits such as this one. And those punishments are not benign: they can result in lasting harm to students with significant consequences. As advocates for accountability and freedom in education, amicus curiae submits this brief to highlight these dangers.

ARGUMENT

I. Declining to "second-guess" school administrators risks overwhelming courts with lawsuits challenging censorship.

The district court's assertion that insufficient deference to school administrators will "overwhelm the judiciary" is backward: if courts fail to clearly protect the speech rights of students it will invite more

censorship and punishments, which will inevitably invite more lawsuits. Courts should therefore send a clear message that enforcement of hypersensitive political orthodoxy in schools is never permissible. Indeed, stories like B.B.'s appear to be increasing, with attempts by administrators to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette,* 319 U.S. at 642.

Consider amicus' representation of C.M., a minor plaintiff who was suspended for asking whether the word "alien" in a vocabulary lesson meant "space aliens" or "illegal aliens who need green cards." *C.M. v. Davidson County Board of Education,* Middle District of North Carolina, No. 24-CV-380. For this innocuous question, the school insisted on a "harsh" (its description) punishment of a three-day out-of-school suspension. As a result, the student was prohibited from competing in the most important track meet of the year, potentially hampering his ability to earn a track scholarship to attend college. And his college dreams themselves are jeopardized by the school's write-up of the incident as racially biased; according to the then-principal, C.M.

had to be punished has if the student had said "the N-word." *Id.*, Dkt. No. 8 (P's Mot.) at p. 7.

Or consider *Starbuck v. Williamsburg James City Cty. Sch. Bd.,* 28 F.4th 529 (4th Cir. 2022). There, a student received both an in-school and out-of-school suspension for factually discussing the February 2018 school shooting that occurred in Parkland, Florida. The student "question[ed] the intent of the shooter" and noted that "the shooter was left alone within the building unchallenged by local law enforcement" for a considerable length of time. 28 F.4th at 531-32. The Fourth Circuit held that "[t]he First Amendment does not permit schools to prohibit students from engaging in . . . factual, nonthreatening speech." *Id.* at 536. Nor could schools "silence such student speech on the basis that it communicates controversial or upsetting ideas." *Id.* And although the school board argued that the student's language was "reasonably perceived as threatening school violence," the Fourth Circuit disagreed. *Id.* The Court stated that deferring to the administrators, as the district court urges here, "would be incompatible with the very purpose of public education." *Id.*

Such attempts to enforce political orthodoxy extend beyond students as well. Amicus also represents Barton Thorne, a career educator in Tennessee who saw that career threatened simply for explaining the value of the marketplace of ideas to his students. *See Thorne v. Shelby County Board of Education,* Western District of Tennessee, No. 2:21-cv-02110. In the aftermath of the riot at the Capitol on January 6, 2021, then-principal Thorne devoted that week's "principal's message" to the dangers of restricting speech one might disagree with: "You may be in agreement with the people who are doing the filtering, but it's just one moment away from somebody else being able to filter you. And so, if they can do that to a minority . . . what will stop them one day from doing that to you?" For simply telling his students about free speech, Thorne was subject to suspension and investigation by his school district.

Each of these lawsuits arose when school administrators failed to take seriously the lessons of free speech espoused in seminal precedents such as *Barnette* and *Tinker*. And the District Court's implication that retreating from these precedents will serve the interests of judicial economy is precisely backward: if administrators better understand the

Constitution's restrictions, there will be far fewer punishments requiring judicial review.

II. Declining to "second-guess" school administrators exposes children to harm.

The Supreme Court has recognized that schools' punishments of students can "seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Goss v. Lopez*, 419 U.S. 565, 575 (1975). Like the amicus's client C.M., B.B. was not only censored, but punished. C.M. was labeled as "racist" and subjected to a lengthy out-of-school suspension ("OSS"). B.B. was forced to make a public apology, prohibited from drawing pictures, and was prevented from playing at recess for weeks.

The District Court's finding that such punishments concern only a "schoolyard dispute . . . not of constitutional proportions" wildly understates the harms that such punishments can create for children. For example, out-of-school suspensions are increasingly recognized to "do more harm than good," leading to significant negative tangible

outcomes for students, both academically and personally.[2] Public shaming (such as the label of racist placed on C.M., or the forced public apology from B.B.) has been widely criticized as resulting in "children feel[ing] stressed, hurt, rejected, and angry; . . . mak[ing] it harder for children to learn emotional and social skills."[3] Likewise, the American Academy of Pediatrics takes the position that "recess is a crucial and necessary component of a child's development and, as such, it should not be withheld for punitive or academic reasons."[4]

Perhaps the most outrageous punishment meted out by the administrators in B.B.'s case was limiting her ability to further express herself through art. Drawing holds profound value for elementary-aged children. Notably, it "has been undeniably recognized as one of the most

[2] Brenda Álvarez, *School Suspensions Do More Harm Than Good*, Nat'l Educ. Ass'n (Sept. 10, 2021), https://www.nea.org/nea-today/all-news-articles/school-suspensions-do-more-harm-good; National Institute of Justice, *Student Suspensions Have Negative Consequences, According to NYC Study*, National Institute of Justice (Oct. 15, 2019), available at https://nij.ojp.gov/topics/articles/student-suspensions-have-negative-consequences-according-nyc-study (last visited June 26, 2024).

[3] NAEYC, *Using Guidance Instead of Discipline, Teaching Young Children,* vol. 46, no. 2 (Feb. 2020).

[4] *Id.*

important ways that children express themselves."[5] It not only serves creative value but serves as a potent communication mechanism for children who have yet to develop sufficient verbal skills to articulate their thoughts and emotions. *Id.* Discouraging a child from this activity discourages self-expression and the development of crucial skills.

Ultimately, "[f]f there is anything that needs to be singled out, it's schools that bully students."[6] Considering the critical importance of recess and drawing, as well as the harm caused by OSS, excessive punishment, and shaming, the school's humiliation of a first grader for her expression in response to a complex topic introduced by the school is not only inappropriate but also damaging to a student's well-being. If the District Court's decision is left standing, more children will be exposed to such harm.

CONCLUSION

This Court should reverse the judgment of the District Court.

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[5] Malchiodi, Cathy A. *Understanding Children's Drawings* at 1, Guilford Press, 1998.

[6] Jonathan Eckert, *Shaming Students Is Keeping Schools from Teaching Them*, Brookings (Sept. 19, 2018).

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because this motion contains 1,648 words.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this motion has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: July 22, 2024

/s/ Dean McGee
DEAN MCGEE

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I filed the foregoing Amici Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: July 22, 2024

/s/ Dean McGee
DEAN MCGEE