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On-Campus or Off-Campus? - That Is *Still* the Question: *Mahanoy Area Sch. Dist. v. B.L.* and the Supreme Court's New Digital Frontier

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On-Campus or Off-Campus?—That Is *Still* the Question: *Mahanoy Area Sch. Dist. v. B.L.* and the Supreme Court's New Digital Frontier

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ABSTRACT

This Article examines the contours of the "on-campus" versus "off-campus" distinction embedded in the Supreme Court's opinion in Mahoney School District v. B.L. *This Article argues that* B.L., *and the Court's broader* Tinker *doctrine, fail to adequately address modern student speech issues, especially student speech arising in extracurricular programs and activities. This Article proposes a two-part legal framework for future courts to analyze student speech issues in an increasingly digital post-pandemic world.*

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INTRODUCTION

For more than fifty years, the United States Supreme Court has managed to balance two competing First Amendment principles: (1) that students do not "shed" *all* of their free speech rights at the "schoolhouse gate,"[1] and (2) that public school officials have a special interest in regulating certain aspects of student speech that may cause a "material" and "substantial disruption" to the school environment.[2]

While the boundary demarcating schools' heightened authority to regulate student speech "is not constructed solely of the bricks and mortar surrounding the school yard[,]"[3] since the Supreme Court's landmark decision in *Tinker v. Des Moines,* most of its student speech jurisprudence has hinged on a fundamental (and outdated)[4] presumption: that the student's speech occurred on a school's physical campus, within the context of a traditional

1. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506–07 (1969); *see also* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 177 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) ("*Tinker* . . . struck a balance, reaffirming students' rights but recognizing a limited zone of heightened governmental authority.").

2. *B.L.*, 964 F.3d at 184.

3. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) (citing Supreme Court first amendment jurisprudence).

4. *See, e.g.*, Sheldon McCurry Stokes, Note, *Bracelets and Boobies:* B.H. v. Easton Area School District *and the Need for a New Uniform Test in Student Speech Cases*, 13 FIRST AMEND. L. REV. 530, 532 (2015) (arguing for the Supreme Court to grant certiorari in a student speech case to update *Tinker* doctrine); Lindsay J. Gower, Note, Blue Mountain School District v. J.S. Ex Rel. Snyder*: Will the Supreme Court Provide Clarification for Public School Officials Regarding Off-Campus Internet Speech?*, 64 ALA. L. REV. 709, 710 (2013) (advocating for the Supreme Court to clarify *Tinker*'s application); Allison Martin, Comment, Tinker*ing with the Parameters of Student Free Speech Rights for Online Expression: When Social Networking Sites Knock on the Schoolhouse Gate*, 43 SETON HALL L. REV. 773, 776 (2013) (arguing that the Supreme Court needs to clarify application of the *Tinker* standard to off-campus internet speech); Aaron J. Hersh, Note, *Rehabilitating* Tinker*: A Modest Proposal to Protect Public-School Students' First Amendment Free Expression Rights in the Digital Age*, 98 IOWA L. REV. 1309, 1313–1314 (2013) (proposing a modified application of *Tinker* to encourage cohesion among the circuit courts).

school day.[5] Accelerated by a global pandemic,[6] this presumption has quickly given way to a new frontier[7] of student speech questions, emerging in novel digital contexts quite different than the traditional in-person school settings that formed the foundation of the Supreme Court's *Tinker* doctrine: i.e., symbolic speech protesting the Vietnam War in a school building,[8] sexual innuendo in a student's speech during a school assembly,[9] censorship in a school's printed newspaper,[10] and a student banner promoting illegal drug activity outside of a school-sponsored event.[11]

In *Mahanoy Area School District v. B.L.*, the Court attempted to bring the *Tinker* doctrine into the information age but left most of the heavy work for future courts.[12] In *B.L.*, the Court held, in an 8-1 decision, that a public school district violated the First Amendment by disciplining a student for social media posts made online that were vulgar and critical of her high school cheerleading team, when that speech occurred off-campus, outside of school hours, and on her own personal cell phone.[13] In its decision, the Court acknowledged that the special interest school officials have in regulating on-campus student speech under *Tinker* may extend to *some,* but not

5. *See Tinker*, 393 U.S. at 506–07; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting); Morse v. Frederick, 551 U.S. 393, 396 (2007); *see also* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2050 (2021) (Alito, J., concurring) ("Our cases involving the regulation of student speech have not directly addressed [the off-campus] question. All those cases involved either in-school speech or speech that was tantamount to in-school speech. And in those cases, the Court appeared to take it for granted that 'the special characteristics of the school environment' justified special rules." (first citing *Morse*, 551 U.S. at 397, 403, 405, 406, n. 2, 408; then citing *Hazelwood*, 484 U.S. at 266; and then citing *Tinker*, 393 U.S. at 506)).

6. *See generally*, *COVID-19*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/index.html [https://perma.cc/S8PL-2CCC].

7. *B.L.*, 964 F.3d at 175 ("With new forms of communication have come new frontiers of regulation, where educators assert the power to regulate online student speech made off school grounds, after school hours, and without school resources.").

8. *Tinker*, 393 U.S. at 506–07.

9. *Fraser*, 478 U.S. at 677–78.

10. *Hazelwood*, 484 U.S. at 262.

11. Morse v. Frederick, 551 U.S. 393, 396 (2007).

12. Mahanoy Area School District v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2063 (2021) (Thomas, J., dissenting) ("In effect, [the majority] states just one rule: Schools can regulate speech less often when that speech occurs off campus. It then identifies this case as an 'example' and 'leav[es] for future cases' the job of developing this new common-law doctrine." (alteration in original) (citation omitted)).

13. *Id.* at 2047–48.

all, areas of speech that occur off-campus.[14] While the Court recognized the relevance of the "on-campus" and "off-campus" distinction,[15] it stopped short of explaining exactly what counts as off-campus speech or even how ordinary First Amendment principles should apply in off-campus settings.[16] Ultimately, *B.L.* offers little more than guideposts on the opposite ends of the student-speech spectrum.[17] Still, the message from the Court is clear: regulation of purely off-campus student speech raises serious First Amendment concerns.[18]

This Article explores the contours of the on-campus versus off-campus distinction embedded in *B.L.* Part II begins with a brief history of the First Amendment student speech doctrine, tracing this distinction throughout the development of the Court's *Tinker* doctrine. Part III builds on Supreme Court jurisprudence to highlight a body of circuit court caselaw that emerged in the decade following the turn of the millennium to address whether *Tinker* could be applied to off-campus speech that still reached the "schoolhouse gate." Part IV analyzes the factual and procedural background in *B.L.*, beginning with the federal district court proceedings and concluding with analysis of the Supreme Court's opinion. Part V concludes by proposing a two-part legal framework to resolve student speech cases post-*B.L.* and addressing the biggest inconsistency in *B.L.*—application of off-campus speech principles in a school's extra-curricular programs or activities, particularly its sports programs.

I. *TINKER* DOCTRINE

The First Amendment to the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[19] It is well settled that under the U.S. Constitution, states have a "special" governmental interest in prescribing and controlling conduct that occurs in public schools.[20] However, by the turn of the twentieth century, the

14. *Id.* at 2045–46.

15. *Id.* at 2046–47.

16. *Id.* at 2047.

17. *Id.* at 2054–57 (Alito, J., concurring).

18. *Id.* at 2045.

19. U.S. CONST. amend. I.

20. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969); Meyer v. Nebraska, 262 U.S. 390, 393 (1923); Epperson v. Arkansas, 393 U.S. 97, 105 (1968)*; see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("The role and purpose of the American public school system were well described by two historians, who stated: '[P]ublic

Supreme Court had recognized that the Fourteenth Amendment's Due Process Clause prevented a state from interfering with the liberty rights of "teacher[s], student[s] and parent[s],"[21] and that the Constitution protects all citizens "against the State itself and all of its creatures—Boards of Education not excepted."[22] Although the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"[23] until the Supreme Court's landmark opinion in *Tinker v. Des*

education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" (quoting CHARLES BEARD & MARY BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting) ("[T]he public educator nurtures students' social and moral development by transmitting to them an official dogma of 'community values.'" (quoting Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 864 (1982))); *Mahanoy*, 141 S. Ct. at 2059 (Thomas, J., dissenting) ("Cases and treatises from that era reveal that public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school." (citing Morse v. Frederick, 551 U.S. 393, 419 (2007)).

21. *Tinker*, 393 U.S. at 506*; see* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (recognizing parents' liberty interest in choosing their child's education); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing children's liberty interest in political expression by allowing them to refuse recitation of the pledge of allegiance); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 209–12 (1948) (holding use of public schools for dissemination of religious lessons violated the first and fourteenth amendments); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring) (acknowledging teachers' right to participate in political associations); Sweezy v. New Hampshire, 354 U.S. 234, 241 (1957) (holding academic and political freedom preserved a university professor's right to refuse to testify about a guest lecture); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (emphasizing the importance of student and teacher freedom to associate); Engel v. Vitale, 370 U.S. 421, 424–25 (1962) (holding students were not required to take part in daily prayer at a school); Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967) (stressing the importance of teachers' first and fourteenth amendment rights in cultivating well-rounded learning environments); *see also* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 211–14 (3d Cir. 2011) (en banc) (noting the history of the student speech doctrine).

22. *Barnette*, 319 U.S. at 637 ("[Boards of Education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

23. *Hazelwood*, 484 U.S. at 280 (Brennan, J., dissenting) (quoting *Fraser*, 478 U.S. at 682) (commenting on the history of the student speech doctrine post-*Tinker*).

Moines, the Court had never squarely addressed a student's free speech rights in a public school.[24]

A. Tinker v. Des Moines Independent Community School District

In *Tinker*, a group of high school students planned to wear black armbands with a peace sign to their school as a symbol of their disapproval of the Vietnam War.[25] Soon after, the school's principal adopted a policy that students wearing black armbands would be asked to remove them or face discipline.[26] In open defiance of the school's policy, Mary Beth and John Tinker wore their black armbands to school and were quickly suspended by school administrators.[27] Parents, on behalf of their minor children, sued the school district for violation of their children's First Amendment rights to free speech.[28] Ultimately, the Supreme Court reversed the school's suspension, holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29] However, the Court also recognized that student speech within the "schoolhouse" is not absolute. In its holding, the *Tinker* Court crafted a legal test that balances a student's right to free speech with a school's need to promote an orderly learning environment for all students.[30] Under *Tinker*, student speech "*in class or out of it*,"[31] that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment.[32] Ultimately, *Tinker's* "substantial disruption" test continues to be the leading constitutional analysis in the student speech arena, with several notable distinctions.[33]

24. *See supra* note 22 and accompanying text.

25. *Tinker*, 393 U.S. at 504.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 506.

30. *Id.* at 512–14.

31. *Id.* at 513 (emphasis added). Extension of the Court's holding here is at the heart of the on-campus versus off-campus distinction. Arguably the *Tinker* Court's statement alludes to student speech rendered outside of the four corners of the in-person classroom (i.e., in the hallway, in the cafeteria, or on the playing field) but still within a traditional on-campus in-person school day. *Id.* at 512–13.

32. *Id.* at 513.

33. *See infra* Part II (B–D); *see also* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2044–46 (2021) (beginning the Supreme Court's most recent First Amendment student-speech analysis with references to *Tinker's* "substantial disruption" test).

B. Bethel School District v. Fraser

Nearly twenty years after *Tinker*, the Court addressed the scope of a student's free speech rights in *Bethel School District v. Fraser*.[34] In *Fraser*, a high school student gave a speech to nominate a fellow classmate for a student government position during a school assembly.[35] The speech was delivered in-person, to 600 members of the student body.[36] Throughout the speech, Fraser repeatedly referred to the candidate through "elaborate graphic, and explicit sexual metaphor."[37] Following the speech, the school suspended Fraser for violation of a school rule prohibiting "obscene language" which later prompted a lawsuit against the school district under the First Amendment.[38] The Supreme Court upheld the school's suspension, holding that the Constitution did not protect student speech given during a school assembly that was "indecent," "vulgar," or "lewd" and that would "undermine the school's basic educational mission."[39] In its holding, the Court declined to apply *Tinker's* substantial disruption test, finding the purely political and symbolic speech at issue in *Tinker* distinguishable from a "pervasive sexual innuendo" that was "plainly offensive to both teachers and students."[40] However, the Court did acknowledge (at least implicitly) that if Fraser's comments had not occurred on-campus during a school assembly, they would have been entitled to First Amendment protection.[41]

34. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

35. *Id.*

36. *Id.*

37. *Id.* at 677–678.

38. *Id.* at 678–679.

39. *Id.* at 685.

40. *Id.* at 683.

41. *See Id.* ("The determination of what manner of speech *in the classroom* or *in school assembly* is inappropriate properly rests with the school board." (emphasis added)); *see also* Morse v. Frederick, 551 U.S. 393, 404 (2007). In analyzing the speech in *Morse*, the Court reflected on the speech in *Fraser*. *Morse*, 551 U.S. at 404–05. For the first time, the Court drew the line between on-campus and off-campus student speech—re-iterating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," but making clear that "[h]ad *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 404–05 (citing *Fraser*, 478 U.S. at 682–83). "In school, however, Fraser's First Amendment rights were circumscribed 'in light of the special characteristics of the school environment.'" *Morse*, 551 U.S. at 405 (quoting *Tinker*, 393 U.S. at 506).

C. Hazelwood School District v. Kuhlmeier

Two years later, the Court decided *Hazelwood School District v. Kuhlmeier*.[42] In *Hazelwood*, a Missouri high school student brought a First Amendment lawsuit against her school district after her principal removed portions of an article about student pregnancy and divorce that she wrote for the school-sponsored print newspaper.[43] The Court upheld the school district's decision, holding that educators do not run afoul of the First Amendment by "exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[44] Like *Fraser*, the Court distinguished *Hazelwood* from *Tinker*, finding a school's tolerance of student speech, which just happened to occur at school, markedly different than the promotion or endorsement of student speech in a school-sponsored forum.[45]

D. Morse v. Frederick

Finally, in 2007, the Supreme Court refined its student speech doctrine once more in *Morse v. Frederick*.[46] In *Morse*, a student was suspended for refusing a principal's directive to take down a "large banner" promoting illegal drug use, that read "BONG HiTS 4 JESUS."[47] The student displayed the banner across the street from the school building, but as part of a school-sanctioned event, during "normal school hours" within the traditional school day.[48] The student filed a First Amendment lawsuit challenging the suspension.[49] The Court held that a school district does not violate the First Amendment by regulating student speech that promotes illegal

42. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

43. *Id.* at 262–64.

44. *Id.* at 273.

45. *Id.* at 270–72.

46. Morse v. Frederick, 551 U.S. 393 (2007).

47. *Id.* at 396–97.

48. *Id.* at 398. *Morse* arose during the unique backdrop of the 2002 Winter Olympics. "[T]he Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions." *Id.* at 397 (citations omitted).

49. *Id.* at 399.

drug use at school.[50] In upholding the student's suspension, the Court explicitly rejected his argument that the school lacked the authority to regulate his speech because it occurred across the street from the school building.[51] Rather, the Court found that the event was in fact school-sanctioned: the school planned the event as a "class trip," and it was actively supervised by teachers and administrators.[52] The high school band even performed.[53] In this context, the school's right to regulate speech was clearly warranted. However, the Court was quick to note that like in *Fraser*, if the student's speech had been rendered off-campus, the speech "would have been protected" by the First Amendment.[54]

In short, *Tinker*, *Fraser*, *Hazelwood*, and *Morse* form a predictable body of case law that balances the progressive ideals of the 1960's with traditional notations of discipline and order in traditional public-school settings (i.e., on-campus). Thus, the *Tinker* doctrine has created several well-settled rules for the regulation of student speech on-campus: "(1) 'Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language[;]' (2) 'Under [*Kuhlmeier*], a school may regulate school-sponsored speech . . . on the basis of any legitimate pedagogical concern[;]' and (3) Under *Morse*, a school may categorically prohibit speech that can reasonably be regarded as encouraging illegal drug use . . . ."[55] On-campus speech that falls "outside of these categories" is presumptively subject to analysis under *Tinker*'s "substantial disruption" test.[56] While the *Tinker* doctrine continues to provide a useful framework for on-campus speech, beyond passive references and vague hypotheticals in *Fraser* and *Morse*, it did little to establish any framework for off-campus speech prior to *B.L.*[57]

In many ways, the timing of *Morse* was fortuitous. *Morse* was decided in 2007 and the Court would not hear another student speech case for almost

50. *Id.* at 409–10.

51. *Id.* at 400–01.

52. *Id.*

53. *Id.* at 401.

54. *Id.* at 404–05 (noting that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." (first citing Cohen v. California, 403 U.S. 15 (1971); and then citing Bethel Sch. Dist. No. 403 v. Fraser 478, U.S. 675, 682–83 (1868))).

55. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 436 (M.D. Pa. 2019), *aff'd*, 964 F.3d 170 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) (alterations in original) (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001)).

56. *Id.* at 436.

57. *See* Fraser, 478 U.S. at 677; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266–73 (1988).

fifteen years.[58] 2007 proved to be an inflection point in a decade that witnessed unprecedented growth in digital communication.[59] Since *Morse*, the fusion of social media and smart phone technologies have reached a state of "omnipresence"[60] that has fundamentally altered how speech is disseminated. As Part III explains, a body of circuit court precedent emerged following *Morse* to address this paradigm shift and determine whether off-campus digital speech, impacting the in-person learning environment, was actionable under the First Amendment.[61]

II. CIRCUIT COURT PRECEDENT (2007–2021)

Although *Tinker* remained the gold standard for constitutional analysis of student speech on-campus, whether (and to what extent) *Tinker* applied to "speech uttered beyond the schoolhouse gate" continued to be an open question prior to *B.L.*[62] Circuit court cases decided since *Morse* yielded no

58. *Morse*, 551 U.S. at 393.

59. THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS 19–23 (2016). As author Thomas Fieldman explains, 2007 is a critically important year in the understanding of our current tech-drive society and in the history of technology generally. In 2007, Apple launched the first generation of the iPhone, Facebook and Twitter went global, Google bought Youtube, Kindle and Android were released, and IBM introduced the Watson supercomputer. *Id. See* Lizzy Gurdus, *Your World Changed Forever in 2007, Get with the Program, Thomas Friedman Says*, CNBC (Nov. 22, 2016, 12:33 PM), https://www.cnbc.com/2016/11/22/your-world-changed-forever-in-2007-with-iphone-and-tech-boom-thomas-friedman.html [https://perma.cc/Y365-FFEM].

60. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 179 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) (first citing Layshock v. Hermitage Sch. Dist. 650 F.3d 205, 220–21 (3d Cir. 2011) (en banc) (Jordan, J., concurring); and then citing J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (Smith, J., concurring)).

61. *See infra* Part III.

62. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 444 (M.D. Pa. 2019), *aff'd*, 964 F.3d 170 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021); *see also Snyder*, 650 F.3d at 926 (assuming, without deciding, that *Tinker* applies to off-campus speech); Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 573 (4th Cir. 2011) ("There is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here . . . ."); *Layshock*, 650 F.3d at 216 ("It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities.").

consistent legal analysis.[63] However, three distinct categories of constitutional analysis emerged from the fray.[64]

In the first category, *Tinker* was applied to off-campus speech if "it was reasonably foreseeable" that a student's off-campus speech would substantially disrupt the school learning environment.[65] A second category applied *Tinker* if the off-campus speech had a sufficient "nexus" to the school's "pedagogical interests."[66] Finally, a hodgepodge of circuit courts applied *Tinker* to off-campus settings without fully articulating a governing standard.[67] It is this fractured legal landscape from which *B.L.* emerged.

A. The "Reasonably Foreseeable" Test

The Second and Eighth Circuits addressed off-campus student speech under *Tinker* within the context of violent and threatening online student speech directed at the school community. In *Wisniewski ex rel. Wisniewski v. Board of Education*, an eighth-grade student created an icon for his American Online (AOL) instant messaging account that displayed a "pistol firing a bullet at a person's head" with a notation that read "Kill Mr. VanderMolen," the student's English teacher.[68] The student's icon was visible to each of his AOL "buddies," some of whom were his fellow classmates.[69] The student's AOL icon was circulated for approximately three weeks.[70] The student was later suspended after images of the icon were captured by another student and forwarded to the school.[71] The Second Circuit, applying *Tinker*, upheld the student's suspension, holding that off-campus speech that "pose[d] a reasonably foreseeable risk"[72] of "materially and substantially disrupt[ing] the work and discipline of the school[s]" was not

63. This Article is limited to a brief review of circuit court cases from 2007–2021 that were applicable to the Court's outcome in *B.L.* For a comprehensive review of the circuit split in authority during this time period, see, for example, Brief of *Amici Curiae* Nat'l Sch. Bds. Ass'n et al. in Support of Petitioner at 6–10, Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021) (No. 20-255); Brief for Pa. Sch. Bds. Ass'n and Pa. Principals Ass'n as *Amici Curiae* Supporting Petitioner at 10–11, *Mahanoy*, 141 S. Ct. 2038 (No. 20-255).

64. *B.L.*, 964 F.3d at 186–87.

65. *See infra* Part III(A).

66. *See infra* Part III(B).

67. *See infra* Part III(C).

68. Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 35–36 (2d Cir. 2007).

69. *Id.*

70. *Id.* at 36.

71. *Id.*

72. *Id.* at 38.

protected under *Tinker*.[73] In its holding, the Second Circuit had "no doubt" that the violence depicted in the student's AOL icon, once made known to the school, was a foreseeable substantial disruption the learning environment.[74]

The Eighth Circuit adopted a similar approach in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*.[75] Like *Wisniewski*, in *D.J.M.*, the speech at issue involved a series of AOL instant messages sent by a student online, outside of the traditional school day.[76] In *D.J.M.*, the student's messages indicated that he had been "talking about taking a gun to school" and shooting "everyone he hates [and] then shoot[ing] himself."[77] These messages were forwarded to the school's principal, who contacted the police.[78] The student was later arrested by law enforcement and suspended by the school district.[79] Thereafter, parents and students expressed concerns about school safety, and the school spent "considerable time dealing with these concerns" to ensure the school's security.[80] Like *Wisniewski*, the Eighth Circuit upheld the student's suspension, finding that it was "reasonably foreseeable" that the student's threatening off-campus speech would be brought to the attention of the school, and that it would create a "risk of substantial disruption within the school environment."[81]

Since *Wisniewski* and *D.J.M*, the "reasonably foreseeable" test has also been extended to non-violent off-campus student speech cases, such as allegations of sexual and racial harassment.[82] In the Eighth Circuit, prior to *B.L.*, this approach was extended to govern all forms of off-campus student speech.[83]

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73. *Id.* at 39 (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)).

74. *Id.* at 40.

75. D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 765–67 (8th Cir. 2011).

76. *Id.* at 757–60.

77. *Id.* at 758 (first alteration in original).

78. *Id.* at 759.

79. *Id.*

80. *Id.* at 766.

81. *Id.* ("[S]tudent creativity and . . . ability . . . can[not] flourish if violence threatens the school environment.").

82. *See* C.R. *ex rel.* Rainville v. Eugene Sch. Dist. 4J, 835 F.3d 1142, 1146, 1151 (9th Cir. 2016); S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771, 773, 777–78 (8th Cir. 2012).

83. *See* Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 43, 48–52 (2d Cir. 2008) (denying preliminary injunction and upholding discipline for a student who used an off-campus online platform to urge others to protest the school's decision to postpone a concert); *S.J.W.*, 696 F.3d at 777; *see also* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

B. The "Nexus" Test

The Fourth Circuit's approach focuses less on the foreseeability of off-campus speech reaching the on-campus learning environment and more on the "nexus" of the off-campus speech to specific pedagogical interests of the school. The leading circuit case for this mode of analysis is *Kowalski v. Berkeley County Schools*.[84] In *Kowalski*, a high school senior created a MySpace page entitled "S.A.S.H." that was used by fellow classmates as an online forum to verbally attack another student, "Shay N."[85] Kowalski invited approximately one-hundred of her MySpace friends (many of whom attended her high school) to join the webpage.[86] At least one of the students accessed the MySpace page on a school-owned computer during the course of the school day.[87] Thereafter, Shay's parents filed a harassment complaint against Kowalski with the school.[88] Shay also missed class time because she "fe[lt] uncomfortable about sitting in class with students who had posted comments about her on the MySpace webpage."[89]

Subsequently, the school district suspended Kowalski for her online comments under its existing "Harassment, Bullying, and Intimidation Policy."[90] The Fourth Circuit found that the prevention of harassment was an important pedagogical interest for the school and that harassment could have the effect of "caus[ing] victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide."[91] Thus, schools generally "must be able to prevent and punish harassment and bullying in order to provide a safe school environment . . . ."[92] In that light, the Fourth Circuit found that Kowalski's speech, although rendered "metaphysical[ly]" off-campus, through an online medium, still had a sufficient "nexus" to the school's "pedagogical interests" (i.e., prevention of harassment) to justify the school's suspension.[93]

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

85. *Id.* at 567. The Fourth Circuit found that there was disagreement as to what the acronym "S.A.S.H." represented. In her deposition, Kowalski testified that "S.A.S.H." meant "Students Against Sluts Herpes" while another student testified that "S.A.S.H." meant "Students Against Shay's Herpes," referring directly to another student at the school. *Id.*

86. *Id.*

87. *Id.* at 568.

88. *Id.*

89. *Id.*

90. *Id.* at 568–69.

91. *Id.* at 572 (citation omitted).

92. *Id.*

93. *Id.* at 573. In that regard, the Fourth Circuit found that the school officials were "carrying out their role as the trustees of the student body's well-being." *Id.*

C. Other Circuit Court Approaches

Finally, several circuits have applied *Tinker* in off-campus speech cases without pronouncing a global legal standard. In *Bell v. Itawamba County School Board*, the Fifth Circuit applied *Tinker* to uphold the suspension of a student for disseminating "[a] rap recording containing threats to, and harassment and intimidation of, two teachers" that was "intentionally direct[ed] at the school community[.]"[94] Similarly, in *Wynar v. Douglas County School District*, the Ninth Circuit upheld a student's suspension in the face of evidence of "an identifiable threat of school violence."[95]

In sum, several circuit court approaches to handling off-campus student speech emerged in the wake of *Morse*.[96] Although the mechanics of the opinions differed, the results were the same: *Tinker* was extended deep into realms of off-campus digital student speech to combat threatening and harassing behavior impacting the school's learning environment.[97] As Part IV displays, the facts in *B.L.* do not involve threatening or harassing conduct, and now serve as an exemplar for the type of non-violent, non-threatening off-campus student speech entirely beyond the reach of school officials under the First Amendment.[98]

III. *MAHANOY AREA SCHOOL DISTRICT V. B.L.*

A. Relevant Factual Background

In the spring of 2016, a public school student made several social media posts on her personal Snapchat account that were critical of her high school cheerleading team.[99] At the time, B.L. was a freshman at Mahanoy Area High School, which is a part of the Mahanoy Area School District,

94. Bell v. Itawamba Cnty. Sch. Dist., 799 F.3d 379, 394 (5th Cir. 2015) (en banc).

95. Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1069 (9th Cir. 2013) (declining to "divine and impose a global standard for . . . off-campus speech[]").

96. *See supra* Part II (D).

97. *Id. Cf. supra* note 84 and accompanying text.

98. *See* Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2047 (2021).

99. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 432–33 (M.D. Pa. 2019), *aff'd*, 964 F.3d 170 (3d Cir.), *aff'd*, 141 S. Ct. 2038 (2021) ("Snapchat is a social media application for smartphones that allows users to send private text, photo, and video messages to other users—but these messages are limited in duration, cannot be accessed from the web, and can only be viewed temporarily." (citing B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d. 607, 610 n.1 (M.D. Pa. 2017))).

located outside of Schuylkill County, Pennsylvania.[100] During her freshman year in high school, B.L. was a member of the junior varsity cheerleading squad.[101] At the end of her freshman year, B.L. tried out for the school's varsity cheerleading squad.[102] Student athletes trying out for the cheerleading team were required to agree to the team's Cheerleading Rules (Rules) which "would apply to her if [B.L.] made the [cheerleading] squad again."[103] The Rules stated, among other things, that Mahanoy High School cheerleaders would "have respect for [their] school, coaches, teachers, other cheerleaders and teams. Remember you are representing your school when at games, fundraisers, and other events. Good sportsmanship will be enforced, this includes foul language and inappropriate gestures."[104]

The Rules put cheerleaders on notice that there would be "no toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet."[105] Both B.L. and her mother reviewed the Rules and "signed a document acknowledging B.L. would be bound by them."[106] Following tryouts, cheerleading coaches decided to keep B.L. on the junior varsity cheerleading squad for her sophomore year, while an incoming freshman was placed on the varsity team.[107]

Frustrated by her coaches' decision, over the weekend B.L. made two social media posts on Snapchat.[108] The first post was a selfie taken outside of the Cocoa Hut, a local convenience store and student hangout, where she and a friend "pos[ed] in street clothes" with their "middle fingers raised."[109] The Snapchat post included the following text at the top of the photo: "fuck school fuck softball fuck cheer fuck everything."[110] B.L. later made another Snapchat post that read: "Love how me and [my friend] get told we need a year of jv before we make varsity but that[] doesn't matter to anyone else?"[111] "The caption also contained an upside-down smiley-face emoji."[112] Once the social media posts were published online, they were

100. *B.L.*, 376 F. Supp. 3d at 432.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 432–33.
108. *Id.* at 433.
109. *Id.*
110. *Id.*
111. *Id.* (alteration in original).
112. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2043 (2021).

viewable by B.L.'s 250 Snapchat friends, many of whom attended her high school, and some of whom were fellow members of the cheerleading team.[113] One of B.L.'s Snapchat friends (also a cheerleader at the high school) took screenshots of B.L.'s Snapchat posts and forwarded them to the cheerleading team's coach.[114]

Following the weekend, news about B.L.'s social media posts began to circulate around the high school. Several cheerleaders and non-cheerleaders approached the school's coaches to express their concerns about the posts.[115] Some of these individuals were "visibly upset."[116] Although chatter about B.L.'s online posts "persisted during an Algebra class taught by one of the two coaches," discussion about the posts took up "at most, 5 to 10 minutes" of class time.[117] Ultimately, Mahanoy's cheerleading coaches decided to suspend B.L. from the cheerleading team for one school year for violating cheerleading team Rules.[118] Subsequently, B.L.'s parents sought review of the coaches' decision with the school's principal, athletic director, as well as the school district's superintendent and Board of Education, "to no avail."[119]

B. Federal District Court Lawsuit

B.L., by and through her parents, filed a lawsuit under 42 U.S.C. § 1983 against the Mahanoy Area School District in Pennsylvania federal district court seeking a temporary restraining order and preliminary injunction

113. *B.L.*, 376 F. Supp. 3d at 433.

114. *Id.* The cheerleader who forwarded B.L.'s screenshots to the coach was the coach's daughter. *Id.*

115. *Id.*

116. *Id.*

117. *Mahanoy*, 141 S. Ct. at 2043, 2047–48. The court record in *B.L.* indicated that during the cheerleading coaches' depositions, she was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," to which "she responded simply, 'No.'" *Id.* at 2048.

118. *B.L.,* 376 F. Supp. 3d at 433. The District Court found as fact that "[e]ven though electronic squabbling amongst cheerleaders at the High School 'is a fairly typical occurrence,' the coaches felt the need to enforce the Rules against B.L. 'to "avoid chaos" and maintain a "team-like environment."'" *Id.* However, "[t]he cheerleading coaches would not have suspended B.L. from the team if her Snaps had not referenced cheerleading." *Id.*

119. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 176 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) ("Although school authorities agreed B.L. could try out for the team again the next year, they upheld the coaches' decision for that year."); *see also* B.L., 376 F. Supp. 3d at 438 ("The School Board decided that it should not get involved in the minutiae of extracurricular activities, and that coaches must be permitted to hold students accountable for their actions.").

enjoining the school district from suspending B.L. from the cheerleading team for off-campus speech protected by the First Amendment.[120] The district court granted B.L.'s prayer for injunctive relief and entered a temporary restraining order and preliminary injunction against the school district.[121] Following discovery, the district court granted summary judgment in favor of B.L.[122]

At summary judgment, the school district advanced two arguments in support of its regulation of B.L.'s social media posts.[123] First, B.L. waived her First Amendment rights when she agreed to the cheerleading team's Rules.[124] The district court acknowledged that a party *can* waive its constitutional rights, but that such a waiver must be "voluntary, knowing, and intelligent . . . shown by 'clear and compelling' evidence."[125] To meet this heightened standard, at least in the Third Circuit, the parties must have equal bargaining power in the negotiation and advice of legal counsel to boot.[126] In this case, the district court found that there simply was not sufficient evidence in the record to establish a lawful constitutional waiver.[127] Indeed, "neither B.L. nor her mother had bargaining equality with the coaches or the school; the Cheerleading Rules were not subject to negotiation; and B.L. and her mother were not represented by counsel when they agreed B.L. would abide by the Rules."[128] Moreover, the district court found that "conditioning extracurricular participation on a waiver of a constitutional right is coercive."[129] Thus, B.L. had not waived her First Amendment rights through a waiver in the cheerleading team's Rules.

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120. *B.L.*, 964 F.3d at 176; *see also B.L.*, 376 F. Supp. 3d at 433; B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 289 F. Supp. 3d 607 (M.D. Pa. 2017).

121. *B.L.*, 376 F. Supp. 3d at 433 (citing *B.L.*, 289 F. Supp. 3d at 607).

122. *Id.* at 445.

123. *Id.* at 437–38.

124. *Id.* at 437.

125. *Id.* (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 145 (1967).

126. *Id.* (first citing Erie Telecomms., Inc. v. City of Erie, 853 F.2d 1084, 1096 (3d 1988) (providing Third Circuit waiver standard); and then citing to Yoder v. Uni. Of Louisville, 526 F. App'x 537, 546–47 (6th Cir. 2013) (distinguishing from Sixth Circuit waiver standard)).

127. *Id.* at 437–38.

128. *Id.* at 437. The demanding and exacting scrutiny applied here would likely doom many, if not all, athletic codes of conduct. Even with expert draftsmanship, almost no school official would presume that a parent must retain legal counsel to review an athletic code of conduct for it to be enforceable.

129. *Id.* (first citing Moran v. Burbine, 475 U.S. 412, 421 (1986); and then citing Capua v. City of Plainfield, 643 F. Supp. 1507, 1521 (D.N.J. 1986)).

Second, the school district argued that it could still regulate B.L.'s off-campus speech under *Tinker*, or in the alternative, that it could discipline B.L. for B.L.'s vulgar speech under *Fraser*.[130] The district court rejected both arguments.[131] The district court held, under existing Third Circuit precedent, that a school district could not punish a student under *Tinker* for off-campus speech that was "merely profane."[132] Regardless, the school district had not demonstrated that B.L.'s Snapchat posts caused a "substantial disruption" to the school environment required to trigger *Tinker*.[133] Moreover, the district court made clear that *Fraser's* exception for "vulgar" or "lewd" student speech did not extend to off-campus speech, outside of school hours.[134]

C. Third Circuit Appeal

The Mahanoy Area School District appealed the district court decision to the Third Circuit Court of Appeals.[135] The Third Circuit upheld the district court's decision, finding that Mahanoy's suspension of B.L. from the cheerleading team for off-campus speech violated the First Amendment.[136] However, the Third Circuit departed from the district court's rationale, offering a much broader, bright-line rule: *Tinker* does not apply to *any* off-campus student speech.[137]

As a threshold matter, the Third Circuit began its analysis by addressing the on-campus/off-campus distinction.[138] The Third Circuit defined off-campus speech as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[139] The Third Circuit held, unequivocally, that B.L.'s speech, "created . . . away from campus, over the weekend, and without school resources, . . . shared . . . on a social media platform unaffiliated

130. *Id.* at 441.

131. *Id.* at 441–42.

132. *Id.* at 441 (citing J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 932–33 (3d Cir. 2011) (en banc) (holding that a "school cannot punish a student for off-campus speech that is merely profane").

133. *Id.* at 442–43.

134. *Id.* at 441.

135. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

136. *Id.* at 175.

137. *Id.* at 189.

138. *Id.*

139. *Id.*

with the school" constituted off-campus speech.[140] Thus, the primary inquiry with the Third Circuit was whether B.L. could be disciplined by her school for her off-campus speech.[141]

The Third Circuit surveyed a mixed body of Circuit Court precedent,[142] ultimately adopting its own free speech test. In fashioning a bright-line rule, the Third Circuit emphasized the "distinct advantages" of providing "up-front clarity to students and school officials" over a fact-based, case-by-case analysis.[143] In its opinion, a case-by-case approach was fraught with too much uncertainty in determining whether, and to what extent, ever-changing online speech actually impacts the school's learning environment.[144] However, "a test based on whether the speech occurs in a context owned, controlled, or sponsored by the school [was] much more easily applied and understood" by stakeholders.[145] Although the outcome for the parties remained the same, ironically, the Third Circuit's opinion furthered an existing circuit split, and ultimately prompted review by the United States Supreme Court.[146]

D. Supreme Court Opinion

Nearly four years after B.L.'s Snapchat posts were first published on the internet, the Supreme Court granted the Mahanoy Area School District's petition for certiorari.[147] For the first time, the Court had chosen to address the *Tinker* doctrine in a contemporary off-campus setting.[148] With the backdrop of Snapchat as a speech medium, and the nature of the speech at issue (i.e., "F&*k Cheer"), media interest in *B.L.* was fervent.[149]

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140. *Id.* at 180.

141. *Id.* at 181.

142. *Id.* at 186–87; *see also supra* Part III, n.63 (examining the Circuit Court split in the application of *Tinker* to off-campus settings following *Morse*).

143. *B.L.*, 964 F.3d at 189.

144. *Id.* at 196–97 (Ambro, J., concurring).

145. *Id.* at 190 ("[This] clarity benefits students, who can better understand their rights, but it also benefits school administrators, who can better understand the limits of their authority and channel their regulatory energies in productive but lawful ways.").

146. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 976 (2021) (mem.) (granting certiorari).

147. *Id.*

148. *See* Parts II and III *supra*.

149. *See, e.g.*, Adam Liptak, *A Cheerleader's Vulgar Message Prompts a First Amendment Showdown*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html [https://perma.cc/S4JK-9AW7]; Ian Millhiser, *The Supreme Court's "Cursing Cheerleader" Case Could Reshape Student's First Amendment Rights*, VOX (Apr. 22, 2021, 10:30 AM), https://www.vox.com/2021/4/22/22394121/suprem

1. Majority Opinion

A necessary starting point for the Court's majority was the Third Circuit Court of Appeals' opinion below. Previously, the Third Circuit had held that student speech occurring on-campus could be regulated consistent with *Tinker*, but that *all* student speech occurring off-campus was categorically barred from regulation under the First Amendment.[150] The Supreme Court abandoned the Third Circuit's rigid "all-or-nothing" approach, acknowledging the complex nature of the on-campus versus off-campus distinction.[151] In dicta, the Court noted several general areas of potential off-campus speech proffered by legal counsel that *might* justify regulation by school officials.[152] These areas include, but are not limited to: "[1] serious or severe bullying or harassment targeting particular individuals; [2] threats aimed at teachers or other students; [3] the failure to follow rules concerning lessons[;] [4] the writing of papers[;] [5] the use of computers, or participation in other online school activities; and [6] breaches of school security devices . . . ."[153] Rather than adopting a formal definition for off-campus speech,[154] or developing a "broad, highly general First Amendment rule" to determine the framework of off-campus speech, the Court primarily focused on the fundamentals necessitating the regulation of student speech in the first place: orderly and effective instruction.[155]

To that end, the majority articulated three features of off-campus speech that, in its opinion, diminished the need for the same type of First Amendment "leeway" to regulate on-campus speech.[156] First, public

e-court-cursing-cheerleader-first-amendment-bl-mahanoy-brandi-levy-student-free-speech-campus [https://perma.cc/VC29-D9GA]; *The Late Show with Stephen Colbert* (CBS Television Broadcast June 23, 2021).

150. *See B.L.*, 964 F.3d at 180.

151. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021) ("Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus.").

152. *Id.*

153. *Id.* Counsel for B.L. conceded in written arguments to the Court that many areas of off-campus speech could still be regulated by a school. *See Id.* These areas included, speech occurring "over school laptops or on a school's website; speech taking place during remote learning [activities]; and communications to school e-mail accounts or phones." *Id.* Although this is mere dicta, these areas are likely to serve as fodder for parties in future cases.

154. *See B.L.*, 964 F.3d at 178–80 (examining the on-campus versus off-campus distinction within the context of Supreme Court and circuit court precedent, concluding that B.L.'s snapchat posts were made off-campus).

155. *Mahanoy*, 141 S. Ct. at 2045–47.

156. *Id.* at 2046.

schools rarely stand *in loco parentis* for students when speech occurs off-campus.[157] Thus, parents (and not schools) serve the primary role of disciplinarians responsible for a child's off-campus conduct.[158] Second, in our democratic society, adolescents are full-time students, and a large part of their daily life occurs on a school's campus.[159] Additional regulation of off-campus student speech, combined with regulation of on-campus speech, would be tantamount to regulating *all* the speech a student utters in a twenty-four-hour day.[160] Finally, in the Court's opinion, schools are the "nurseries of democracy," tasked with ensuring a well-educated populous.[161] In that sense, a school's primary speech interest is to promote "the 'marketplace of ideas'" and protecting, rather than suppressing, unpopular student speech that occurs off-campus.[162] "Taken together . . . the leeway the First Amendment grants to schools in light of their special characteristics [on-campus] is diminished" when the speech occurs off-campus.[163]

With these principles in mind, the Court found that the speech in *B.L.* simply did not fall within the purview of regulation by the school for several reasons. First, the school did not stand *in loco parentis* for speech made by B.L. off-campus, over the weekend at a local student hangout.[164] Nor was there sufficient evidence that "B.L.'s parents had delegated . . . control of B.L.'s behavior at the Cocoa Hut" to the school.[165] Second, the record reflected little to no actual disruption at the school, much less the "substantial disruption" required to trigger *Tinker*.[166] Finally, the Court did not find persuasive the school's speculative "concern for [cheerleading] team morale" as a basis for B.L.'s team suspension.[167] Without more, the Court found these interests insufficient to "overcome the right to freedom of expression" at the heart of the First Amendment.[168]

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 2047.
165. *Id.* As to the substance of the speech, the court acknowledged its contents were vulgar but that it "encompassed a message . . . of B.L.'s irritation with, and criticism of, the school and cheerleading communities" to which she was a part. *Id.* The Court also found that the school had not sought to regulate vulgarity outside of the classroom. *Id.*
166. *Id.* at 2047–48.
167. *Id.* at 2048.
168. *Id.* (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 508 (1969)).

2. Concurring Opinion

Justice Alito, joined by Justice Gorsuch, drafted a concurring opinion that added gloss to the majority's holding and offered additional guidance to the on-campus and off-campus distinction.[169] The concurrence agreed with the central holding of the majority: namely, that "the First Amendment permits public schools to regulate *some* student speech that does not occur on school premises during the regular school day" and that "courts should be 'skeptical' about the constitutionality of the regulation of [off-campus] speech."[170] However, the concurrence took a deeper dive into the principles buttressing the majority's ultimate holding.[171]

In Justice Alito's opinion, the true underlying question was: "[w]hy does the First Amendment *ever* allow the free-speech rights of public school students to be restricted to a greater extent than the rights of other juveniles who do not attend a public school?"[172] The answer—a parent's "consent, either express or implied."[173] Ultimately for the concurrence, the need for a public school to regulate *any* aspect of student speech relied on the underlying theory that "by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights."[174]

With those principles in mind, Justice Alito examined several areas where student speech could certainly be regulated. Examples included, "standard classroom instruction," and "periods when students are in school but are not in class," such as "when they are walking in a hall, eating lunch, congregating outside before the school day starts, or waiting for a bus after school" (i.e., on-campus speech).[175]

A school's regulation of off-campus speech is quite different and depends on a multi-factor analysis.[176] However, for Justice Alito the central factor was simply "whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the

169. *Id.* at 2048–59 (Alito, J., concurring).

170. *Id.* at 2049 (Alito, J., concurring).

171. *See Id.* at 2050–52 (Alito, J., concurring).

172. *Id.* at 2049–50 (Alito, J., concurring) (emphasis added).

173. *Id.* at 2051 (Alito, J., concurring).

174. *Id.* (Alito, J., concurring).

175. *Id.* at 2052 (Alito, J., concurring).

176. *See Id.* at 2054 (Alito, J., concurring) ("The degree to which enrollment in a public school can be regarded as a delegation of authority over off-campus speech depends on the nature of the speech and the circumstances under which it occurs.").

authority to regulate the speech in question."[177] In certain off-campus categories, it can be readily understood that a parent has consented for their child's speech to be regulated.[178] Examples might include, "online instruction at home, assigned essays or other homework . . . transportation to and from school . . . . school trips, school sports and other extracurricular activities . . . and after-school programs for students who would otherwise be without adult supervision during that time."[179] This category would also include "[a]busive speech that occurs while students are walking to and from school."[180]

On the opposite end of the student speech spectrum lies a category of off-campus student speech "beyond the regulatory authority of a public school."[181] This area includes "speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations."[182] Between these "two extremes" of potential off-campus speech, Justice Alito identified (without deciding) several other categories highlighted by the majority, such as threatening comments and harassment of other students and teachers, which had given rise to litigation in circuit courts following *Morse*.[183] Ultimately, because the facts of *B.L.* did not require foray into any of these categories, they were not critically examined by either the concurrence or the majority.[184]

3. Dissenting Opinion

Justice Thomas penned the lone dissent in *B.L.* In his dissent, Justice Thomas scolded the majority for offering an opinion "untethered from any textual or historical foundation"[185] and for leaving unaddressed the crux of the modern issue with *Tinker*: "[H]ow does a court decide if speech *is on or off campus*?"[186] In his dissent, Justice Thomas opined that the scope of a school's authority to regulate off-campus student speech should begin

177. *Id.* (Alito, J., concurring).
178. *Id.* (Alito, J., concurring).
179. *Id.* (Alito, J., concurring).
180. *Id.* (Alito, J., concurring).
181. *Id.* at 2055 (Alito, J., concurring).
182. *Id.* (Alito, J., concurring).
183. *Id.* at 2056 (Alito, J., concurring); *see supra* Part III.
184. *Mahanoy*, 141 S. Ct. at 2057–58 (Alito, J., concurring).
185. *Id.* at 2061 (Thomas, J., dissenting).
186. *Id.* at 2059 (Thomas, J., dissenting) (emphasis added).

with the understanding of student speech at the time the Fourteenth Amendment was ratified.[187] In his opinion, from a historical perspective, the history of the student speech doctrine supports a school having wide latitude to regulate off-campus speech "so long as it has a proximate tendency to harm the school, its faculty or students, or its programs."[188] Thus, because B.L.'s off-campus speech was offered, at least in part, to "degrade" her cheerleading coaches in front of classmates and teammates, her speech had a "direct and immediate tendency to . . . subvert the [cheerleading coach's] authority," and was subject to discipline by the coach.[189]

Justice Thomas also noted the importance of B.L.'s voluntary participation in an extracurricular program, a fact that was given "little apparent significance" by the majority.[190] In his opinion, schools have more authority "over off-campus speech . . . when students participate in extracurricular programs," because these students have a "greater potential" to harm an extracurricular program through their speech.[191] For example, a "profanity-laced" social media post, critical of the football team does much more harm when published by the quarterback of the football team than a regular member of the student body.[192] Thus, under Justice Thomas's rule, courts should first look to the "*effect* of speech, not its location" when determining whether a student's speech is subject discipline.[193]

All told, the Court's opinion in *B.L.* recognizes a distinction between on-campus and off-campus student speech. *B.L.* does not categorically prohibit courts from applying a *Tinker* analysis to off-campus student speech.[194] Nor does it compel the application of *Tinker* to off-campus speech.[195] While the *B.L.* Court demarcated the outer boundaries of

187. *Id.* (Thomas, J., dissenting) (citing McDonald v. Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring)).

188. *Id.* at 2061 (Thomas, J., dissenting).

189. *Id.* (Thomas, J., dissenting) (citing Lander v. Seaver, 32 Vt. 114, 120 (1859)).

190. *Id.* at 2062. *But see* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 437–38 (M.D. Pa. 2019); B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 182 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021) (providing a thorough discussion of B.L.'s voluntary participation in the extracurricular activity).

191. *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting).

192. *Id.* (Thomas, J., dissenting).

193. *Id.* (Thomas, J., dissenting); *cf. id.* at 2058 (Alito, J., concurring).

194. *See id.* at 2045 ("[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.").

195. *See id.*

off-campus speech that *could* be regulated by school officials, the Court's opinion stops short of addressing the myriad of novel speech questions public school districts continue to face.

What sets *B.L.* apart from other *Tinker* doctrine cases is the lack of a true disruption to the learning environment. Indeed, there was near universal agreement among all three *B.L.* courts, including the majority, concurrence, and dissent in the Supreme Court, that there simply was no evidence of a substantial disruption in *B.L.*[196] Had the nature of B.L.'s off-campus speech been more akin to the threats in *Wisneski* or the harassment in *Kowalski*, perhaps the Court would have felt compelled to chart new *Tinker* territory with greater zeal. Nevertheless, as Part V argues, a deeper analysis is still necessary for future courts to fully address modern student speech issues left unresolved by *B.L.*[197]

IV. LEGAL ANALYSIS

The Supreme Court did not clearly define the parameters of on-campus and off-campus speech in *B.L.*, leaving public school officials to face novel and modern speech issues with little guidance. This Part offers a two-part approach for future courts to navigate emerging student speech questions post-*B.L.* and concludes by briefly addressing the biggest question mark from the Court's opinion—the regulation of student speech in (or relating to) extra-curricular activities, particularly sports programs.

A. Two-Part Framework

The first question for any court seeking to resolve a student speech issue post-*B.L.* is: *Was the speech rendered by the student in a traditional on-campus setting (i.e., at the brick-and-mortar school building, during a traditional school day)?* If the answer to Question #1 is "yes," then a traditional *Tinker* analysis should still be employed.[198] If the answer to Question #1 is "no," courts should consider the speech off-campus speech and ask a second question: *Did the off-campus speech occur under circumstances where the parent can be said to have consented for the student's speech to be regulated?*[199] If the answer to Question #2 is "yes," then the off-campus speech is seemingly interchangeable with traditional on-campus speech and

196. *See id.* at 2044; *id.* at 2056 (Alito, J., concurring); *id.* at 2063 (Thomas, J., dissenting).

197. *See id.* at 2059 (Alito, J., concurring).

198. *See id.* at 2044–45; *id.* at 2057 (Alito, J., concurring); *see also supra* Part II (D).

199. *See id.* at 2054 (Alito, J., concurring).

can likely still be resolved under the same traditional *Tinker* analysis as Question #1.[200] However, if the answer to Question #2 is "no," then courts may now presume after *B.L.* that this type of speech is beyond the regulation of school officials, with two notable exceptions.[201] In two special circumstances, such as threatening speech and speech that amounts to "serious or severe" harassment or bullying of other students or staff members, courts must look deeper into the nature and the impact of the off-campus speech, (either realized or reasonably forecasted) to determine if a student can still be disciplined under the First Amendment.[202]

1. Was the Student Speech Rendered in a Traditional On-Campus Setting?

Under Question #1, if the student's speech occurred within a traditional on-campus setting, then a court should examine whether the speech can be categorically regulated under *Fraser*, *Hazelwood*, or *Morse*, and if not, a *Tinker* "substantial disruption" test should still be applied.[203] For example, speech rendered at the school, during in-class instruction or during periods where students are in school but not in class, such as "walking in a hall, eating lunch, congregating outside before the school day starts, or waiting for a bus after school," still fits squarely into on-campus activity following *B.L.*[204] While the physical location of the speech (i.e., in-person and on a school's campus) is still a natural starting point for this free speech analysis, it is not entirely dispositive given advances in modern technology and hybrid distance learning models.[205] However, if the speech is not clearly

200. *See id.* (Alito, J., concurring) ("The imperatives that justify the regulation of student speech while in school—the need for orderly and effective instruction and student protection—apply more or less equally to these off-premises activities.").

201. *Id.* at 2046 ("Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished.").

202. *Id.* at 2045.

203. *See id.*

204. *Id.* at 2052 (Alito, J., concurring); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("[Students] cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.'" (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969))).

205. Distance education and remote learning have increased at a rapid pace out of necessity due to COVID-19. *See generally* Cathy Li & Farah Lalani, *The COVID-19 Pandemic*

within the boundaries of a traditional on-campus setting, courts should consider the speech off-campus speech and conduct a multi-factor analysis under Question #2 to determine whether the off-campus conduct can still be regulated under the First Amendment.

2. If the Speech Occurred Off-Campus, Did It Occur Under Circumstances Where the Parent Can Be Said to Have Consented for the Student's Speech to Be Regulated?

The scope of student speech occurring off-campus is more complex. For speech occurring off-campus to be actionable, many factors should be considered by courts, including the physical location of the student, the age of the student, and the context of the speech.[206] While future litigants can expect the three "features" of student speech articulated in *B.L.* to be prominent in any future court's decision, the central question for courts will be: "*Whether parents who enroll their children in a public school can reasonably be understood to have delegated to the school the authority to regulate the speech in question*[?]"[207] Although the actual degree of delegation given by a parent will vary from case-to-case, the more the facts bear out that a parent has consented for their child to be disciplined for speech made off-campus, the more likely it will be to fall within a traditional *Tinker* analysis.[208]

Has Changed Education Forever. This Is How, WORLD ECON. F. (Apr. 29, 2020), https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/ [https://perma.cc/6FX8-8ZHF]. An unprecedented amount of federal dollars flowed to States and local school districts during the COVID-19 pandemic. *See* American Rescue Plan Act of 2021, Pub L. No. 117-2, 135 Stat. 4 (2021); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136, 134 Stat. 181 (2020). One of the many things that public schools can use federal CARES Act and American Rescue Plan Act dollars on is to enhance online learning and purchase educational technology. *See* U.S DEPT. OF EDUC., FREQUENTLY ASKED QUESTIONS: ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF PROGRAMS GOVERNOR'S EMERGENCY EDUCATION RELIEF PROGRAMS 41–41 (2021)https://oese.ed.gov/files/2021/05/ESSER.GEER_.FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf[https://perma.cc/9JEQ-BEMP]; *American Rescue Plan Act of 2021*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 9, 2021), https://www.ncsl.org/ncsl-in-dc/publications-and-resources/american-rescue-plan-act-of-2021.aspx [https://perma.cc/NY7Q-NWE2]. These factors will continue to have a residual effect on the availability and demand for distance learning platforms for years to come.

206. *Mahanoy*, 141 S. Ct. at 2046.

207. *Id.* at 2054 (Alito, J., concurring) (emphasis added).

208. *Id.* (Alito, J., concurring).

A helpful analogy is to think of student speech on a spectrum.[209] As Justice Alito articulated in his concurrence, on one end of the spectrum, several areas of off-campus speech are seemingly interchangeable with on-campus speech and should still lend themselves to the traditional *Tinker* analysis.[210] Examples might include: assigned essays, speech occurring in online or remote instruction,[211] on "school trips, school sports, and other extracurricular activities that may take place after regular school hours or off school premises, and after school programs," as well as "[a]busive speech that occurs while students are walking to and from school." [212] In each of these areas, if the speech was made while the student was participating in a school's programs or activities, it would seem to be a direct extension of the school's on-campus environment, where the school is standing *in loco parentis*, regardless of temporal location, and still within the scope of the *Tinker* doctrine.[213]

On the opposite end of the spectrum are areas of student speech "almost always beyond the regulatory authority of a public school."[214] These areas include, off-campus speech that is "not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern[.]"[215] This could "includ[e] sensitive subjects like politics, religion, and social relations[,]" as well as speech that is merely unpopular, or offensive, intemperate, or crude.[216] It could also include "vulgar" speech and even the promotion of illegal drugs, which *were* subject to regulation in *Fraser* and *Morse* when rendered on-campus,

209. *Id.* at 2055 (Alito, J., concurring).

210. *Id.* at 2054 (Alito, J., concurring).

211. *Id.* (Alito, J., concurring). The Court and the parties seemed to agree that most speech made within the context of online or remote learning platforms, although occurring off-campus, could still be treated interchangeably with traditional on-campus speech. However, school officials must take special care to recognize the subtle nuances that physical distancing through an online or remote platform might add, or takeaway, from a substantial disruption analysis.

212. *Id.* (Alito, J., concurring). The obvious inconsistency in the Court's holding here is B.L herself. B.L.'s speech, although made off-campus, outside of school hours, on her own personal cell phone, prior to the start of the cheerleading season, to some degree, was directly related to her participation in the school's cheerleading program.

213. *Id.* (Alito, J., concurring).

214. *Id.* at 2055 (Alito, J. concurring).

215. *Id.* (Alito, J., concurring).

216. *Id.* at 2055–56 (Alito, J., concurring). The speech in *Fraser* and *Morse*, if rendered under these circumstances off campus, would fall into this category.

but likely to be permissible off-campus.[217] These categories of off-campus speech, without more, will likely fall outside the regulation of school officials. As *B.L.* illustrates, speech rendered on a personal device, via private messaging or personal social media platforms, outside of school hours, and not directly as part of the school's program or activity, is particularly likely to fall outside the purview of school regulation.[218]

Furthermore, the Court made clear that parents, not schools, are the primary regulators of off-campus speech.[219] School officials should keep this principle in mind when reviewing messages forwarded by employees, coaches, students, parents, and community members regarding a student's off-campus speech.[220] The Court's carte blanche deference to custodial parents as regulators of speech inherently conflicts with renewed public interest in school administration and a growing sense that K-12 and higher education institutions (not just parents) must hold students accountable for their digital speech, in some cases, regardless of the First Amendment implications.[221]

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217. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 435–36 (M.D. Pa. 2019), aff'd, 964 F.3d 170 (3d Cir. 2020), aff'd, 141 S. Ct. 2038 (2021); *see also Mahanoy*, 141 S. Ct. at 2056 (Alito, J., concurring) ("[T]he Court has held that these rights extend to speech that is couched in vulgar and offensive terms.") (first citing Iancu v. Brunetti, 139 S. Ct. 2294 (2019); then citing Matal v. Tam, 137 S. Ct. 1744 (2017); then citing Snyder v. Phelps, 562 U.S. 443 (2011); then citing Cohen v. California, 403 U.S. 15 (1971); and then citing Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

218. *See Mahanoy*, 141 S. Ct. at 2047.

219. *Id.* at 2046; *id.* at 2053 (Alito, J., concurring) ("[P]arents, not the State, have the primary authority and duty to raise, educate and, form the character of their children." (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972))).

220. *See id.* at 2054 (Alito, J., concurring).

221. *See generally* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017) (advocating for schools to have more autonomy for speech-control, relying on an "effect" driven analysis rather than the current "location" driven one); Manny Fernandez & Richard Pérez-Peña, *As Two Oklahoma Students are Expelled for Racist Chant, Sigma Alpha Epsilon Vows Wider Inquiry*, N.Y. TIMES (Mar. 10, 2015), https://www.nytimes.com/2015/03/11/us/university-of-oklahoma-sigma-alpha-epsilon-racist-fraternity-video.html [https://perma.cc/8P78-WE4J] (stating that the University of Oklahoma expelled two members of Sigma Alpha Epsilon fraternity after they led a racist chant which was recorded on video and sparked outrage across the country); Jeremy Bauer-Wolf, *'Voluntary' Departures: the New Expulsion?*, INSIDE HIGHER ED (Jan. 28, 2019), https://www.insidehighered.com/news/2019/01/28/u-oklahoma-students-racist-video-departure-prompt-first-amendment-questions [https://perma.cc/R7SD-UMMB] (evaluating whether public universities violate the First Amendment when they give students an ultimatum either to voluntarily withdraw from school or face expulsion) ("If officials at Oklahoma had urged the women, even gently, to leave the institution, it could have violated their free speech rights, experts say.").

The difficult cases for courts will lie somewhere in-between the opposite ends of the *B.L.* spectrum.[222] To be sure, the Court did not foreclose the possibility that *Tinker*'s "substantial disruption" test might still be applied in some cases to off-campus speech.[223] Again, *Tinker* applies to student speech "*in class or out of it*" if it "materially" and "substantially" disrupts the learning environment.[224] Although the Supreme Court declined to provide an exhaustive list, two specific areas of off-campus speech that might prove to be actionable under the First Amendment include student comments amounting to "threats aimed at teachers or other students," as well as "serious or severe bullying or harassment" targeting "school administrators, teachers, or fellow students."[225]

For several reasons, these two categories of off-campus speech—*threats* and *severe bullying and harassment*—provide the best argument for a modest carve-out to *B.L.'s* general limitation on the regulation of off-campus student speech.[226] First, both the majority and concurrence in *B.L.* acknowledged that a "school's regulatory interests remain significant" in these two specific areas of student speech.[227] Second, as Part III explained, a significant body of circuit court precedent already exists addressing these two categories of off-campus speech.[228] Finally, the Court failed to critically examine either the "nexus" or "foreseeability" tests adopted by Second, Fifth, and Fourth Circuits prior to *B.L.*, and only explicitly disagreed with the Third Circuit's "all or nothing" approach to off-campus student

222. *See Mahanoy*, 141 S. Ct. at 2056–57 (Alito, J., concurring).

223. *See id.* at 2045; *id.* at 2049 (Alito, J., concurring).

224. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513 (1969) (emphasis added); *see also* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011) (en banc) (noting that it is "well established" that the boundary separating a schools' heightened authority to regulate student speech "is not constructed solely of the bricks and mortar surrounding the school yard.").

225. *See Mahanoy*, 141 S. Ct. at 2045, 2055; *see also supra* Part IV (C–D).

226. *See Mahanoy*, 141 S. Ct. at 2045–47.

227. *See id.* at 2045 ("The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students[.]"); *id.* at 2057 (Alito, J., concurring) ("Perhaps the most difficult category involves criticism or hurtful remarks about other students. Bullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech." (citing Saxe v. State College Area School Dist., 240 F.3d 200, 206–07 (3d Cir. 2001))).

228. *See supra* Part III.

speech.[229] For now, these approaches lay dormant and the singular guidepost for off-campus student speech in the Supreme Court is *B.L.* To create separate entry points on the student-speech spectrum and survive First Amendment scrutiny, school districts will need to distinguish their case from *B.L.* and harmonize the facts of their case with existing circuit court precedent.

B. Application of B.L. *in Extracurricular Activities and Sports*

Following *B.L.*, one of the most difficult areas of student speech for courts to reconcile will be off-campus speech that intersects with extra-curricular activities, particularly school sports. In one part of *B.L.*, the Court conceded that participation in extra-curricular activities, off school premises and outside of school hours, may give rise for the need to regulate student speech (although not in *B.L.*).[230] The Court also based much of its rationale on whether a parent consented for their child's speech to be regulated off-campus, something that would typically occur, at least implicitly, through participation in an extra-curricular activity.[231] Still, Justice Alito asserted it was "not reasonable to infer that [the parent] gave the school the authority to regulate [the child's] choice of language when she was off school premises and not engaged in any school activity."[232]

This conclusion conflicts with other material facts in *B.L.*'s court record. To start, both the student and her parent acknowledged before cheerleading tryouts that she would abide by the cheerleading team's Rules, which required, among other things, that all cheerleaders show "'respect for [their] school, coaches, . . . [and] other cheerleaders'; avoid 'foul language and inappropriate gestures'; and refrain from sharing 'negative information regarding cheerleading, cheerleaders, or coaches . . . on the internet.'"[233]

Moreover, the question whether or not a parent can voluntarily waive their child's First Amendment rights was thoroughly analyzed by both the district and circuit court[234] and the Rules were part of the record in the

229. *See Mahanoy*, 141 S. Ct. at 2043 (affirming the Third Circuit's holding in *B.L.* but disagreeing "with the reasoning of the Third Circuit's panel majority").

230. *Id.* at 2045.

231. *Id.* at 2051, 2054–55 (Alito, J., concurring).

232. *Id.* at 2058 (Alito, J., concurring).

233. B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 176 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

234. *See* B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429, 437–38 (M.D. Pa. 2019); *B.L.*, 964 F.3d at 192–94.

Supreme Court.[235] However, these issues were not even mentioned by the majority or concurrence, much less analyzed.[236] B.L.'s speech occurred off-campus, before the first game of the cheerleading season, and ultimately did not amount to a substantial disruption of the learning environment. Still, her comments were recognized as crude,[237] they were undeniably critical of the cheerleading squad, as well as the coach,[238] and were posted after cheerleading tryouts culminated for the start of the season.[239] At a minimum, the type of speech at issue in *B.L.* significantly undermined the coach's authority and directly impacted delicate team dynamics. The *B.L.* Court seemed to agree with this premise, but still bemoaned the fact that B.L. had been suspended from the cheerleading team for an entire school year, rather than merely benched for her conduct.[240]

Ultimately, participation in athletics has traditionally been regarded as a "privilege" and not a right,[241] with the regulation of an athlete's behavior primarily residing within the discretion of school officials, not a court.[242] *B.L.* flips this notion on its head and calls into question a swath of conduct that has not typically been considered a constitutional question.[243] This

235. *See*, *e.g.*, *Mahanoy*, 141 S. Ct. at 2043 (citing to the appellate record).

236. *Mahanoy*, 141 S. Ct. at 2062 (Thomas, J., dissenting) (noting the fact that B.L. participated as a school cheerleader as an extra-curricular activity at her school was given "little apparent significance" in the majority's decision).

237. *See id.* at 2056 (Alito, J., concurring).

238. *Cf. id.* at 2061 (Thomas, J., dissenting) ("[T]he purpose and effect of B.L.'s speech was 'to degrade the [program and cheerleading staff]' in front of 'other pupils,' thus having 'a direct and immediate tendency to . . . subvert the [cheerleading coach's] authority.'" (alteration in original) (citing Lander v. Seaver, 32 Vt. 114, 120 (1859)).

239. *Id.* at 2043.

240. *See id.* at 2057–58 (Alito, J., concurring) ("Schools may assert that parents who send their children to a public school implicitly authorize the school to demand that the child exhibit the respect that is required for orderly and effective instruction, but parents surely do not relinquish their children's ability to complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence." (first citing Brief for College Athlete Advocates as *Amicus Curiae* at 12–21, *Mahanoy*, 141 S. Ct. 2038 (2021) (No. 20-255); and then citing Brief for Student Press Law Center et al. as *Amici Curiae* at 10–11, 17–20, 30, *Mahanoy*, 141 S. Ct. 2038 (2021) (No. 20-255))).

241. *E.g.*, B.L. *ex rel.* Levy v. Mahanoy Area Sch. Dist., 964 F.3d 170, 176 (3d Cir. 2020), *aff'd*, 141 S. Ct. 2038 (2021).

242. *Id.* at 193.

243. *Compare* Johnson *ex rel.* S.J. v. Cache Cnty. Sch. Dist., 323 F. Supp. 3d 1301, 1321 (D. Utah 2018) (reasoning that "there is no constitutional right to participate in an extracurricular activity[,]" and holding that "[b]y choosing to 'go out for the team,' [students] voluntarily subject themselves to a degree of regulation higher than that imposed on students generally, [and] have reason to expect intrusions upon normal rights and privileges") (alterations in original) (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995)) *with*

quagmire has a chilling effect on student speech and leaves coaches and administrators with little guidance on how to develop enforceable athletic codes of conduct in the modern digital world.

CONCLUSION

"[A]lthough schools perform 'important, delicate, and highly discretionary functions,' there are 'none that they may not perform within the limits of the Bill of Rights.'"[244] As Parts I and II demonstrate, the *Tinker* doctrine simply does not offer insight into the complex student speech issues facing public school officials today.[245] However, as Part III detailed, a body of circuit court caselaw emerged during the 2010's to fill the void left by the Supreme Court.[246] Ultimately, as Parts IV and V explained, granting certiorari in *B.L.* allowed the Court to paint with a broad brush and still punt on the deeper off-campus student speech questions that persist in American public schools.[247] Future student speech cases are likely to play out differently and will require more discrete legal analysis.[248]

For now, the parameters of off-campus student speech are still not well-defined and remain constrained only by the pace of social media development and the imagination of school-age children.[249] On this new

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B.L., 376 F. Supp. 3d at 438 (disagreeing with *Johnson*'s holding, finding the approach in *Johnson* akin to "put[ting] the constitutional cart before the horse" by "assum[ing] all student athlete speech is *ipso facto* less protected" which "muddies the First Amendment analysis, and conflates it with Due Process analysis" (citing Lowery v. Euverard, 497 F.3d 584, 605 (6th Cir. 2007))). Notably, these cases highlight the delicate intersection between a student's First Amendment right to freedom of speech and the student's Fourteenth Amendment right to due process.

244. *B.L.*, 964 F.3d at 177 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

245. *See supra* Part I, II.

246. *See supra* Part III.

247. *See supra* Part IV, V.

248. *See supra* Part V.

249. One of the biggest emerging issues for off-campus student speech is viral "Tik Tok" challenges, some of which increasingly threaten staff and students. *See, e.g.*, Asha C. Gilbert, *Some Students Face Charges for the 'Slap a Teacher' Challenge. Now Schools are Issuing Warnings.*, USA TODAY (Oct. 11, 2021, 10:28 AM), https://www.usatoday.com/story/news/nation/2021/10/08/slap-teacher-tiktok-challenge-condemned-tiktok-and-schools/6048654001/ [https://perma.cc/6X8V-6SGB] ("New TiKTok viral 'smack-a-teacher challenge' encourages students to hit their teachers[.]"); Hannah Natanson & Laura Meckler, *School Threats and Social Media Hoaxes are Forcing Closures, Time-Consuming Investigations*, WASH. POST (Dec. 20, 2021, 3:50 PM), https://www.washingtonpost.com/education/2021/12/20/school-threats-oxford-shooting-tiktok/ [https://perma.cc/HE8S-2UJT]

digital frontier, *B.L.* occupies but one end of the modern student speech spectrum, with a myriad of areas in-between the hedges, ripe for litigation in a new post-pandemic world.

(noting recent increases in school shooting threats on social media pages caused many school districts to take action by cancelling classes or switching to online learning for the day).