# *Mahanoy v. B.L. ex rel. Levy* and the Virtual School Environment: A Framework for Regulating Online, Off-Campus Student Speech

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## INTRODUCTION

In March 2020, the World Health Organization's announcement of the global COVID-19 pandemic[1] sent workers from offices to homes and students from classrooms to Zoom.[2] Students and parents faced a challenging and often unpredictable school year. School districts transitioned from the traditional in-person school environment to at-home virtual learning, often with only days of notice. Online virtual learning has been challenging for most students,[3] however, some parents and educators have been grateful for the learning transition.[4] Regardless of their personal feelings about virtual learning, forecasters predict that remote learning will continue well into the future.[5] Thousands of school districts nationwide now say "they intend to make some form of remote and hybrid instruction permanent."[6]

Even discounting the time spent online during virtual learning, students are now spending more time online than ever before.[7] Parents

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1. Tedros Adhanom Ghebreyesus, Dir.-Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020).

2. COLLEEN MCCLAIN ET AL., PEW RSCH. CTR., THE INTERNET AND THE PANDEMIC 36 (2021) ("93% of parents with children in grades K-12 say their children have had some online instruction since the beginning of the coronavirus outbreak in February 2020.").

3. KARYN LEWIS ET AL., CTR. FOR SCH. & STUDENT PROGRESS, LEARNING DURING COVID-19: READING & MATH ACHIEVEMENT IN THE 2020-21 SCHOOL YEAR 2 (2021) ("Achievement was lower for all student groups in 2020-21 . . . .").

4. Alyson Klein, *We Love Virtual Learning: Students, Parents Explain Why*, EDUC. WK. (Jan. 6, 2021), https://www.edweek.org/technology/we-love-virtual-learning-students-parents-explain-why/2021/01.

5. Benjamin Herold, *Remote Learning Is Changing Schools. Teacher-Preparation Programs Have to Adjust*, EDUC. WK. (May 18, 2021), https://www.edweek.org/teaching-learning/remote-learning-is-changing-schools-teacher-preparation-programs-have-to-adjust/2021/05.

6. *Id.*

7. *See* MONICA ANDERSON & JINGJING JIANG, PEW RSCH. CTR., TEENS, SOCIAL MEDIA & TECHNOLOGY 2018 9 (2018) ("Some 45% of teens say they use the internet 'almost constantly,' a figure that has nearly doubled from the 24% who said this in the 2014-2015 survey.").

of K–12 public students report that 72% of students spend more time on screens (computers and phones) than before the COVID-19 outbreak.[8] Online platforms take student conversations that traditionally occur in person and make them accessible virtually anytime and anywhere. "Now we are in a situation where children's entire, or the majority, of school experience is online–that's where all forms of human interaction will take place: flirting, passing notes and bullying."[9]

These changes have made it difficult for school administrators to balance what student speech they may regulate and what speech is protected by the First Amendment. "[T]he nation's experiment with remote learning has blurred the line between home and school to an unprecedented degree," and school administrators are left wondering how to protect students at home when all communication is off-campus.[10] The Ninth Circuit has described the task of balancing potential threats of violence and keeping students safe without impinging on their constitutional rights as a "tightrope," "where an error in judgment can lead to a tragic result."[11] However, despite the challenge faced by school administrators, the Supreme Court has yet to set clear guidance for schools on what student speech they may regulate.

The Supreme Court has clarified that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[12] However, at the same time, "[t]he First Amendment rights of public school students 'are not automatically coextensive with the rights of adults in other settings.'"[13] Thus, "[s]chools must achieve a balance between protecting the safety and well-being of their students and respecting those same student's constitutional rights."[14]

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8. MCCLAIN ET AL., *supra* note 2, at 4.

9. Brittany Wong, *How Remote Learning Has Changed the Nature of School Bullying*, HUFFPOST (Sept. 17, 2020, 2:43 PM), https://www.huffpost.com/entry/bullying-problem-remote-learning_l_5f61214fc5b68d1b09c8dc16.

10. Stephen Sawchuk, *Teachers Are Watching Students' Screens During Remote Learning. Is That Invasion of Privacy?*, EDUC. WK. (April 2, 2021), https://www.edweek.org/technology/are-remote-classroom-management-tools-that-let-teachers-see-students-computer-screens-intrusive/2021/04.

11. Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064 (9th Cir. 2013).

12. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

13. Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 527 (9th Cir. 1992) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

14. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 987 (9th Cir. 2001) (citing Karp v. Becken, 477 F.2d 171, 174 (9th Cir. 1973)).

In the landmark case *Tinker v. Des Moines Independent Community School District*, the Supreme Court described that school administrators may regulate student speech if they (1) forecast the student's speech will cause a substantial or material disruption to school activities or (2) the student's speech invades the rights of others.[15] The Supreme Court has also outlined that school administrators have authority to regulate student speech that is lewd or vulgar,[16] school-sponsored speech,[17] or speech that promotes illegal drug use.[18] Despite this guidance, all Supreme Court student speech cases address on-campus speech, leaving schools and students wondering what ability public schools have to regulate off-campus speech.

In 2021, the Supreme Court decided *Mahanoy Area School District v. B.L ex rel. Levy*, its first genuine off-campus student speech case.[19] Almost 40 years after the birth of the internet,[20] the Supreme Court's attempt to clarify when public schools may regulate students' off-campus speech has left many unanswered questions. The Court held that public schools have a special interest in regulating certain off-campus speech, but only in situations where the speech implicates the school's regulatory interests.[21] Writing for the majority, Justice Breyer declined to define a broad, general rule stating what counts as "off-campus" speech.[22] Similarly, the Court declined to decide which online, off-campus activities might be subject to a school's regulation.[23] The Court noted the difficulty of developing a general rule "[p]articularly given the advent of computer-based learning."[24]

Prior to *Mahanoy*, absent any clear guidance from the Supreme Court about off-campus student speech, the federal appellate courts devised several tests to determine when off-campus student speech

15. *Tinker*, 393 U.S. at 513.
16. Bethel Sch. Dist. No. 403, 478 U.S. 675.
17. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
18. Morse v. Frederick, 551 U.S. 393 (2007).
19. Mahanoy Area Sch. Dist. v. B. L. *ex rel.* Levy, 141 S. Ct. 2038 (2021).
20. Univ. Sys. of Ga., *A Brief History of the Internet*, ONLINE LIBRARYLEARNING CTR., https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml. ("January 1, 1983 is considered the official birthday of the Internet.").
21. *Mahanoy*, 141 S. Ct. at 2045.
22. *Id.*
23. *Id.*
24. *Id.*

should be able to be regulated. The two primary tests emerging from the federal circuit courts are the (1) reasonably foreseeable test[25] and (2) the nexus test.[26] These two tests provide an additional step to the traditional *Tinker* analysis to help prevent public school officials from reaching into the territory of protected speech. However, either test standing alone presents only a small hurdle to clear when public schools seek to regulate off-campus internet speech. Without clear guidance from *Mahanoy*, the federal appellate courts will likely continue to apply some version or combination of the reasonably foreseeable test and the nexus test to online off-campus speech.

Part I of this Note will identify specific challenges that online learning and internet speech pose to the current Supreme Court student-speech framework. Part II will then discuss the background of Supreme Court student-speech cases, how Mahanoy fits into the Supreme Court's framework, and the remaining unanswered questions left by the Court in *Mahanoy*. Next, Part III will describe the tests created by federal circuit courts to bolster students' free speech protections and the advantages and drawbacks of each approach. Finally, Part IV proposes a new approach that combines prior circuit court approaches to balance students' rights and the school's ability to protect its students.

## I. CHALLENGES WITH REGULATING ONLINE STUDENT SPEECH

School districts and administrators have engaged in regulating students' speech since the beginning of American public education.[27] Which begs the question, why is internet speech different? Simple, online student speech often occurs off-campus—beyond the traditional reach of public-school regulation. Online learning blurs the line between when students are on- and off-campus. Consider a student sitting at home while participating in a Zoom classroom. Is that student off-campus? The answer is clearly, yes. However, now consider that same

25. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007); *see also* D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765 (8th Cir. 2011).

26. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 573 (4th Cir. 2011).

27. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (discussing a public school regulation requiring students to salute the flag); People of State of Ill. Ex rel. McCullum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty, Ill., et al., 333 U.S. 203 (1948) (noting that students cannot be punished for "professing religious beliefs or disbeliefs, for church attendance or nonattendance"); Wieman v. Updegraff, 334 U.S. 183 (1952).

student, if they verbally bully another student in their virtual class, should that student's teacher still be able to discipline them? The answer is likely also yes. In this situation, the student is off-campus, but their speech is likely to impact the school environment. Does the student's constitutional right to free speech prevent the hypothetical teacher from stopping the student from bullying their fellow classmate? As this brief example illustrates, it is not so easy to draw a bright line between when schools may and may not regulate student speech.

"To enjoy the free speech rights to which they are entitled, students must be able to determine when they are subject to schools' authority and when [they are] not."[28] The problem with the Supreme Court's decision in *Mahanoy* is that it lacks a straightforward, easily appliable test for determining if a school may regulate student speech. The issue with developing a simple rule may rest more on the broad spectrum of "speech" a student may utter and the diverse and ever-evolving nature of the internet. A one-size-fits-all rule is difficult to formulate, and courts have often declined to attempt to create one.[29]

While the Court's attempt to develop a consistent rule, data shows a clear need for schools to regulate student speech. In 2018, nearly half of U.S. teens reported that they were online "almost constantly."[30] Approximately 59% of U.S. teens have personally experienced abusive online behavior, with more than 63% of teens reporting this as a "major problem."[31] Further, public-school parents with K–12 children say that 93% have experienced some form of online instruction since February 2020.[32] Schools owe a duty to protect students, and this duty may extend to protection from internet cyber-speech. Further, without considering the possibility of bullying, the more time students spend online, the more students communicate online, the greater the potential is for harmful student speech.

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28. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020), *aff'd but criticized*, 141 S. Ct. 2038.

29. Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) ("[W]e are reluctant to try and craft a one-size fits all approach [to student speech cases].").

30. MONICA ANDERSON, PEW RSCH. CTR., A MAJORITY OF TEENS HAVE EXPERIENCED SOME FORM OF CYBERBULLYING 5 (2018).

31. *Id.* at 2–3.

32. MCCLAIN ET AL., *supra* note 2.

While the need to protect students from harmful online speech is clear, it is equally as clear that schools cannot be allowed to regulate any speech they find unpleasant.[33] Traditionally, parents are responsible for disciplining their children for their speech while not within the schoolhouse gates. Further, some parents fear constant surveillance and twenty-four hour limitation of student speech if schools regulate online off-campus speech.[34] Finally, our nation's public schools operate as a learning ground for children, where they live, play, and learn how to interact within our democracy.[35] When schools protect unpopular student speech, especially off-campus, schools help to ensure "that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'"[36]

## II. STUDENT SPEECH FRAMEWORK & *MAHANOY*

### A. First Amendment Speech Overview

The Supreme Court has outlined that any form of speech considered unprotected speech for adults also applies to students, whether they are on- or off-campus. The First Amendment does not protect speech classified as fighting words;[37] true threats;[38] false statements, such as fraud or defamation;[39] expressions that incite others;[40] obscenity;[41]

33. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

34. Hugh Grant-Chapman et al., *Student Activity Monitoring Software: Research Insights and Recommendations*, CTR. DEMOCRACY & TECH. (Sept. 21, 2021), https://cdt.org/wp-content/uploads/2021/09/Student-Activity-Monitoring-Software-Research-Insights-and-Recommendations.pdf ("[P]arents and teachers also express privacy concerns around the use of [student monitoring software], which include concerns about disciplinary application as well as potential impacts on LGBTQ+ students.").

35. Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 141 S. Ct. 2038, 2046 (2021).

36. *Id.*

37. Virginia v. Black, 538 U.S. 343, 359 (2003) (fighting words are not protected speech).

38. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (a state may punish words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

39. United States v. Alvarez, 567 U.S. 709, 719 (2012) (false statements, such as fraud or defamation, are not perforce unprotected).

40. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement is not protected speech).

41. Miller v. California, 413 U.S. 15, 18 (1973) (obscenity is not protected speech).

commercial speech;[42] child pornography;[43] or speech integral to criminal conduct.[44] However, the school environment does contain special characteristics that allow school administrators to restrict student speech, which may otherwise be protected speech if uttered by an adult[45] or outside the school context.[46]

## B. Supreme Court Student Speech Cases

### *1*. Tinker v. Des Moines Independent Community School District

In 1969, during the height of the Vietnam War, the Supreme Court decided the landmark student-speech case *Tinker v. Des Moines Independent Community School District*.[47] Five public-school students in Des Moines, Iowa, agreed to wear black armbands to school as a symbol of protest against the ongoing Vietnam War.[48] After catching wind of the Tinkers' plan, the principals of Des Moines schools implemented a policy attempting to limit the protest's potential disruption during school.[49] The policy banned students from wearing armbands during school and threatened to suspend any student that failed to adhere.[50] The same week the principals enacted the policy, three Tinker children were sent home for wearing armbands and were suspended until they could return without them.[51]

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42. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980) (the government can regulate commercial speech).

43. New York v. Ferber, 458 U.S. 747, 764 (1982) (child pornography is not protected speech).

44. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (holding that the First Amendment affords no protection to speech "used as an integral part of conduct in violation of a valid criminal statute").

45. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[W]e reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

46. *Id.* at 688 (Brennan, J., concurring) ("If [Fraser] had given the same speech outside the school environment, he could not have been penalized.").

47. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

48. *Id.* at 504.

49. *Id.*

50. *Id.*

51. *Id.*

Tinker filed a complaint against the Des Moines school district for violating the student's right to freedom of speech.[52] The Court determined that the Des Moines school district could not punish the Tinker children for wearing their armbands in protest.[53] In their opinion, the Supreme Court uttered the famous quote that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[54] While students do retain their constitutional rights at public school, the special characteristics of the school environment justify some limited exceptions to First Amendment protections to allow schools to operate effectively.[55] For this reason, schools may only regulate student speech if either (1) the school had some reasonable expectation that the expression would cause a *substantial disruption* to the school's operations or (2) the student's expression *invades* the rights of others.[56] Further, a school's reasonable expectation that a student's speech will cause a substantial disruption requires "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[57]

Following this decision, the two-pronged *Tinker* test, requiring either a (1) substantial disruption or (2) an invasion of others' rights, became the Supreme Court's foundational analysis for all student-speech cases.

*2.* Bethel School District No. 403 v. Fraser

Almost a decade-and-a-half later, the Supreme Court again took up the issue of when a school may regulate a student's speech in *Bethel School District No. 403 v. Fraser*.[58] While attending a school-wide assembly, Matthew Fraser gave a sexually explicit and innuendo-filled speech, nominating a friend for an upcoming student government election.[59] Bethel High School officials determined that Fraser's speech violated school rules prohibiting the "use of obscene, profane language

52. *Id.*
53. *Id.* at 514.
54. *Id.* at 506.
55. *Id.* at 507.
56. *Id.* at 508–09, 513.
57. *Id.* at 509.
58. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
59. *Id.* at 677–78.

or gestures."[60] As a result, school officials suspended Matthew Fraser for three days.[61] Fraser filed suit, asserting that following his explicit assembly speech, Bethel School District had violated his right to the freedom of speech by suspending him.[62] The Court determined that lewd and vulgar speech, such as Fraser's, undermines the fundamental values of public school education.[63] The Court found that Bethel School District had "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[64] Deviating from the *Tinker* test, the Court in *Fraser* described that a school may regulate indecent, lewd, or vulgar student speech, regardless of whether that speech satisfies either of *Tinker*'s prongs.[65] This exception to the First Amendment marked the first Supreme Court carveout to the *Tinker* test, expanding public schools' ability to regulate student speech.

*3.* Hazelwood School District v. Kuhlmeier

*Hazelwood* involved a school-sponsored journalism class and the regulation of a student newspaper.[66] The student newspaper at Hazelwood East High School, the Spectrum, was set to release an edition containing two stories: one story about a students' experience with pregnancy and another story about the impact divorce has on students.[67] Both stories kept the actual name of the students a secret to protect their identity.[68] School administrators worried that these articles referenced sexual activity and may be inappropriate for younger students.[69] Believing there was not enough time to change the articles before they were printed, the Hazelwood principal concluded that the only option was to eliminate the two stories from the newspaper's final

60. *Id.* at 678.
61. *Id.*
62. *Id.* at 679.
63. *Id.* at 683.
64. *Id.* at 685.
65. *Id.* at 688–89.
66. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).
67. *Id.* at 263.
68. *Id.*
69. *Id.*

draft.[70] The students, believing the elimination of the stories abridged their freedom of speech, filed suit.[71]

After taking up the case, the Supreme Court found that the school administrators had not infringed on the students' free speech rights by preventing the two articles from being published.[72] The Court found that schools could exercise "editorial control" over school-sponsored activities because the public viewing such student speech could reasonably view the speech as sanctioned by the school.[73] In a school-sponsored setting, restrictions on student speech must be "reasonably related to legitimate pedagogical concerns."[74] Schools may restrict student speech that "bear[s] the imprimatur of the school" without satisfying either *Tinker* prong.[75] The Supreme Court's recognition that public school may regulate school-sponsored speech marked the second carveout to the *Tinker* test, further expanding a school's ability to regulate student speech.

*4.* Morse v. Frederick

The next Supreme Court student speech case came in 2007 with the infamous "BONG H!TS 4 JESUS" case.[76] Joseph Frederick, a senior in high school, was dismissed from class to attend a gathering of students across the street from campus to watch the Olympic Torch Relay[77] pass near the school.[78] "As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: 'BONG H!TS 4 JESUS.'"[79] Frederick's high school principal believed the sign was promoting illegal drug use and immediately asked the students to take it down; all students except Frederick complied.[80] When

70. *Id.*
71. *Id.*
72. *Id.* at 274.
73. *Id.* at 273.
74. *Id.*
75. *Id.* at 271.
76. Morse v. Frederick, 551 U.S. 393, 397 (2007).
77. *Id.* (noting that the 2002 Winter Olympics were held in Salt Lake City, Utah, but the Olympic Torch Relay, passed near Frederick's school in Juneau, Alaska).
78. *Id.*
79. *Id.*
80. *Id.* at 398.

Frederick refused to remove the banner, the school suspended him for ten days.[81]

The Supreme Court determined that the school was within its right to discipline Frederick for his student speech.[82] The Court determined that although Frederick was technically off-campus (only across the street from the high school), the incident occurred during school hours and at a school-sanctioned activity, making it a traditional "school speech case."[83] In writing for the Court, Chief Justice Roberts determined that Frederick's sign "advocated for illegal drug use" and that public schools have an "important—indeed, perhaps compelling" interest in deterring drug use.[84] With this case, the Supreme Court identified its third carveout to the traditional *Tinker* test for student-speech cases.

### C. *Mahanoy Area School District v. B.L. ex rel. Levy*

For the first time in the Supreme Court's history, in 2021, the Court decided an off-campus student speech case. While many onlookers were excited about the potential clarity the case may bring to students and schools, determining when public schools may regulate student speech may be more unclear now than before the case was decided.

B.L. (a minor at the time of the case), later voluntarily identified as Brandi Levy,[85] was a high school student attending Mahanoy Area High School in Mahanoy City, Pennsylvania.[86] Brandi tried out for the public school's cheerleading team, and despite being a sophomore (second-year) student at the time, she failed to make the varsity team.[87] As students across the nation have done, and likely will do, Brandi became upset with the news of her junior varsity placement and showed her

81. *Id.*
82. *Id.* at 397.
83. *Id.* at 401.
84. *Id.* at 402, 407.
85. *Identifying Brandi Levy*, CNN (Jan. 2, 2021), https://transcripts.cnn.com/show/smer/date/2021-01-02/segment/01.
86. Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 141 S. Ct. 2038, 2043 (2021).
87. *Id.*

frustration by posting a Snapchat.[88] Brandi posted the Snapchat while off-campus after school had ended.[89] This Snapchat was viewable online on Brandi's "story" for her Snapchat "friend" group of about 250 students.[90] One of the images showed a picture of B.L. and a friend with their middle fingers raised, alongside a caption reading: "Fuck school fuck softball fuck cheer fuck everything."[91] Eventually, talk of this Snapchat spread throughout Mahanoy Area High School, making several cheerleading team members "upset," and the Snapchat was discussed in several classroom settings over "a couple of days."[92] After word of B.L.'s Snapchats made it back to the cheerleading coaches, with the principal's approval, Brandi was suspended from the cheerleading team for one year for violating a team policy about using profanity.[93] Through her parents, Brandi brought suit against her high school for violating her First Amendment freedom of speech rights.[94]

Brandi Levy was successful at the district court level, with the court granting her motion for summary judgment against the school.[95] The district court reasoned that B.L.'s Snapchat posts had not reached *Tinker*'s substantial disruption standard for limiting student speech.[96] On appeal, the Third Circuit again ruled in B.L.'s favor, holding that "*Tinker* does not apply to off-campus speech."[97] The Third Circuit ruled in Brandi Levy's favor because her speech occurred off-campus.

The Supreme Court then took up the case to determine whether or not *Tinker* applied to off-campus speech and, in the alternative, whether a school administrator may regulate off-campus student speech independent of *Tinker*.[98] The Court determined that "the special characteristics that give schools additional license to regulate student

88. *Id.*; Christine Elgersma, *Everything You Need to Know About Snapchat*, COMMON SENSE MEDIA (June 18, 2018), https://phys.org/news/2018-06-snapchat.html (describing Snapchat as a social media app, which gives users "share everyday moments while simultaneously making them look awesome," offering a somewhat unique feature in that "Snapchat uses messages that are meant to disappear" after a specific timeframe.)

89. *Mahanoy*, 141 S.C. at 2043.

90. *Id.*

91. *Id.*

92. *See id.* at 2047–48.

93. *Id.* at 2043.

94. *Id.*

95. *Id.* at 2043–44.

96. *Id.*

97. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020), *aff'd but criticized*, 141 S. Ct. 2038.

98. *Mahanoy*, 141 S. Ct. at 2044.

speech [does not] always disappear when a school regulates speech that takes place off campus."[99] The Court reasoned that the school retains some significant regulatory interests in prohibiting specific off-campus student speech.[100]

Although the Court concluded that schools may regulate off-campus speech, their guidance on when a school may regulate off-campus speech is less than clear.[101] The Court noted that "[p]articularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list [of appropriate exceptions or carveouts to the Third Circuit majority's rule, limiting a school's ability to regulate student speech occurring off campus]."[102] However, despite the lack of a general off-campus speech rule, the Court identified several types of off-campus behavior that may call for school regulation.[103] Examples include severe bullying or harassment that targets particular individuals, threats aimed at individuals in the school community, the failure to follow the rules in online school activities, and breaches in school security devices, including school computers.[104]

Absent these specific scenarios, the Court did not provide much guidance for schools or students on how to know when and what sort of online off-campus speech may be regulated. Instead, the Court offered three "features" of off-campus speech that "diminish[s] the strength of the unique educational characteristics" of the school environment.[105]

The first feature identified is that schools rarely stand *in loco parentis* regarding off-campus speech.[106] Traditionally, when a child utters speech outside of the schoolhouse gates, it is the domain of the parent to choose what speech is allowed.[107] However, when a child is in

99. *Id.* at 2045.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 2046.
106. *Id.*
107. *Id.* at 2051 (Gorsuch, J., concurring) ("[A father could] delegate part of his parental authority [over a child's speech] . . . to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has *such a portion of the power of the parent* committed to his charge, [namely,] that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*.") (emphasis in original).

school, the school stands in the place of the parent—*in loco parentis*.[108] For this reason, the school may regulate student speech inside the schoolhouse gates.[109] However, when the student steps beyond the schoolhouse gate, the school is no longer standing in the parent's place.[110] Therefore, the Court determined that schools' interest in regulating student speech is diminished when the speech takes place off-campus.[111]

The second feature the Court noted that diminishes public schools' interest in regulating off-campus speech, particularly regarding religious and political speech, is that when coupled with the school's regulation of on-campus speech, regulating off-campus speech would completely prohibit that student from uttering that sort of speech at all. Restrictions on speech during the time a student is in school and when a student is off campus would regulate all twenty-four hours of a student's day. When students utter off-campus speech regarding religious or political expressions, the school carries a heavy burden to justify completely limiting the student's speech. This sort of speech is traditionally referred to as "pure speech" and is traditionally entitled to the highest level of First Amendment protection.[112]

The third and final feature that diminishes public schools' interest in regulating off-campus speech is that the school itself has an interest in protecting students' unpopular off-campus speech.[113] Since *Tinker*, the Court has described schools as a microcosm of American society—as "nurseries of democracy."[114] The Court expressed that "democracy only works if we protect the 'marketplace of ideas,'" and a school

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108. *Id.* at 2046.

109. *See id.* at 2052 (Gorsuch, J., concurring) ("[I]t is reasonable to infer that this authority [,to regulate student speech,] extends to periods when students are in school but are not in class, for example, when they are walking in a hall, eating lunch, congregating outside before the school day starts, or waiting for a bus after school.").

110. *See id.* at 2053 (Gorsuch, J., concurring) ("A public school's regulation of off-premises speech is a different matter [than regulating on-campus speech]. While the decision to enroll a student in a public school may be regarded as conferring the authority to regulate *some* off-premises speech . . ., enrollment cannot be treated as complete transfer of parental authority over a student's speech.") (emphasis in original).

111. *Id.* at 2046.

112. *See id.* at 2047.

113. *Id.* at 2046.

114. *Id.*; *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of multitude of tongues, (rather) than through any kind of authoritative selection.").

should be where children learn what sort of speech is and is not appropriate.[115] Therefore, when a student has an unpopular expression, especially off-campus, the school has a duty to help students learn to deal with opposing ideas and to protect that student's speech. Unfortunately, the Court was notably silent about how courts should apply these features to future cases, although it did provide some guidance, however small, on reasons a school may not be able to limit a student's speech.

While this case answered the question of whether *Tinker* applied to off-campus speech, the Court left many uncertainties regarding internet speech following this case. For example, how are the three features diminishing a school's interest in regulating speech to be applied? What is considered off-campus? Moreover, how can school administrators feel justified in regulating speech without a clear line? However, despite all these ambiguities following the decision in *Mahanoy*, courts across the nation still need a single, clear test for when schools may regulate off-campus student speech. As the Third Circuit noted, "[u]pdating the line between on- and off-campus speech may be difficult in the social media age, but it is a task we must undertake."[116]

## III. CIRCUIT COURT TESTS FOR OFF-CAMPUS STUDENT SPEECH

Without providing clear guidance, the Supreme Court has left federal circuit courts the task of creating a test for when schools may regulate student speech. Prior to *Mahanoy*, the federal circuit courts developed two main tests to evaluate whether a school may regulate a student's off-campus speech.[117] Both main tests for determining when public schools can regulate off-campus student speech recognize the importance of the First Amendment protection of freedom of speech and add an additional step to the traditional *Tinker* analysis to bolster students' protections off-campus.[118] This Section will first discuss the "reasonably foreseeable" test, used in some form by the Second, Third,

115. Tinker, 393 U.S. at 512.

116. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020), *aff'd but criticized*, 141 S. Ct. 2038.

117. *See* discussion *infra* Section III.A; *see also* discussion *infra* Section III.B.

118. *See* discussion *infra* Section III.A; *see also* discussion *infra* Section III.B.

and Eighth Circuits, and its benefits and drawbacks.[119] Next, this Section will discuss the "sufficient nexus" test used by the Fourth Circuit and its benefits and drawbacks.[120]

## A. Reasonably Foreseeable Test

The "reasonably foreseeable" test asks how likely the student's speech is to reach the school campus and how likely that speech is to cause a substantial disruption.[121] This two-part test gained prominence with the Second Circuit case of *Wisniewski v. Board of Education of Weedsport Central School District*.[122]

In *Wisniewski*, Aaron Wisniewski, an eighth-grade student in upstate New York, was suspended from school for an AOL icon depicting violence against a teacher.[123] While at home, on a personal computer, Wisniewski created an icon for his AOL instant messenger account.[124] This icon "was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood."[125] "Beneath the drawing appeared the words 'Kill Mr. VanderMolen,' referring to Philip VanderMolen, Wisniewski's English teacher."[126] Although the icon was never sent to school officials, Mr. VanderMolen eventually became aware of Wisniewski's icon when one of Wisniewski's fifteen friends who viewed the icon shared it with him.[127] After being suspended for this conduct, Wisniewski filed a lawsuit against the school district for violating his freedom of speech.[128]

The Second Circuit, while analyzing whether school officials could regulate Wisniewski's speech, concluded that his speech "crosses the boundary of protected speech and constitutes student conduct that poses

119. *See* discussion *infra* Section III.A.

120. *See* discussion *infra* Section III.B.

121. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007) (ruling that a student's speech could be regulated by school administrators because it (1) "constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities" and (2) "that it would 'materially and substantially disrupt the work and discipline of the school.'") (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969)).

122. *Wisniewski*, 494 F.3d 34.

123. *Id.* at 35.

124. *Id.*

125. *Id.* at 36.

126. *Id.*

127. *Id.*

128. *Id.* at 37.

a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school."[129] In coming to this conclusion, the Court analyzed two separate questions in this test.[130] First, is it reasonably foreseeable that the student's off-campus speech would come to the attention of the school authorities?[131] Next, is it reasonably foreseeable that the student's off-campus speech would cause a material and substantial disruption to the school environment?[132] If the answer to both questions is in the affirmative, then given the special characteristics of the school environment, school administrators may regulate the student's speech.

This test offers several benefits. First, the Court creates an objective test that can be satisfied by school administrators without attempting to look into the individual student's mind to gauge intent.[133] While some courts opt to ask if the student *intended* the speech to reach campus, this approach relies on the school to obtain concrete evidence of the student's mental state, making regulating harmful speech challenging.[134] An objective test, such as the reasonably foreseeable test, allows administrators and courts to balance interests without the need for concrete proof of mental state.

On the other hand, the reasonably foreseeable test's lower evidentiary bar allows schools the ability to regulate speech that may traditionally be beyond their reach. In a digital age, where schools can reasonably foresee nearly all off-campus online speech making its way inside the schoolhouse gate and to the attention of school officials, this test may be ineffective at adequately protecting students' freedom of expression. As the Third Circuit noted in Brandi Levy's case, prior to its appeal to the Supreme Court, although "a student can control how and where she speaks," they have little control over whether their online

129. *Id*. at 38–39 (first quoting Morse v. Frederick, 551 U.S. 393, 403 (2007); then quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396 (5th Cir. 2015) ("[W]e hold *Tinker* governs our analysis, as in this instance, when a student *intentionally directs* at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher.") (emphasis added).

speech "come[s] to the attention of the school authorities."[135] Because schools could reasonably foresee nearly all online student speech being accessed, read, and discussed at school, this test alone adds little protection for students. Further, this test provides no actual limits on the school's ability to reach into the public square and regulate student speech—allowing school administrators immense discretion to control student speech.[136] As such, the reasonably foreseeable test utilized alone provides insufficient First Amendment protections for students and may allow public schools to overreach and regulate constitutionally protected student speech.

## B. Nexus Test

The Fourth Circuit follows the "nexus test," a similar, however slightly different, test to determine if schools may regulate online off-campus student speech.[137] It explains that "where [student] speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."[138] Under this test, before applying *Tinker*, the public school administrators seeking to regulate off-campus student speech must ask whether there is a significant relationship between the speech and the school's interests.[139] Schools' regulatory interests are broadly defined but likely include interests such as protecting students from the harmful impacts of speech, protecting diversity within the school environment, teaching students to deal with opposing viewpoints, and allowing students to critically think for themselves.

The leading Fourth Circuit case on off-campus student speech, *Kowalski v. Berkeley County Schools*, offers an excellent example of

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135. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 188 (3d Cir. 2020), *aff'd but criticized*, 141 S. Ct. 2038 (2021) (first citing D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011); then quoting *Wisniewski*, 494 F.3d at 39)).

136. Maggie Geren, Comment, *Foreseeably Uncertain: The (In)ability of Sch. Off. to Reasonably Foresee Substantial Disruption to the Sch. Env't.*, 73 ARK L. REV. 141, 176 (2020) ("Absent any clear definition of 'reasonably foreseeable,' whether a student's speech satisfies the foreseeability threshold is a purely subjective inquiry.").

137. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565 (4th Cir. 2011).

138. *Id.* at 577.

139. *See id.* at 573 (finding that "the nexus of Kowalski's speech to Mussleman High School's pedagogical interests was sufficiently strong to justify the action taken by the school officials" before finding that "the School District was authorized by *Tinker* to discipline Kowalski").

how courts apply this test.[140] *Kowalski* involves a high school senior in Berkeley County, West Virginia.[141] While at her home and after school hours, Kara Kowalski created an online Myspace page dedicated to ridiculing a fellow student at Musselman High, a public school.[142] Within hours, the targeted student was made aware of the harassing webpage and was immediately offended by its contents.[143] The following morning, the parents of the targeted student filed a complaint with the High School, eventually leading to Kara Kowalski's suspension from school.[144] Kowalski alleged that the school violated her freedom of speech by suspending her from school for her off-campus speech.[145]

In applying the nexus test, courts must first identify a school's regulatory interest in prohibiting certain types of student speech.[146] For example, the Court in *Kowalski* explained that "schools have a responsibility to provide a safe [school] environment."[147] This responsibility and other identifiable "pedagogical interests" grant schools some leeway to regulate student speech.[148] Other identified school interests include a duty to protect students from bullying and provide an environment free from messages advocating illegal drug use, along with the "[s]chool's attempt to educate students about 'habits and manners of civility or the fundamental values necessary to the maintenance of a democratic political system.'"[149]

Once the court identifies the school's interests, the nexus test then asks whether a significant relationship exists between the speech and the school's interest. The *Kowalski* Court characterized Kara

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140. *Id.* at 565.
141. *Id.* at 567.
142. *Id.*
143. *Id.* at 568.
144. *Id.* at 569.
145. *Id.* at 570.
146. See *id.* at 572 (identifying that "public schools have a 'compelling interest' in regulating speech that interferes or disrupts the work and discipline of the school," and then explaining that preventing "student-on-student bullying is a 'major concern' in schools across the country")
147. *Id.* at 572 (citing Morse v. Frederick, 551 U.S. 393 (2007)).
148. *See id.* at 573 ("[W]e are satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being.").
149. *Id.* at 572–73 (quoting Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (internal quotation marks and citations omitted)).

Kowalski's speech as "harassing" and noted that she explicitly targeted another high school student with her online speech.[150] Given the nature of this speech, the Court was satisfied that there was a sufficient nexus between the school official's interest in protecting the student body's well-being and Kara Kowalski's Myspace posts.[151] After a sufficient nexus is satisfied, courts are then free to apply *Tinker* to off-campus speech, as it usually would apply to on-campus speech.[152] In this case, the Court found that Kowalski's speech caused a substantial disruption to the school environment, and therefore, they were justified in regulating Kowalski's online speech.[153]

The most significant benefit of the nexus test is that school administrators must show that their decisions to regulate student speech are related to a legitimate school interest. This step adds an additional burden for schools when attempting to regulate student speech, allowing for increased protection of students' First Amendment rights. Further, it offers slightly more protection than the reasonably foreseeable test because the regulation requires an actual connection to the school's interest, not just the mere possibility that the student's speech will reach the campus. While this test makes it more difficult for administrators to regulate off-campus student speech in some cases, in situations such as the bullying at play in *Kowalski*, school administrators will not face any increased burden when attempting to regulate the speech. Instances, where school administrators regulate student speech to promote and protect students will almost always pass the nexus test as they are related to the school's responsibility to provide a safe school environment. Creating an additional step to the traditional *Tinker* test to further protect First Amendment rights, without making it overly difficult for public school administrators to protect students from the harmful aspects of online speech is the greatest strength of the nexus test.

While the nexus test does offer some positive benefits, it may still not go far enough to protect students' freedom of expression. This test may be less permissive than the reasonably foreseeable test. However, it still only requires a low burden of proof on behalf of the school because school officials may create or identify almost any legitimate interest to satisfy this test, such as a guise of school safety or promoting

150. *Id.* at 573.
151. *Id.*
152. *Id.*
153. *Id.* at 574.

education.[154] Further, this test does not identify how "well-connected" a school's justification for regulating off-campus student speech and their identified regulatory interest must be.[155] Should the interest be directly connected? Or, only tangentially connected? Because the nexus test lacks this distinction, public schools may potentially regulate off-campus student speech that isn't sufficiently connected to schools' pedagogical interests. This ambiguity calls for a more definite and protective test before allowing public schools to potentially reach into the town square and punish a student for their off-campus speech.

With an increasing percentage of student speech occurring off-campus and online, combined with tests requiring relatively low burdens to regulate that speech, public schools may inadvertently restrict constitutionally protected student speech. A test that requires additional barriers before regulation may allow students greater protection of their First Amendment freedoms.

## IV. PROPOSED FRAMEWORK

Federal circuit courts have developed tests to regulate off-campus student speech that attempt to balance a students' First Amendment rights and public schools' duty to provide a safe and effective school environment.[156] To protect students' off-campus speech rights, some circuit courts have developed tests that require school districts to make some threshold showing that their regulation of student speech is related to the school.[157] While this additional burden placed on school districts does help to protect students' rights, neither the reasonably foreseeable test nor the nexus test does enough to sufficiently protect students' speech. Accordingly, the proposed framework for analyzing when a

154. Victoria Bonds, *Tinkering with the Schoolhouse Gate: The Future of Student Speech After Mahanoy Area School District v. B.L.*, 42 LOY. L.A. ENT. L. REV. 83, 99 (2021).

155. Kevin Nathaniel Troy Fowler, Note, *Tinker Tortured: The Scope of Student Off-Campus Viral Speech Rights in the Federal Courts*, 104 KY. L.J. 719, 739 (2015) (arguing "'pedagogical interests' is an extremely vague term that the Court did not spend sufficient time describing" and that "[a]rguably even minor school disruptions" could satisfy this test).

156. *See, e.g.*, Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013); Kowalski v. Berkeley Cnty Sch., 652 F.3d 565 (4th Cir. 2011); Doninger v. Neihoff, 527 F.3d 41 (2d Cir. 2008).

157. *See, e.g.*, *Kowalski*, 652 F.3d at 573 (4th Cir. 2011) ("sufficient nexus" test).

school may regulate off-campus student speech combines aspects of both tests to further protect students' speech in the digital age.

Courts analyzing whether a public school may regulate off-campus student speech must first determine whether that speech occurs on-campus or off-campus. If students utter speech off-campus, then courts ought to ask if a reasonable person in the student's position would have foreseen the speech reaching the schoolhouse gates. Next, courts should look from the student's viewpoint to determine if a reasonable person would have foreseen that the speech would likely to cause a substantial disruption to the school environment. If yes, then the speech may be considered targeted at the school. Next, a school may regulate targeted student speech if the restriction is connected to a legitimate school interest. In this analysis, the school's interests are diminished in light of *Mahanoy*'s off-campus speech "features."[158] Finally, if the school's interest in regulating student speech is still sufficiently strong in light of *Mahanoy's* features, then the court may apply the traditional *Tinker* analysis "to evaluate the constitutionality of the school's imposition of discipline."[159]

This combination test ensures that courts balance a student's foreseeable risk when uttering off-campus speech with the school's interest in promoting a productive learning environment. Balancing both students' interests and public-school administrators' interests attempts to allow schools to continue to regulate harmful and derogatory off-campus student speech without students fearing that every online post could result in discipline from their schools.

## A. On- or Off-Campus Student Speech?

The obvious first step in this analysis is determining whether the student's speech occurs on- or off-campus. Traditionally, this step was straightforward, with all speech occurring inside "the schoolhouse gates" as on-campus speech and outside the "schoolhouse gates" as off-campus speech. However, situations such as school extracurricular and virtual learning have complicated this determination. As schools and technology change, so too will the limit of the schoolhouse gate. For the

158. Mahanoy Area Sch. Dist. v. B.L. *ex rel*. Levy, 141 S. Ct. 2038, 2046 (2021).
159. C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016).

time being, the parties in *Mahanoy* appear to agree on an acceptable standard for what is considered on-campus and off-campus:

> Even B.L. herself and the *amici* supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: *all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B.L.'s proposed rule.*[160]

This definition of times when student speech is considered on-campus is as good as any in the current digital climate. Therefore, all student speech, whether online or in-person, that occurs outside of this definition should be considered off-campus in all circuit court analyses. If, after analysis of this definition, it is determined that the student's speech is on-campus, then a traditional *Tinker* analysis should kick in. If, however, the student's speech is considered off-campus, the next step is to determine the reasonably foreseeable consequences of the student's speech.

## B. Reasonably Foreseeable from the Student's Perspective?

The next step in the proposed framework involves viewing from the student's perspective the reasonably foreseeable impacts their speech may cause. It is critically important to view this question from the student's perspective to allow them to predict the likely consequences of their speech before its uttered. For example, there are often situations where a public-school administrators may forecast that a student's speech will disrupt the school environment, but if a reasonable person in that student's position could not foresee this disruption, how can

160. *Mahanoy*, 141 S. Ct. at 2045 (emphasis added) (internal citations omitted).

schools justify punishing that student for an unforeseen potential disruption? If it is clear that a reasonable person in the student's shoes would both (1) reasonably foresee their off-campus speech reaching the schoolhouse gates and (2) reasonably foresee their speech causing a substantial disruption to the school environment, then that speech lends itself to potential regulation by school administrators.

*1. Reasonably Foreseeable to Reach the Schoolhouse Gates*

The first element of this test asks whether it is foreseeable from the student's position that their off-campus speech will reach the school environment. While it is true that modern internet and social media interconnectivity makes it increasingly likely that all online off-campus student speech could be accessed in the school environment at any time, this step still provides some additional protection for student speech. In this step, courts may consider any measure taken by a student to limit the possibility of the speech reaching school as potential mitigating factors. Examples of measures taken by students to limit the foreseeability of the speech reaching the school include password protection,[161] limiting other students' access to the speech and even using a foreign domain site to prevent U.S. users from finding it via a Google search.[162] If, considering any mitigating factors, it is reasonably foreseeable from the student's perspective that the speech will reach the school environment, then the court may consider the foreseeability of a substantial disruption.

*2. Reasonably Foreseeable that Off-Campus Student Speech Will Cause a Substantial Disruption to the School Environment*

The ubiquitous access and connectivity of internet speech results in the previous step often being a mere formality when considering off-campus, online student speech. However, because of the minimal protection afforded by the first step alone, this step should receive careful consideration by courts and school administrators alike.

Evaluators must look from the student's perspective to determine if it was reasonably foreseeable that the student's off-campus speech

161. S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773 (8th Cir. 2012).

162. *Id.*

would cause a substantial disruption on campus. For this step, after-the-fact evidence that a substantial disruption occurred on campus will not suffice to satisfy this element. The evaluation must determine the likelihood that a substantial disruption would be caused at school and if a reasonable person in the student's position would have been able to foresee this outcome. This evaluation is critically important because it allows students to evaluate whether school officials could restrict their speech before making potentially harmful or disruptive expressions. Viewing this question from the student's perspective attempts to protect students from the expansive reach of the internet. Additionally, viewing this question from the student's perspective furthers public schools' pedagogical interests of teaching students how they ought to act in a democratic "marketplace of diverse ideas."[163] It challenges the student to look at the speech and ask if it would be disruptive in school, and if it would be, it allows the student the opportunity to conform their speech to the acceptable societal standards. Further, this step seeks to shield students from the possibility that their benign online speech inadvertently causes, or in the eyes of school administrators, is likely to cause a substantial disruption to the school environment. Protection from school regulation of off-campus speech that inadvertently causes a substantial disruption is critical to safeguard students' constitutional rights. If the student speech satisfies both elements, the off-campus speech then potentially becomes subject to school regulation. However, before a school may restrict off-campus student speech, it must demonstrate that its restriction is connected to furthering a legitimate school interest.

## C. Nexus to a Legitimate School Interest

Once it has been shown that a student's speech is capable of being regulated by a school, the school administrators next must show that they have a sufficient reason for limiting a student's First Amendment rights. As identified in *Kowalski*, schools have several regulatory interests and responsibilities.[164] Among them are providing a drug-free and safe school environment, preventing and protecting students from

163. Tinker v. Des. Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 521 (1969).
164. Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 572 (4th Cir. 2011).

harassment and bullying, promoting diversity, teaching good manners, promoting team morale, and providing a constructive learning environment.[165] These regulatory interests must be given proper context by considering how they are diminished when students utter speech off-campus.

### *1. School's Regulatory Interests Diminished by* Mahanoy*'s "Features of Off-Campus Speech."*[166]

When seeking to regulate off-campus student speech, schools must identify a specific identifiable interest and how abridging a student's speech serves that interest. As the Supreme Court in *Mahanoy* identified, a school's "unique educational characteristics" that allow it some leeway to regulate otherwise protected student speech are often diminished when student speech occurs off-campus.[167] Features of off-campus speech that distinguish a school's efforts to regulate off-campus speech from their efforts to regulate on-campus speech include: (1) schools rarely stand *in loco parentis* regarding off-campus speech; (2) regulating off-campus speech, particularly regarding religious and political speech, when coupled with the school's regulation of on-campus speech, would amount to a total prohibition of students uttering that sort of speech; and (3) the school's interest in protecting a student's unpopular expression, especially when that speech occurs off-campus.[168]

Once a school identifies an interest it seeks to promote by regulating a student's speech, it must then consider the strength of that interest in light of *Mahanoy's* diminishing features of off-campus speech. Finally, considering the school's diminished regulatory interests, the court must determine if those interests are sufficient to overcome the student's interest in free expression.[169] Determining whether these diminished interests overcome a student's interest in their First Amendment protection must consider the substantial importance that courts give to protecting First Amendment rights. If the school's interests are not vital enough to overcome the student's interest, then the school may not

165. *Id.*; *Mahanoy*, 141 S. Ct. at 2047–48.
166. *Mahanoy*, 141 S. Ct. at 2046.
167. *See id.* at 2045–46.
168. *Id.* at 2046.
169. *See id.* at 2047–48.

regulate the off-campus student speech. However, if the school's interest still warrants restriction on student speech, the court then shifts to applying a traditional *Tinker* analysis to evaluate the constitutionality of the school's discipline.[170]

### D. *Tinker* Analysis to Evaluate the Constitutionality of the School's Discipline

As stated previously, the *Tinker* test allows schools to regulate and punish student speech only if (1) the school had some reasonable expectation that the expression would cause a *substantial disruption* to the school's operations or (2) the student's expression *invades* the rights of others.[171] *Tinker* allows these exceptions to the First Amendment's freedom of expression because students would potentially be deprived of their rights to a safe and productive school environment without them.[172]

Once all prior elements of the proposed framework, analyzing when a school may regulate off-campus student speech, are met, the school must justify its imposition of punishment under *Tinker*'s standards. If the student's expression satisfies either of the *Tinker* prongs, the school is finally justified in regulating off-campus speech.

## V. CONCLUSION

The Supreme Court's first attempt to clarify when a school may regulate off-campus student speech has left much to be desired. While it did clarify that schools may regulate off-campus speech, it failed to identify any specific test or guidance as to when and in what circumstances this may occur. Instead, as the Court has done for several years, it opted to punt the question of when a school's off-campus student speech to lower federal courts for their determination.[173] Without offering clear guidance, the Supreme Court has left federal circuit courts to their own devices for developing a test to determine when schools may regulate off-campus speech.

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170. *See* C.R. v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1150 (9th Cir. 2016).
171. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).
172. *Id*. at 513.
173. *See Mahanoy*, 141 S. Ct. at 2045.

The various federal circuit courts have developed several tests attempting to balance the rights of students and the special characteristics of the school environment. Unfortunately, of the several tests created by federal circuit courts, no single test articulates safeguards sufficient to protect a student's interest in their First Amendment protections of freedom of expression. Because all existing circuit tests fail to go far enough to protect students' rights, a new framework is necessary to balance the rights of students and schools in a digital age.

This proposed framework for regulating students' off-campus speech attempts to combine the protections offered by both primary circuit court tests without abridging a school's duty to protect its students and promote a productive educational environment. This framework starts by asking whether the speech occurs on- or off-campus, with a clear definition of on- and off-campus so that students and school administrators alike may be aware of the relevant rules depending on the location of their speech. Next, the framework looks from the student speaker's point of view and asks whether it was reasonably foreseeable that the speech would reach the school environment and whether it was reasonably foreseeable that once that speech reached campus, it would cause a substantial disruption. If both of these are satisfied, the framework seeks to determine if a school's regulatory interests are sufficient to justify abridging the student's constitutional rights. Again, the school's interest must be considered in light of *Mahanoy*'s diminishing regulatory features of off-campus speech. Finally, suppose a school is within its right to regulate a student's off-campus speech. In that case, the framework then asks whether the school's imposition of punishment is constitutionally permissible under the traditional *Tinker* test. If the framework's elements are satisfied, then a school is justified in regulating off-campus student speech.

This framework may appear cumbersome, with many steps to be identified and analyzed. However, when dealing with a constitutional right such as the freedom of expression, there must be sufficient protections to ensure that the government cannot restrict those rights. Furthermore, given the unique and constantly changing nature of the internet and online speech, this test will often have to be updated to conform with the times. However, in today's virtual learning climate, with students spending increasing time online, this framework aims to

provide protection and predictability given the increasingly blurred lines between on- and off-campus activity.