DECLARATION OF RYAN ALSHAK

I, Ryan Alshak, hereby declare and state:

1. I am a student at Gould High School, where I am in my senior year. I am scheduled to graduate in spring 2013. This declaration is being submitted in support of Plaintiffs' Motion for Preliminary Injunction.

2. I have played basketball my entire life and have started for the Gould High School basketball team since my freshman year. I became the team captain at the beginning of my junior year. I have always hoped to play basketball for a major national university. In March of 2012, during my junior year, I was named to American Sports Magazine's list of the "Top Ten College Prospects."

3. My grade point average at the end of my junior year was 3.84, and I have received scores of "4" and "5" in five different Advanced Placement courses.

4. Based on my athletic experience and academic performance, I anticipate receiving a scholarship to play basketball for a national university starting in the fall of the 2013-14 school year. I have visited several universities and spoken to various admissions and athletics officials, who have indicated that I am an extremely likely candidate for a significant athletic scholarship.

5. I am particularly interested in attending and playing for Southern California College ("SCC"), one of the nation's premier academic and athletic institutions. SCC's Director of Athletics, Morgan Smith, met with me during my junior year and told me that I was a "true outlier" with "extremely impressive credentials and abilities," who would "fit right into the SCC community." She also told me that I was "almost certain" to receive a major scholarship as long as my "record stay[ed] strong and everything ke[pt] going smoothly."

6. When I met with Ms. Smith, she provided me with a packet of admissions materials, including a copy of SCC's Athletic Admissions policy. Among other things, the policy provides that "[a]ny prospective student who during the course of his or her high school career was ever permanently removed from a school athletic program for any disciplinary reason shall not be eligible for an athletic scholarship."

7. From 1998 through May 2012, the coach of the Gould High School basketball team was Derek Kigongo. Mr. Kigongo strongly supported my basketball career throughout my freshman, sophomore, and junior years. He has also been very popular with the student body for as long as I have attended Gould High School. He led the team to the state championship in the 2012 season.

8. In May 2012, shortly after the end of the 2012 basketball season, Mr. Kigongo's employment as coach was terminated by Gould High School's principal, Brendan Charney. I was extremely surprised by Mr. Kigongo's termination, especially in light of the team's successful performance during the prior season and Mr. Kigongo's popularity. At the time of his termination, no one from the school gave any explanation or reason for it.

9. I regularly write and publish posts on an online blog, which is read by other Gould High School students. I use the blog to express my thoughts on a variety of subjects, including my personal life and opinions. I also write about events at Gould High School, especially events relating to the basketball team.

10. On May 20, 2012, at 11:37 p.m., I wrote and published an online blog post to express my anger at the sudden termination of Mr. Kigongo and to voice my suspicion that Mr. Kigongo had been fired because Mr. Charney personally disliked him and felt intimidated by him. I wrote and published this blog post using my parents' home computer.

11. On May 24, 2012, I was called from class to Mr. Charney's office. Mr. Charney showed me a copy of my blog post about Mr. Kigongo and asked if I was the author. I admitted that I had written the post and apologized to him for the foul

language I had used in the post. Mr. Charney told me that he was "extremely offended and disappointed" by the way I had characterized him in my blog and asked me to return to class.

12. On May 25, 2012, I received a letter from Gould High School signed by Mr. Charney describing several measures that Gould High School intended to take to discipline me for writing the blog post. These measures included:

a. suspending me from school for three days;

b. permanently removing me from the basketball team; and

c. prohibiting me from participating in any Gould High School athletic activities during the 2012-2013 year.

13. Many other students posted comments on my blog post, agreeing with my statements about Mr. Charney. None of the other students who posted comments were disciplined in any way.

14. As a result of the disciplinary measures taken by Gould High School, I believe there is a very high likelihood that I will not receive a college athletic scholarship and that I might be prevented from playing college basketball.

I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this _4th_ day of June, 2012 in Gould City, California.

Ryan Alshak

RYAN ALSHAK

DECLARATION OF BRENDAN CHARNEY

I, Brendan Charney, hereby declare and state:

1. I am employed by the Gould County School District as the Principal of Gould High School. I have been so employed for approximately nine years. This declaration is being submitted in support of Defendant's Motion for Summary Judgment.

2. Gould High School has approximately 1,200 students. The student body is quite diverse, including students from many different social, religious, and ethnic backgrounds, as well as students of different sexual orientations.

3. As Principal, my responsibilities include ensuring a safe, orderly environment for students; promoting high standards of academic performance and responsible behavior for students; serving as a role model for students; and supervising an effective discipline system consistent with the values, philosophy, policies, and mission of the school.

4. Derek Kigongo was the school's Varsity Basketball coach from 1998 through 2012. The basketball season begins in early February and concludes in mid-May. The Gould County School District Board and I terminated Mr. Kigongo's employment with Gould County School District on May 18, 2012. It was a difficult decision because Mr. Kigongo led the team to the state championship in the 2012 spring season, and Mr. Kigongo was very popular with the students. However, in early 2012 after winning

the championship, Mr. Kigongo demanded a significant raise. Because the school district was having financial difficulties, it could not afford to meet his salary demand and a decision was made to terminate him.

5. The news of Mr. Kigongo's termination upset many of the students at Gould High School, particularly the basketball players. The captain of the basketball team, Ryan Alshak, expressed his grievances in a blog post. He later admitted to me that he created that post on May 20, 2012 on a computer in his parents' home. Because he is a prominent member of the student body, many Gould High School students follow his blog. The blog post read, in its entirety:

> coach k got fired cuz we have some fuckin dickwads running our school who dont know a good coach when they see one. principal charney must hate him or something cuz it doesnt make any sense to fire him after we won state last year. hes probly just jealous cuz coach k has mad game and principal charney couldnt even get a hooker to blow him. i bet he cant even get it up w/out popping like 16 viagra . . . principal charney's running this school like a fascist dictator. why didnt he ask the team what we thought when he fired OUR coach? shouldnt OUR opinions mean something?! holla at me if u think this is bullshit

too and maybe we can get that fucktard running our school to change his mind.

"Coach K" is how the basketball players refer to Mr. Kigongo.

6. The blog post came to my attention on May 24, 2012, when one of our history teachers, Megan Hopkins, confiscated student Devin Murtaugh's cell phone because he was using it during class. When Ms. Hopkins took the phone, the blog post was visible on the screen. Gould High School has a cell phone policy that allows students to use cell phones only before school, during passing periods, at lunch, and after school. Cell phone use during class is prohibited.

7. When I read the blog post on May 24th, there were 167 comments from other Gould students. The time stamps and IP addresses for the comments showed that all of these comments were made during school hours from cell phones. To the best of my knowledge, no school computers were used to access or comment on the blog post. Aside from the cell phone Ms. Hopkins confiscated, eight other students' cell phones were confiscated during class time from May 21 to May 24. Although at least two cell phones are confiscated every day at Gould High School, nine phones is a higher number than normal.

8. The other students' comments on the blog post repeated sentiments similar to Alshak's, calling the termination "fuckin

bullshit," "horseshit," etc. Many of the comments also insulted me personally, accusing me of sexual impotence. Although the students insulted me on the blog, none of the students ever harassed me in any way at the school. I was quite upset by this debacle, but I did not take a leave of absence because I was needed at the school.

9. In 2010, Gould High School instituted a policy forbidding the harassment of students and staff. The anti-harassment policy was drafted after four homosexual students reported to me that they had been repeatedly verbally harassed and bullied in the school hallways during the first month of the fall semester by other students who disapproved of their sexual orientation. The policy defines harassment as "any intentional act, physical, verbal, or written, meant to torment, annoy, or intimidate another person that causes physical or mental anxiety or creates a hostile environment." The punishment for violating the anti-harassment policy is a three-day suspension.

10. Additionally, the school has a number of policies covering student athletes. One student-athlete policy states that any athlete involved in situations concerning "a civil offense, arrest, or suspension for conduct unbecoming of his team and school will be removed from the team immediately until such matters are cleared to the school and athletic staff's

satisfaction." Students receive a handbook at the beginning of each school year that contains all of the school policies.

11. On May 24, 2012, I brought Alshak to my office to discuss the blog post. He admitted to writing the post on his parents' computer. He also stated that his request for students to "holla" at him was a request for other students to get involved, not a suggestion that students contact the school directly. Alshak then apologized for the derogatory and vulgar nature of the post, and I sent him back to class.

12. The School Board and I determined that Alshak violated the school's anti-harassment policy by posting vulgar and unbecoming statements about me on his blog. He was therefore suspended for three days, as required by the anti-harassment policy. He was also removed from the basketball team pursuant to the student-athlete policy.

I hereby declare under penalties of perjury that the foregoing is true and accurate. Executed this 6th day of June, 2012 in Gould City, California.

Brendan Charney

BRENDAN CHARNEY

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

NEAL AND BRADY ALSHAK As Guardians of Ryan Alshak, a Minor,	)	CV No. 12-013-MB
PLAINTIFFS,	)	ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
v.	)	
GOULD COUNTY SCHOOL DISTRICT,	)	
DEFENDANT.	)	

This matter comes before the Court on Plaintiffs Neal and Brady Alshak's motion to obtain preliminary injunctive relief to prevent the Gould County School District from disciplining their minor son, Ryan Alshak, for statements that he made online. For the reasons set forth below, Plaintiffs' motion is GRANTED.

I. Factual Background

The material facts of this case are undisputed. Ryan Alshak, a minor, is a high school basketball player who has achieved a degree of national recognition, being named to American Sports Magazine's Top Ten College Prospects in March 2012, during his junior year. He also seems to be a serious student, having achieved a cumulative 3.84 GPA at the end of the 2011-2012 school year.

In May 2012, immediately following the conclusion of a highly successful season for the Gould High School basketball team, Gould High School's principal, Brendan Charney, fired the team's coach without offering any explanation. Frustrated, Alshak responded with a highly profane and insulting online blog post directed at principal Charney, calling into question Mr. Charney's sexual potency and calling on other Gould High School students to respond. The blog post came to Mr. Charney's attention shortly thereafter, and Alshak was suspended from school for three days. The School District also prohibited him from participating on the Gould High School basketball team or any other athletic program during his senior year.

Before this incident Alshak was expected to receive a scholarship to play basketball for a major national university. The parties agree, however, that the disciplinary action taken by the School District in response to Alshak's colorful online protest could seriously jeopardize those hopes. Accordingly, Alshak's parents immediately filed a complaint in the above-captioned matter, alleging a violation of 42 U.S.C. § 1983 and arguing that the school violated their son's First Amendment right to free speech. They now seek a preliminary injunction to prevent the School District from disciplining their son.

II. Legal Analysis

Before this Court can reach the merits of Plaintiffs' motion, it must decide the appropriate standard for assessing a motion for preliminary injunction. In the years since the Supreme Court decided Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), courts have disagreed as to what standard should be used. Because the Twelfth Circuit has yet to decide this issue, this Court must first do so.

All courts agree that a four-prong test should be used when evaluating whether to grant a preliminary injunction; the four prongs are (1) the likelihood of success on the merits, (2) whether the moving party will suffer "irreparable harm" without the injunction, (3) the balance of the equities, and (4) whether the injunction is in the public interest. See id. at 20; Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010). The question, however, is how those four prongs should be applied.

Before Winter, many courts took a flexible approach to assessing the four prongs, one of the most common of which was called the "serious questions" standard. Citigroup, 598 F.3d at 35-36. Under the "serious questions" standard there are two different ways a movant can justify the issuance of a preliminary injunction. Id. at 35. First, a preliminary injunction will be issued if the moving party shows both that he

or she will suffer irreparable harm in the absence of an injunction and a likelihood of success on the merits of the case. Id. Alternatively, a preliminary injunction can also be justified if the moving party shows irreparable harm, a balance of hardships weighing strongly in the moving party's favor, and serious legal questions making the case appropriate for litigation. Id.

The validity of the "serious questions" standard was, however, thrown into doubt by Winter. In Winter, the Supreme Court stated that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary injunctive relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. at 20.

At first glance this holding appears to weigh against the use of a "serious questions" standard and rigidly require that all four elements be established, but at second glance Winter's meaning is uncertain. As the dissent observed, "[c]onsistent with equity's character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief. . . . [t]his Court has never rejected that formulation, and I do not believe it does so today." Id. at 51 (Ginsberg, J., dissenting).

In the wake of Winter, the circuits have split as to whether some sort of flexible standard remains good law. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1132 (9th Cir. 2011) (recognizing the split). The Fourth Circuit, for example, formerly applied a flexible standard whereby a preliminary injunction was justified if: (1) the balance-of-hardships weighed in the plaintiff's favor; and (2) there were "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." Real Truth About Obama, Inc. v. Fed. Election Com'n, 575 F.3d 342, 346 (4th Cir. 2009) (quoting Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977)), vacated on other grounds, 130 S. Ct. 2371 (2010). But following Winter, the Fourth Circuit concluded that its former standard was in "fatal tension" with the majority opinion in Winter because Winter seemed to require a clear demonstration that the plaintiff would likely win on the merits. Real Truth About Obama, 575 F.3d at 346-47.

The Second Circuit, however, has taken a different view of Winter. In Citigroup it held that the "serious questions" test, which allows an injunction to issue when the balance of hardships tips strongly in the plaintiff's favor and "serious questions" as to the merits of the case exist, 598 F.3d at 35,

remains valid even in the post-Winter world, id. at 38. Two significant rationales supported this conclusion. First, courts need to be flexible in granting preliminary injunctions because if plaintiffs were required to show a greater than 50% chance of success on the merits, then preliminary injunctions would only be granted in easy cases. See id. at 34-36. Second, flexible preliminary injunction standards should not be summarily rejected because they have been successfully used by numerous courts for decades. See id. at 38. If Winter was meant to overrule such a longstanding practice, it would have done so explicitly. Id.

For these same reasons, the Ninth Circuit has also held that the "serious questions" test survives Winter. Alliance for the Wild Rockies, 632 F.3d at 1134.

This Court agrees with the Second and the Ninth circuits. The purpose of a preliminary injunction is to prevent irreparable harm to the moving party during the often-lengthy wait for final judgment in a lawsuit. Winter did not hold otherwise and did not explicitly overrule the "serious questions" standard, which has been a common feature of American equity jurisprudence for decades. Accordingly, the Court holds that when a moving party shows a likelihood of irreparable harm, the balance of hardships tips sharply in the party's favor, and

the party shows serious questions going to the merits of the case, a preliminary injunction should issue.

Alshak's case is a prime example of why courts should use this relatively flexible standard to determine whether a preliminary injunction is merited. First, there is no doubt (and the parties do not dispute) that Alshak will likely suffer irreparable harm in the absence of a preliminary injunction; he will miss his senior basketball season and likely be denied a scholarship to a major university-level athletic program. On the other hand, the School District will suffer only a relatively light burden if the injunction is issued; it merely has to reinstate Alshak on the basketball team, allow him to play his senior year while the case is pending, and temporarily expunge his suspension from his record. Thus, the balance of the equities weighs sharply in favor of Alshak.

Second, because the law is unsettled as to whether schools can regulate student speech on the Internet without infringing students' First Amendment rights, it would be virtually impossible for the Plaintiffs to show a probability of success on the merits. Yet Alshak's senior basketball season and his opportunity to join a major university program are fast approaching. If the Court were to refuse to take any action until the conclusion of a trial, it would likely be too late to prevent Alshak from suffering irreparable harm.

Alshak has presented a serious legal question, and his chance to pursue the career of his choice will pass him by if he is forced to wait. It would be inequitable to withhold immediate relief simply because the unsettled state of the law makes it impossible for him to show a likelihood of prevailing on the merits of his claims.

III. Conclusion

Plaintiffs' motion for a preliminary injunction is GRANTED.

Dated: June 25, 2012

Marissa Buck

MARISSA BUCK
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

NEAL AND BRADY ALSHAK As Guardians of Ryan Alshak, a Minor,	)	CV No. 12-013-MB
PLAINTIFFS,	)	ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
v.	)	
GOULD COUNTY SCHOOL DISTRICT,	)	
DEFENDANT.	)	

This matter comes before the Court on the parties' cross-motions for summary judgment. Plaintiffs Neal and Brady Alshak seek summary judgment on their claim that the Defendant Gould County School District violated their son's First Amendment rights when he was punished for a vulgar blog post accusing the Gould High School principal of impotency. Defendant moved for summary judgment on the grounds that the punishment did not violate the Plaintiffs' son's First Amendment rights under the Tinker v. Des Moines Independent Community School District "substantial disruption" standard. Based on the following Findings of Fact and Conclusions of Law, Plaintiffs' Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED.

I. FINDINGS OF FACT

Based on the declarations submitted by the parties in support of their various pretrial motions, the Court hereby finds that the following facts are undisputed and relevant.

1. Gould High School Principal Brendan Charney and the Gould County School District Board terminated Derek Kigongo's employment in May 2012. Mr. Kigongo was the school's Varsity Basketball coach. In response to the termination, the captain of the basketball team, Ryan Alshak, created a vulgar post on his blog about Mr. Charney. The post was created on Sunday night, May 20, 2012, on a computer in Alshak's home.

2. The blog post read, in its entirety:

> coach k got fired cuz we have some fuckin dickwads running our school who dont know a good coach when they see one. principal charney must hate him or something cuz it doesnt make any sense to fire him after we won state last year. hes probly just jealous cuz coach k has mad game and principal charney couldnt even get a hooker to blow him. i bet he cant even get it up w/out popping like 16 viagra . . . principal charney's running this school like a fascist dictator. why didnt he ask the team what we thought when he fired OUR coach? shouldnt OUR opinions mean something?! holla at me if u think this is bullshit

too and maybe we can get that fucktard running our school to change his mind.

"Coach K" is how the basketball players at Gould High School refer to Mr. Kigongo. Alshak admitted that "holla at me" is a slang term equivalent to a request for responses or comments from others.

3. The blog post came to Mr. Charney's attention on May 24, 2012, when a teacher at the school confiscated a student's cell phone in class. When Mr. Charney saw the blog post that day, 167 of Gould High School's approximately 1,200 students had commented on the post. All of those comments were posted during school hours, but no school computers appear to have been used to access or comment on the blog.

4. Gould High School's cell phone policy allows students to use cell phones before school, during passing periods, at lunch, and after school. Cell phone use during class is prohibited.

5. Eight other student cell phones were confiscated during class time on May 21-24. On average, at least two cell phones are confiscated daily at Gould High School.

6. Although a number of other students posted comments on the blog insulting Mr. Charney, none of the

students harassed him at school or in any other way, and he did not take a leave of absence in response to the post.

7. Alshak was suspended for three days for violating the school's anti-harassment policy and removed from the basketball team for violating the student-athlete policy.

II. CONCLUSIONS OF LAW

The issue before this Court is whether a school may punish a student for posting on the Internet vulgar, insulting comments regarding a school official.[1] The Twelfth Circuit has yet to decide this issue, and other courts have split regarding whether such actions are constitutional. For the reasons discussed below, this Court believes that in the particular circumstances present in this case, the School District's actions violated Alshak's First Amendment right to free speech, and accordingly, the Court must grant summary judgment for the Plaintiffs.

The Court's analysis must begin with the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). In Tinker, the Court held that schools may not suppress on-campus student speech unless the speech will "materially and substantially disrupt the work and discipline of the school." 393 U.S. at 509. The school

[1] The parties agree that the school's anti-harassment policy imposes a content-based speech restriction, but the Plaintiffs are not making a facial challenge to that policy. Instead, they are only challenging its application to their son in these circumstances.

violated students' First Amendment rights by prohibiting the students from wearing black armbands in protest of the Vietnam War because the silent protest did not disrupt the school. Id. at 514.

After Tinker, the Court addressed the issue of vulgar student speech in Bethel County School District v. Fraser, 478 U.S. 675 (1986). In Bethel, a student gave a nominating speech at a school assembly that included an "elaborate, graphic, and explicit sexual metaphor." Id. at 678. The Court held that the school district could punish the student for giving a lewd and indecent speech at a school event. Id. at 685.

The Supreme Court next addressed the issue of schools restricting student speech in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). In Kuhlmeier, a school principal prohibited a school newspaper, produced as part of the school's journalism class, from publishing two articles about divorce and teen pregnancy. 484 U.S. at 263. The Court upheld the school's authority to exclude the articles because the public would reasonably perceive the newspaper to bear the imprimatur of the school. Id. at 271.

Finally, the Court addressed the student speech issue recently in Morse v. Frederick, 551 U.S. 393 (2007). In Morse, a student was punished for displaying a banner promoting drug use at a school-sponsored event. Id. at 397. Even though the

speech occurred across the street from the school, the Court considered it student speech because the event occurred during normal school hours and was sanctioned by the school. Id. at 400–01. The Court upheld the school's punishment of the students, basing its decision primarily on the strong governmental interest in prohibiting student drug use. Id. at 408–10.

Circuit courts have reached different conclusions as to how these Supreme Court precedents apply to student speech on the Internet created while the student was off campus. For example, in one case, the Third Circuit refused to allow a school to discipline a student for using his grandmother's computer, after school hours, to create a derogatory "MySpace" webpage about a school principal. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214 (3d Cir. 2011). The court held that the school violated the student's First Amendment rights because it conceded that the webpage had not caused a substantial disruption at the school, and therefore, the school could not show a sufficient nexus between the student's derogatory speech and the school. Id. at 214-16.

In contrast, the Second Circuit has allowed schools to punish student speech created off campus on the Internet in two cases, Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007), and Doninger v. Niehoff, 527 F.3d 41

(2d Cir. 2008). In Wisniewski, a student used his parents' computer to create an image with AOL Instant Messenger saying, "Kill Mr. VanderMolen," a teacher at the school. 494 F.3d at 35–36. The image was available for the student's "buddies" for three weeks. Id. at 36. Some of these "buddies" were fellow students at the school, and one of them eventually informed the teacher about the icon. Id. The school's punishment of the student was constitutional because it was reasonably foreseeable that the image would come to the attention of school authorities and create a risk of substantial disruption. See id. at 39–40. Similarly, in Doninger, a student called school administrators "douchebags" on her blog in reaction to a popular school event being cancelled. 527 F.3d at 45. The post also directed students to contact a school administrator directly to "piss her off more." Id. After the blog post, the school received numerous phone calls and emails about the event, creating a substantial disruption under Tinker and justifying the school punishing the student. Id. at 45, 50–52.

Examining all these cases, this Court is persuaded that the school overstepped its authority in this case. Wisniewksi and Doninger are easily distinguishable. In Wisniewski, the student's speech advocated killing a teacher, a clear disruption of the school under Tinker. And in Doninger, the student specifically directed others to disrupt school by contacting

administrators. Alshak's blog post did not threaten the safety of anyone, nor did it directly advocate students contacting the school. The instant case is more similar to Layshock. Alshak created a blog post in his parents' home on the weekend, outside of school hours. Even though the blog post contained lewd and vulgar language about the school principal, Alshak did not engage in any of this speech while in school. Additionally, the School District has not established that Alshak's speech caused a substantial disruption at school. While the district can show that many students accessed the blog during school hours, these students did so from personal cell phones, possibly in compliance with the school's cell-phone-use policy, which allows students to use their personal phones during breaks. Only nine cell phones were confiscated on May 21-24, which is reasonably consistent with the school's average cell-phone-confiscation rate. Therefore, the district has not shown that Alshak's blog post caused a substantial disruption in the school.

Because Alshak's speech took place off-campus and the district cannot show a sufficient nexus between the blog post and a substantial disruption at the school, Tinker does not apply in this case. Therefore, Alshak's punishment for his off-campus speech violated his First Amendment right to free speech.

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III. CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Judgment is GRANTED.

Dated: July 2, 2012

Marissa Buck

MARISSA BUCK
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 12-1737

Decided August 22, 2012

NEAL AND BRADY ALSHAK

As Guardians of Ryan Alshak, a Minor,

PLAINTIFF-APPELLEES,

v.

GOULD COUNTY SCHOOL DISTRICT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the United States District Court for the District of Gould. Before DelaCruz, Lonergan, and Trugman. Opinion by Trugman, J. Reversed.

I. INTRODUCTION

Defendant-Appellant Gould County School District appeals from the grant of both a preliminary injunction and summary judgment in favor of Plaintiff-Appellees Neal and Brady Alshak, acting on behalf of their minor son Ryan Alshak. Holding that the "serious questions" standard was the proper standard to apply, the District Court granted the Alshaks' request for a preliminary injunction. The Court also held that the First Amendment protected their son's vulgar, online statements about Gould High School's principal and granted their motion for summary judgment. The School District contends that both rulings were in error. We agree and accordingly reverse.

As to the grant of the preliminary injunction, the School District argues that the District Court's ruling was in contravention of the Supreme Court's decision in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7 (2008), which requires plaintiffs to show a likelihood of success on the merits to obtain preliminary injunctive relief. We agree. While this is an issue of first impression in this circuit and we recognize that not all circuits agree, we believe that the language of Winter leaves room for no other conclusion. The Alshaks did not show a likelihood of success on the merits and, therefore, were not entitled to a preliminary injunction.

The School District also argues that the District Court erred in granting Alshak's motion for summary judgment. Specifically, the School District argues that the First Amendment did not protect Alshak's speech because there was a sufficient nexus between the off-campus speech and a reasonably foreseeable, substantial disruption at the school. Again, we agree. Deciding another issue of first impression, we hold that the District Court erred in granting the Alshaks' motion for summary judgment because the School District's punishment of Alshak was consistent with the First Amendment.

II. FACTS AND PROCEDURAL HISTORY

In May 2012, led by Coach Derek Kigongo and Ryan Alshak, the team's nationally recognized star player, the Gould High School basketball team took home the state championship title. Almost immediately thereafter, Coach Kigongo demanded a salary raise. Faced with financial difficulties, Gould High School's principal Brendan Charney and the Gould County School District Board decided that they could not afford to pay Mr. Kigongo the salary he was demanding and terminated his employment on May 18, 2012. At the time, however, no school official offered any explanation to Gould High School's students as to why he was terminated.

Mr. Kigongo had been employed by Gould High School for over a decade and was very popular with students. Ryan Alshak was

particularly upset about the School District's decision and responded with a vulgar and derisive online blog post directed at Mr. Charney. The post read:

> coach k got fired cuz we have some fuckin dickwads running our school who dont know a good coach when they see one. principal charney must hate him or something cuz it doesnt make any sense to fire him after we won state last year. hes probly just jealous cuz coach k has mad game and principal charney couldnt even get a hooker to blow him. i bet he cant even get it up w/out popping like 16 viagra . . . principal charney's running this school like a fascist dictator. why didnt he ask the team what we thought when he fired OUR coach? shouldnt OUR opinions mean something?! holla at me if u think this is bullshit too and maybe we can get that fucktard running our school to change his mind.

As the District Court noted, "holla at me" is a request for responses from others. Alshak created the post on Sunday night, May 20, using a computer in his parents' home.

Four days later, a teacher at Gould High School confiscated a student's cell phone in class and noticed the blog post open on the phone. The school has a policy regarding cell phone usage; students may not use cell phones in class, but may use

them before school, after school, during passing periods, and at lunch. By the time Mr. Charney read the blog post, 167 Gould High School students had commented on the post from their cell phones. All of those comments were posted during school hours. The comments repeated Alshak's sentiments and used vulgar language. Many of the comments also accused the principal of sexual impotence. The comments on the blog offended Mr. Charney, but students did not harass him at school, and he did not take a leave of absence. Eight additional student cell phones were confiscated during school hours during the time between when the blog was posted and when it was discovered by school officials. No school computers were used to access the blog.

On May 25, 2012, Alshak was suspended for three days for violating the school's anti-harassment policy. The policy defines harassment as "any intentional act, physical, verbal, or written, meant to torment, annoy, or intimidate another person that causes physical or mental anxiety or creates a hostile environment." The school also has a student-athlete policy, which states that any athlete involved in situations concerning "a civil offense, arrest, or suspension for conduct unbecoming of his team and school will be removed from the team immediately until such matters are cleared to the school and athletic

staff's satisfaction." Alshak was removed from the varsity basketball team for violating the student-athlete policy.

Following the imposition of these penalties, Alshak's parents sued the Gould County School District under 42 U.S.C. § 1983 for violating their son's First Amendment rights.[2] At the same time that they filed the complaint, the Alshaks also filed a motion for a preliminary injunction to prevent the school from implementing its punishment on the theory that their son would be irreparably harmed if he could not obtain relief before the conclusion of trial. The District Court granted their request. Both parties then moved for summary judgment. After finding that the material facts in this case were undisputed, the District Court also granted the Alshaks' motion for summary judgment and denied the School District's motion. The School District has appealed both rulings.

III. DISCUSSION

A. Standard of Review

A district court's grant of a preliminary injunction is reviewed for abuse of discretion. DISH Network Corp. v. F.C.C., 653 F.3d 771, 776 (9th Cir. 2011). A district court abuses its

[2] Although the parties agree that the school's anti-harassment policy is a content-based restriction on speech, the Alshaks have not brought a facial challenge to that policy. Instead, they are challenging only its application to their son in these particular circumstances.

discretion when it applies an incorrect legal rule. See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 34 (2d Cir. 2010). We review a district court's disposition of summary judgment de novo. J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 925 (3d Cir. 2011). Summary judgment is appropriate when the moving party shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Bjorgung v. Whitetail Resort, LP, 550 F.3d 263, 268 (3d Cir. 2008). When deciding a motion for summary judgment, the district court must view the facts in the light most favorable to the non-moving party. Merkle v. Upper Dublin Sch. Dist., 211 F.3d 782, 788 (3d Cir. 2000). We apply the same legal standards as the district court when reviewing an order granting or denying a motion for summary judgment. Bjorgung, 550 F.3d at 268.

B. The District Court Abused its Discretion in Applying the "Serious Questions" Test in Issuing a Preliminary Injunction.

Traditionally, courts have used a four-factor test to determine whether to issue a preliminary injunction. See Winter v. Natural Resources Def. Council, Inc., 555 U.S. 7, 20, 22 (2008). Specifically, plaintiffs seeking a preliminary injunction must show that (a) they are likely to succeed on the merits, (b) they are likely to suffer irreparable harm if the

injunction is not issued, (c) the balance of the equities favors issuance of the injunction, and (d) the injunction is in the public interest. Winter, 555 U.S. at 20. While it is well accepted that these four factors are relevant, the circuits have applied them in different ways.

Before Winter, the majority of the circuits took a flexible approach to applying the factors, allowing a stronger showing on the other factors to justify a weaker showing on the likelihood of success on the merits. See Citigroup, 598 F.3d at 36 n.5; see also Winter, 555 U.S. at 51 (Ginsberg, J., dissenting). For example, the Second Circuit used the flexible "serious questions" standard, whereby the moving party needed to show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Citigroup, 598 F.3d at 35 (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)). The Fourth Circuit similarly used a flexible standard called the "balance-of-hardship test," whereby the most important of the factors was the "probable irreparable injury to the plaintiff without a decree and [the] likely harm to the defendant with a decree." Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir.

1977) (abrogation recognized by Real Truth About Obama, Inc. v. Federal Election Com'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds by, 130 S. Ct. 2371 (2010)).

Over the years, even a few Supreme Court cases seemed to support a more flexible approach. For example, in Ohio Oil Co. v. Conway, 279 U.S. 813, 812-13 (1929), the plaintiff challenged the application of a new state tax on oil production. The Court held that a preliminary injunction may be granted based on a greater likelihood of harm to the plaintiff and a lesser likelihood of harm to the state, id. at 814, without requiring the plaintiff to show a likelihood of success on the merits, see id.

Yet, in most of its cases, the Court has required the plaintiffs to show a likelihood of success on the merits. See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975). In Doran, the Court described "the traditional standard for granting a preliminary injunction" as requiring "the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." Id. The Court extensively considered the merits of the plaintiff's challenge to an anti-nude-dancing ordinance before concluding that the district court did not abuse its discretion by issuing a preliminary injunction. See id. at 932-34.

Then, in Winter, the Court made it clear that courts should require plaintiffs to show that all four factors are met. The plaintiffs in Winter alleged that the Navy's sonar-training program damaged marine mammals and obtained a preliminary injunction restricting the Navy's sonar activities. 555 U.S. at 12. The Ninth Circuit upheld the district court's decision, but the Supreme Court reversed it on several grounds. Id. First, the Court held that a "possibility" of irreparable harm to the plaintiffs was insufficient; plaintiffs instead needed to "demonstrate that irreparable injury is *likely* in the absence of an injunction." Id. at 22 (emphasis in original). Second, the Court found that even if there was injury to the plaintiffs, that injury was outweighed by the harm to the Navy and the public interest in military training. Id. at 23. The Court did not directly address the plaintiffs' likelihood of success because the motion failed on the other factors, id. at 23-24, but the Court nonetheless made clear that before an injunction can be issued the moving party must "establish that he is likely to succeed on the merits," id. at 20.

Finally, two other recent Supreme Court cases support this conclusion, Nken v. Holder, 556 U.S. 418 (2009), and Munaf v. Geren, 553 U.S. 674 (2008). In Nken, while addressing the discretion of courts to issue a stay of a judgment, the Court essentially repeated the four-factor Winter test and required

the plaintiff to make "a strong showing that he is likely to succeed on the merits." 556 U.S. at 434 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The standard for stays and the standard for preliminary injunctions are similar "because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." Nken, 556 U.S. at 434. Similarly, in Munaf, habeas petitioners who were American citizens and prisoners of the Multinational Force-Iraq sought to enjoin their transfer to the custody of the Iraqi government. 553 U.S. at 679-80. The lower courts granted preliminary relief because there were serious questions about whether the courts had jurisdiction over the habeas petitions. Id. at 690. The Supreme Court rejected that approach, requiring a showing of likely success on the merits of the petitions, not simply a likelihood of success on the question of jurisdiction. Id. at 690-91.

Despite the force and clarity of the Supreme Court's recent decisions, the circuits have continued to disagree whether to allow flexibility when applying the four factors. The Fourth Circuit has recognized that Winter plainly requires a showing of likely success on the merits before a district court can issue a preliminary injunction because the likelihood of success requirement is a much higher standard than the "serious

questions" requirement. Real Truth About Obama, 575 F.3d at 346-47.

The Ninth Circuit has reached the same conclusion. For example, in American Trucking Associations, Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009), the Ninth Circuit held that the language of Winter required plaintiffs to show they would likely succeed on the merits and rejected any more lenient standard. The Eighth Circuit has agreed, acknowledging that Winter required a showing of a likelihood of success and disapproving language suggesting that a plaintiff can show merely "a fair ground for litigation." Sierra Club v. U.S. Army Corps of Engineers, 645 F.3d 978, 993-94 (8th Cir. 2011).

On the other hand, courts such as the Second Circuit have continued to apply a flexible approach even after Winter. Citigroup, 598 F.3d at 38. In Citigroup, the Second Circuit upheld the continued use of the "serious questions" standard, arguing that without such a standard preliminary injunctions would be granted only in simple cases, id. at 35-36, and that if the Court in Winter had intended to invalidate the "serious questions" standard it would have done so explicitly, id. at 38.

The Seventh Circuit has also taken a flexible approach, rephrasing Winter's preliminary injunction rule as follows: "Irreparable injury is not enough to support equitable relief. There also must be a plausible claim on the merits, and the

injunction must do more good than harm (which is to say that the "balance of the equities" favors the plaintiff)." Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009).

Considering all of these authorities, we are convinced that the District Court erred in granting a preliminary injunction in this case for several reasons. First, it improperly relied on the dissent in Winter and effectively ignored the majority opinion, which required plaintiffs to show a likelihood of success. We further disagree with the District Court's conclusion that if the Court in Winter had meant to overrule the "serious questions" test, it would have done so more explicitly. The holding in Winter is clear, and it requires plaintiffs to show a likelihood of success on the merits. Finally, the District Court opined that a flexible standard must be applied because injunctions would otherwise be granted too infrequently. To the extent that such policy considerations are relevant, the District Court missed the point. A preliminary injunction provides a party with relief that could normally be granted only at the conclusion of trial, after the fact-finder has evaluated the evidence. Such relief is "extraordinary," Winter, 555 U.S. at 24, and should therefore be granted only sparingly. We are not about to invite any plaintiff who can establish a mere

"serious question" of success on the merits to circumvent the trial system by pursuing preliminary injunctive relief.

It may be true that, in the absence of a preliminary injunction, Alshak will suffer irreparable harm, but that fact is not sufficient to justify the issuance of a preliminary injunction. To merit an injunction, Alshak also needed to establish a likelihood of success on the merits, which he did not do. Accordingly, the District Court abused its discretion, and its grant of preliminary injunctive relief is REVERSED.

C. The District Court Erred in Granting Plaintiffs' Motion for Summary Judgment Because There Was a Sufficient Nexus Between Alshak's Blog Post and a Substantial Disruption at the School

The First Amendment prevents Congress, and through the Fourteenth Amendment, the States, from abridging the freedom of speech. U.S. Const. amend. I; Gitlow v. New York, 268 U.S. 652 (1925). In the school context, students' First Amendment rights are not, however, coextensive with those of adults. See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). School administrators must have latitude in regulating student speech to further educational objectives. Id. at 506. Thus, Tinker allows schools to regulate speech that "disrupts classwork," creates "substantial disorder," or "collide[es] with" or "inva[des]" "the rights of others." Id. at 513.

In Tinker, a group of students was prohibited from wearing black armbands in protest of the Vietnam War. Id. at 504. The Court held that schools may not suppress student speech unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." Id. at 513. The school's punishment in Tinker violated the First Amendment because the students engaged in silent, passive expression that did not create a disturbance at the school. Id. at 514.

Following Tinker, the Court has held that in certain limited circumstances school officials may punish student speech without showing a substantial disruption at the school. First, in Bethel County School District v. Fraser, 478 U.S. 675 (1986), a student was punished for giving a prolonged, lewd, and vulgar speech at a school assembly, despite warnings from school officials to refrain from doing so. Id. at 677–78. Recognizing that schools, as instruments of the state, are responsible for teaching students how to behave in a civil and mature manner, id. at 683, the Court held that the school's punishment of the student's lewd speech did not run afoul of the First Amendment, id. at 685.

Schools can also exercise greater control over student speech when it occurs as part of activities that the public might reasonably believe to be licensed or sponsored by the

school. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988). In Kuhlmeier, a principal prohibited a school newspaper from publishing articles about divorce and teen pregnancy. Id. at 263. The school's refusal to publish the articles did not violate the First Amendment because schools have the authority to refuse to sponsor student speech that may reasonably be perceived as advocating "conduct otherwise inconsistent with the 'shared values of a civilized social order.'" Id. at 272–73 (quoting Fraser, 478 U.S. at 683).

The Court most recently addressed the student speech issue in Morse v. Frederick, 551 U.S. 393 (2007). In Morse, a student was punished for displaying a banner promoting drug use at a school-sponsored event. Id. at 397. The Court recognized the school's right to discipline the student because, even though the student was physically off campus when he displayed the banner, he did so at an event that "occurred during normal school hours," was sanctioned by the school "as an approved social event or class trip," was supervised by teachers and school administrators, and involved performances by the school band and cheerleaders. Id. at 400–01. Taking into account the strong governmental interest in prohibiting drug use, the Court upheld the school's punishment of the student. Id. at 408–10.

The Supreme Court has not, however, addressed the specific issue in this case—whether a student who used a computer off

campus to post on the Internet vulgar information that related to a school official and that later made its way onto the school campus can be punished without violating the First Amendment. Further, the circuits that have addressed this question are split, taking different approaches to the problem of student speech posted on the Internet.

In this case, the District Court relied on the Third Circuit's decision in Layshock v. Hermitage School District, 650 F.3d 205, 214 (3d Cir. 2011). In Layshock, after school on his grandmother's computer, a student created a MySpace profile about the school's principal. Id. at 207. The school conceded that it could not show a substantial disruption at the school; it could not even determine how many students might have accessed the profile from school computers. Id. at 209. Without a sufficient nexus between the student's off-campus speech and an on-campus disruption, the student's punishment violated his First Amendment rights. Id. at 214-16.

In contrast, in Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008), a student created a blog post advocating that students contact the school district superintendent to "piss her off more" after a school event was cancelled. Subsequently, the school received phone calls and emails in response to the blog post. Id. The court held that it was reasonably foreseeable that the post would reach school property, as it was

specifically designed by the student to do so, and in fact caused students to contact the school. Id. at 50–51. Because the blog post reasonably created a risk of substantial disruption in school, the school's punishment of the student did not violate the First Amendment. Id. at 53.

The Fourth Circuit applied a similar analysis in Kowalski v. Berkeley County Schools, 652 F.3d 565, 567 (4th Cir. 2011), after a student created a vulgar MySpace page accusing another student of having a sexually transmitted disease. Even though the student created the web page at home, the page was published to people outside the home and it concerned a student, so it could reasonably be expected to disrupt the school environment. Id. at 573. Therefore, the school decision to punish the student did not violate her First Amendment rights. Id. at 574-75.

The factual scenario in this case parallels the Doninger and Kowalski cases. Alshak's blog post, like the off-campus speech in these cases, concerned a student or a school official. Although Alshak created the post in his home, the Internet is now omnipresent in today's world. The post discussed a school official and invited responses from other students. It was therefore reasonably foreseeable that the post would reach the school and cause a substantial disruption. One hundred sixty-seven students commented on the blog post during school hours

from their cell phones. At least one of the students whose cell phone was confiscated between May 21 and May 24, 2012 viewed the blog during class time. Therefore, the School District was within its rights to punish Alshak's speech under Tinker.

IV. CONCLUSION

In granting the Plaintiffs' motion for preliminary injunction, the District Court ignored the clear language of Winter and abused its discretion. The purpose of a preliminary injunction is to provide immediate relief to plaintiffs who are entitled to it, not to plaintiffs who merely might be entitled to it. Ryan Alshak is a young man who put himself in a very unfortunate position. Although we sympathize with the District Court's eagerness to intervene, sympathy for the plaintiff is not the rule of Winter. Under Winter, plaintiffs must establish a likelihood of success on the merits, and that requirement must be strictly enforced to maintain the extraordinary nature of the remedy.

Additionally, the District Court erred in granting the Plaintiffs' motion for summary judgment. In the technology age, the schoolhouse gate is no longer purely a physical location. Off-campus speech can still cause the kind of "material and substantial disruption" required by Tinker. Because Alshak's speech dealt with a school official and elicited responses from other students, it was reasonably foreseeable that the speech

would cause a substantial disruption at the school. There was also a sufficient nexus between his speech and an actual disruption at school because students were accessing the blog while on campus, during school hours. Therefore, the school was within its rights to punish Alshak under Tinker.

The judgment of the District Court is hereby REVERSED and the matter is REMANDED for further proceedings consistent with this opinion.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-93

NEAL AND BRADY ALSHAK
As Guardians of Ryan Alshak, a Minor,
PETITIONERS,
v.
GOULD COUNTY SCHOOL DISTRICT,
RESPONDENT.

The petition for writ of certiorari is granted, limited to consideration of the following questions presented:

1. Did the district court abuse its discretion when it granted the Petitioners' motion for a preliminary injunction, using the "serious questions" standard, which did not require the Petitioners to prove that they probably would succeed on the merits at trial?

2. Did the district court err in granting the Petitioners' summary judgment motion on the grounds that a school district had violated their son's First Amendment rights by punishing him for posting on the Internet a vulgar comment about the school principal, given that the son used an off-campus computer at night, but 167 students posted responses during school hours?