NEW HAMPSHIRE UNION LEADER

A cheerleader's salty language comes to the Supreme Court

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The case of the cheerleader's salty language comes to the Supreme Court on Wednesday, at a moment when technological and social changes should cause the court to expand First Amendment protections of student speech. Social media necessitate rethinking the proper scope of government's jurisdiction, through public schools, in controlling students. And the fact that freedom of speech is besieged in academic settings justifies judicial supervision of schools' attempts to extend their controls.

When B.L., a Pennsylvania ninth-grader, failed to make the varsity cheerleading team, she posted on Snapchat a picture of her raised middle finger and this caption: "Fuck school fuck softball fuck cheer fuck everything." Another student brought this episode of adolescent volatility to the attention of the school's coaches, who suspended B.L. from the junior varsity cheerleading team because she had damaged the school's image by violating the requirement to "have respect" for coaches and the rule against "foul language and inappropriate gestures."

B.L.'s parents sued the school district for violating her First Amendment rights. Two lower courts sided with her, citing cases beginning with the Supreme Court's 1969 ruling about two Des Moines high school students who planned to wear black armbands to school to protest the Vietnam War. The Iowa school preemptively adopted a rule making refusal to remove an armband grounds for suspension. The students' parents sued. Two lower courts upheld the rule as reasonably related to maintaining school order. The Supreme Court ruled otherwise, saying that armbands are quiet and passive, and hence neither disruptive nor violative of the rights of others.

The court said students do not lose their constitutional rights when they enter school property. In 1969, however, the world was young and social media were nonexistent. Today, tens of millions of students are doing “remote learning,” and off-campus social media speech saturates schools. B.L.’s school says she has scant First Amendment protections even away from school because social media guarantee that what is said off-campus does not stay off campus.

But two libertarian institutions, the Pacific Legal Foundation and the Cato Institute, and libertarian satirist P.J. O’Rourke (who tells the court that he “has heard the exact rant at issue in this case at the family dinner table”), have submitted an amicus brief supporting B.L. They make four arguments:

Schools that erase the distinction between on- and off-campus behavior subject students to constant monitoring of their thoughts. Such ubiquitous monitoring derogates the constitutionally protected right of parents to supervise their children. Allowing schools to punish anytime-anywhere speech will encourage schools in their aggressive enforcement of political agendas, and will inevitably involve punishing speech because of reactions to it, thereby allowing a “heckler’s veto.” (In 2014, the incorrigible U.S. Court of Appeals for the 9th Circuit upheld a school ban on wearing T-shirts emblazoned with the U.S. flag on Cinco de Mayo lest some other students be offended.) All that in turn incentivizes “informant-style behavior” and the snitch culture that fuels today’s vindictive Internet mobs that stifle ideas by punishing people for social media speech.

This brief urges the court to adopt “a rule that permits schools to regulate student speech *only* when the speech occurs in a place or during a time controlled and supervised by school staff, and only when necessary to address *objective* disruption of the learning environment.” Another amicus brief on B.L.’s behalf is written by three constitutional scholars: Jane Bambauer of the University of Arizona, Ashutosh Bhagwat of the University of California at Davis and Eugene Volokh of UCLA.

They argue that while schools may control virtual as well as physical classrooms, it does not follow that they may control online or other speech outside the “school context.” Because schoolchildren are indeed especially vulnerable to cruelty from their classmates, schools should

be able to punish such online cruelties, though only when they are about “the characteristics of individual people, not about broader policy matters,” the brief argues. “Threats” are not accorded First Amendment protection, while speech that threatens only the serenity or the sense of “safety” of the hypersensitive is protected.

In the 1969 armband case, when the court said schools may not become “enclaves of totalitarianism,” this language conjured a merely hypothetical danger. No longer. Today, many schools, from kindergarten through college, are aggressive engines of intellectual homogeneity, sacrificing freedom of speech to imperatives of woke indoctrination. This cultural change, and the dynamics of social media, require from the court a defense of the First Amendment as robust as today’s assaults on it.